STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2215

John Barber,
Relator,

vs.

Minnesota State Community & Technical College,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 25, 2011
Reversed
Muehlberg, Judge[*]

Department of Employment and Economic Development
File No. 25597656-3

John Barber, Moorhead, Minnesota (pro se relator)

Minnesota State Community & Technical College, Perham, Minnesota (respondent)

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

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

MUEHLBERG, Judge

Relator John Barber challenges the decision of the unemployment law judge (ULJ) determining that he is ineligible for unemployment benefits because he was terminated by his employer for employment misconduct. Because the ULJ's decision is not supported by substantial evidence, we reverse.

FACTS

Relator was employed as a full-time plumbing instructor in an "unlimited position" at respondent Minnesota State Community & Technical College (MSCTC) from August 8, 2005, through May 12, 2010. Before he began teaching at MSCTC, he successfully taught for three years at Kirkwood Community College in Cedar Rapids, Iowa.

In May 2006, after relator had been teaching for one year, MSCTC's governing organization, Minnesota State Colleges and Universities (MNSCU) drafted a policy document that included a section on faculty credentialing. According to Procedure 3.32.1, Part 4, subp. A(1), as a current faculty member employed in an unlimited position, relator was, "not . . . required to meet current or future changes in the minimum qualifications [for his field of specialty] unless the revised minimum qualifications state that current faculty must comply." Subpart A(3) of the same section states that current faculty members could complete the newly-required Teacher Education Series (TES), a series of development courses, or could complete the requirement under Part 5, subp. B.

Part 5, subp. B(1) provides a list of courses that faculty members must complete as part of the TES. Subpart B(2) includes an "equivalency clause" that states that the TES requirements "shall be waived for individuals who at the time of hire have . . . three years of successful, full-time (or equivalent) secondary, postsecondary, industry, or trade apprenticeship teaching experience in the field for which they are being hired." The document does not limit the application of Subpart B(2) to new hires.

Relator testified that at the time of the policy change in 2006, the head of Human Resources (HR) told him that he appeared to be exempt from the requirement to take the development courses. This person, who later retired, did not testify at the telephone hearing, but respondent concedes in its brief that until the summer of 2009, relator "understandably and properly relied on a former human resources director's interpretation of the teaching and learning competency requirement."

In 2009, the HR department contacted relator to remind him to complete the TES courses. Relator responded that he was exempt from the requirement and refused to take the TES courses. Relator exchanged emails with HR disputing whether or not the policy applied to him; at the hearing before the ULJ, respondent did not provide evidence that relator had been informed that he faced dismissal if he refused to complete the TES courses or that a final resolution about whether he was exempt under Subpart 5(B)(2) had been made.

On May 12, 2010, relator was called into a meeting at which he was informed that he was terminated as of May 24 for failure to complete the TES courses. May 12 was the last day of the academic year and relator had no duties after that date, but respondent told

him that his last day would be May 24 because it was obligated to give him 10 days notice. The following day, relator submitted a letter of resignation. By contract, respondent had no duty to pay relator for any work performed between May 12 and 24.

The current HR director testified on behalf of the employer. She stated that the equivalency clause, which waived the TES requirement for an instructor who had successfully taught for three years prior to being hired, applied only to instructors hired after 2006. She was unable to point to language in the policy that supports that position and could not explain why Subpart 5(B)(1) applies to current faculty but Subpart 5(B)(2) does not, but stated that this was the interpretation by MNSCU and MSCTS. She testified that relator would have received notice of the policy when he was hired, which was before the policy was implemented.

The unemployment law judge (ULJ) found that relator had been discharged rather than resigning because no work was available to him after May 12, 2010, and further found that the employer's testimony that it would continue to pay relator for the time from May 12 to 24 was not credible. The ULJ concluded that relator had been terminated for employment misconduct, for failure to comply with an employer's reasonable request, and was therefore ineligible for benefits. But the ULJ also stated that "the employer's attempt to explain why the written procedure applied to [relator] was not persuasive." Finally, and somewhat inexplicably, the ULJ added "[Relator's] testimony was more credible than the employer's. His testimony was direct and persuasive." The ULJ confirmed her opinion upon reconsideration.

D E C I S I O N

We will reverse or modify the decision of a ULJ if, among other reasons, it is not supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2008). Although questions of law are reviewed de novo, we will not disturb factual findings that are supported by substantial record evidence, and we will defer to the ULJ's conclusions reconciling conflicts in testimony and inferences to be drawn from testimony. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). If the ULJ relies on the relative credibility of the witnesses in reaching a decision, the ULJ must set out the basis for the credibility decisions. Minn. Stat. § 268.105, subd. 1(c) (Supp. 2009). This court will defer to the ULJ's credibility determinations. *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008).

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2008). "Employment misconduct" is defined as "any intentional, negligent, or indifferent conduct, on or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a) (2008). In determining if an employee committed misconduct, the question of whether the act occurred is one of fact; we review the ULJ's facts in the light most favorable to the decision. *Peterson*, 753 N.W.2d at 774. But the question of whether the act constitutes misconduct is question of law for this court to review de novo. *Id.*

Respondent asserts that once relator was informed during the summer of 2009 that he was required to complete the TES courses, and refused to do so, he committed misconduct by "[r]efusing to abide by an employer's reasonable policies." *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007).

Refusing to comply with reasonable employer directives is employment misconduct. *Id.* But a ULJ's determination must be supported by substantial record evidence. Minn. Stat. § 268.105, subd. 7(d)(5). The record does not reflect that relator was told that he must complete the TES courses or he would be fired. The HR director stated that relator would have been informed of the course requirement when hired, but in fact his hire date predated the policy. She was unable to explain why one part of the policy applied to current faculty but the other part does not, except to say that was how it was generally understood by MNSCU and MSCTS. She said relator received notice that he would be terminated in writing, but could not produce the written notice. She said that she had emailed relator, but then could not remember if that happened in the summer of 2009, saying "Again I don't recall the timeframe but I certainly have been in discussions surrounding this issue over the course of the last five years." In short, the HR director was unable to provide any documentation of discussions about the policy with relator and was vague about when any such discussions occurred or if written notice had been given.

Relator testified that although there had been an exchange of emails about whether he was exempt from the policy, his impression after the exchanges was "I felt that it was left at the point that, you know my stance was that I met the minimum qualifications."

Further, relator testified that "I didn't hear anything more back after my last statement of meeting those qualifications" and he was never told that he would be discharged.

Finally, the ULJ made three separate credibility determinations: (1) "The employer's testimony that MSCTC would have paid [relator] for the period from May 12 to 24, 2010 is not credible, as it is illogical and not believable;" (2) "[T]he employer's attempt to explain why the written procedure applied to [relator] was not persuasive;" and (3) "[Relator's] testimony was more credible than the employer's. His testimony was direct and persuasive."

Assuming that relator's testimony was more credible, as the ULJ indicated, there is not substantial evidence in the record to support the ULJ's determination of ineligibility; it is not clear that the employer communicated its policy directive and the consequences of not following the policy to relator. We defer to the ULJ's factual findings: it is clear that relator refused to complete the TES courses. But whether this is misconduct is a question of law that we review de novo. *Peterson*, 753 N.W.2d at 774. An employee must follow an employer's reasonable policies, but the evidence here indicates that relator received mixed messages about whether or not the TES requirements were waived because of his status; according to his and the HR director's testimony, there was a flurry of discussion without definite resolution, followed almost nine months later by abrupt dismissal. "A good faith misunderstanding of the employer's rules or policies does not constitute misconduct." *Tuckerman Optical Corp. v. Thoeny*, 407 N.W.2d 491, 493 (Minn. App. 1987); *see also Montgomery v. F & M Marquette Nat'l Bank*, 384 N.W.2d 602, 604 (Minn. App. 1986) (stating that a *knowing* violation of

employer's policies constitutes employment misconduct), *review denied* (Minn. June 13, 1986).

Based on the record before us, there is not substantial evidence supporting the ULJ's determination of ineligibility; we therefore reverse the ULJ's determination of ineligibility for benefits.

Reversed.