STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1760

Kristopher Fingal,
Relator,

vs.

Nexlink Communications LLC,
Respondent,
Department of Employment and Economic Development,
Respondent.

Filed April 7, 2014
Affirmed
Stauber, Judge

Department of Employment and Economic Development
File No. 31380896-3

Kristopher Fingal, Wyoming, Minnesota (pro se relator)

Nexlink Communications, Eveleth, Minnesota (respondent employer)

Lee B. Nelson, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent Department)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

In a certiorari appeal from an unemployment-law judge's (ULJ's) decision that appellant is ineligible for unemployment benefits because he was discharged for

employment misconduct when his employer learned that he had lied on an employment application about his criminal record, relator argues that (1) he should not have been asked about his criminal history based on the recent revision to Minn. Stat. § 364.021 (2012); (2) he was the victim of employment discrimination based upon his criminal history; and (3) his employer should have inquired into his criminal history prior to hiring him. We affirm.

FACTS

Relator Kristopher Fingal appeals from the determination made by respondent Department of Employment and Economic Development (DEED) that he is ineligible for unemployment benefits because he was terminated for employment misconduct. There is no factual dispute, rather, relator contends that his actions did not amount to employment misconduct.

In September 2002, relator was convicted of two counts of possession of pictorial representations of minors and two counts of possession of pornographic work on a computer, which are felonies. On December 17, 2012, relator began employment with respondent Nexlink through a temporary staffing agency. On June 1, 2013, relator was hired by Nexlink directly to work as a warehouse supervisor. When relator showed up for his first day of work on June 5, 2013, he was asked to complete and sign an employment application and an acknowledgement of the terms in the employee handbook. When asked on the form if he had "ever been convicted of a felony," relator checked the "no" box. Following a routine post-employment criminal background check,

Nexlink discovered that relator had lied on the form. Relator was subsequently terminated from employment for lying on his employment application.

Relator applied for unemployment insurance benefits through DEED, but was denied because DEED determined that he was terminated for employment misconduct. Relator appealed the decision, and an evidentiary hearing was held. Relator appeared personally, and Nexlink appeared represented by a human resources person and its facilities manager. Relator asserted that he misread the question on the employment application and believed that he was only required to reveal convictions within the past seven years. But relator admitted that he signed and read the employee manual and that he checked the "no" box in reference to his prior convictions when in fact he knew that he had four felony convictions. Nexlink's representatives testified that "dishonesty, falsification or misrepresentation on the applica[tion] for employment . . . is against company policy" as stated in the employee manual, and that relator's criminal history made him not suitable for employment because he would have access to Nexlink's computers and cellphones, raising a concern about relator's potential use of Nexlink's technology to download pornographic images.

The ULJ ruled that relator was ineligible, finding that he "knew or should have known about [Nexlink's] policy" prohibiting lying on job applications. The ULJ also found that relator's assertion that he misread the question on the job application form was not credible because the question was "clear and unambiguous." The ULJ concluded that relator's misrepresentation was a "serious" violation, and therefore relator was ineligible

for unemployment benefits. Relator requested reconsideration, and the ULJ affirmed. This certiorari appeal followed.

D E C I S I O N

On appeal by writ of certiorari, this court may affirm the decision, remand for further proceedings, reverse, or modify the decision where relator's substantial rights were prejudiced because the decision was affected by error of law, unsupported by substantial evidence, or was arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d) (2012). This court reviews "'factual findings in the light most favorable to the decision.'" *Stagg v. Vintage Place, Inc*., 796 N.W.2d 312, 315 (Minn. 2011) (quoting *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006)). This court "will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). "Determining whether a particular act constitutes disqualifying misconduct is a question of law that we review de novo." *Stagg*, 796 N.W.2d at 315 (citation omitted). "We have repeatedly stated that we will narrowly construe the disqualification provisions of the statute in light of their remedial nature, as well as the policy that unemployment compensation is paid only to those persons unemployed through no fault of their own." *Id.* (quotation omitted).

Relator argues that it was improper for his employer to inquire into his criminal background because of a new law prohibiting employers from asking about prior convictions "until the applicant has been selected for an interview . . . or . . . before a conditional offer of employment." *See* Minn. Stat. § 364.021 (Supp. 2013). Relator's

argument is based on a misreading of the statute. First, the revision to Minn. Stat. § 364.021 did not take effect until January 1, 2014. *See* 2013 Minn. Laws ch. 61, § 7, at 302 ("This act is effective January 1, 2014"). Relator was asked to complete the employment application form on June 5, 2013, and was discharged on June 26, 2013, six months before the law took effect. Second, even if the law had gone into effect earlier, it would not have applied to relator. The statute, as amended, states that:

> A public or private employer may not inquire into or consider or require disclosure of the criminal record or criminal history of an applicant for employment until the applicant has been selected for an interview by the employer or, if there is not an interview, before a conditional offer of employment is made to the applicant.

Minn. Stat. § 364.021(a). Relator had already been given a position with Nexlink when he was asked about his criminal background; therefore, Nexlink complied with the requirement of the new law by only asking about relator's criminal background after relator was given an offer of employment.

Relator also argues that he was the victim of employment discrimination, ostensibly based on his status as a felon. But felons are not a protected class under any anti-discrimination laws. The Minnesota Human Rights Act prohibits discrimination in employment based on race, color, creed, religion, national origin, sex, marital status, sexual orientation, status with regard to public assistance, disability, and age. Minn. Stat. § 363A.02, subd. 1(1) (2012). Federal anti-discrimination laws only prohibit discrimination on the basis of race, color, religion, sex, or national origin. *See* 42

U.S.C.A. § 2000e-2, subd. (a)(1) (2012). Relator does not argue that he was discriminated against on the basis of any legally protected class.

Finally, relator argues that Nexlink should have conducted the background check prior to offering him a job. While such action would, under the revised version of Minn. Stat. § 364.021, violate the law, it is also irrelevant to the determination that relator committed employment misconduct. Employment misconduct is defined as "any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or . . . a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6 (2012). "As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Relator acknowledged receiving the employee handbook, which stated that "dishonesty, falsification or misrepresentation on the applica[tion] [for] employment or other work records [was] against company policy." Therefore, the evidence supports the ULJ's conclusion that relator "knew or should have known about this policy." Because relator does not dispute the seriousness of the violation, the evidence sustains the ULJ's conclusion that relator committed employment misconduct.

Affirmed.