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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-205**

Joseph Simmons,
Relator,

vs.

Mile-Hi D R Acquisition I & Mile-Hi
D R Acquisition II Partnership -- Deep Rock Water,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 17, 2012
Affirmed
Minge, Judge**

Department of Employment and Economic Development
File No. 25900286-3

Christopher Kuhlman, Kuhlman Law, PLLC, Minneapolis, Minnesota (for relator)

Mile-Hi D R Acquisition I & Mile-Hi D R Acquisition II Partnership -- Deep Rock
Water, Denver, Colorado (respondent employer)

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

Considered and decided by Kalitowski, Presiding Judge; Minge, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

MINGE, Judge

Relator challenges the determination of the unemployment law judge (ULJ) that he was discharged for employment misconduct and therefore ineligible for unemployment benefits. Because there is substantial evidence in the record supporting the ULJ's factual findings, we affirm.

FACTS

On August 16, 2010, respondent Mile-Hi D R Acquisition I & Mile-Hi D R Acquisition II Partnership -- Deep Rock Water terminated the employment of relator Joseph Simmons for falsifying company documents. Until terminated, Simmons had worked as a route person selling and delivering water and coolers to commercial and residential customers. Simmons filed for unemployment benefits, but respondent Department of Employment and Economic Development (DEED) determined that he was ineligible because he was discharged for employment misconduct. He then appealed the ineligibility determination to a ULJ.

A ULJ conducted an evidentiary hearing, during which Simmons and three Deep Rock employees testified. The ULJ concluded that Simmons had been discharged for employment misconduct and was ineligible for unemployment benefits. Simmons filed a request for reconsideration and requested the opportunity to present additional evidence. The ULJ determined that the additional evidence would not change the outcome, denied the request for a second evidentiary hearing, and affirmed her previous decision. This appeal follows.

DECISION

I. Misconduct

The first issue is whether the ULJ erred in determining that Simmons committed employment misconduct. Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). “Whether the employee committed a particular act is a question of fact.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court gives deference to the ULJ’s credibility determinations, and factual findings will not be disturbed if the evidence substantially sustains them. *Id.* Whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

Employment misconduct is defined as “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a) (2010). An applicant discharged for employment misconduct is ineligible for unemployment benefits. *Id.*, subd. 4(1) (2010).

The statutes provide that “[i]f the conduct for which the applicant was discharged involved only a single incident, [such limited conduct] is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct.” Minn. Stat. § 268.095, subd. 6(d) (2010); *see Potter v. N. Empire Pizza, Inc.*, ___ N.W.2d ___, ___ 2011 WL 3903200, at *3–4 (Minn. App. Sept. 6, 2011) (reviewing “the rise and fall of the single-incident exception to employment misconduct”

and noting that ULJ must consider single incident as an “important” fact), *review denied* (Minn. Nov. 15, 2011); *see also Frank v. Heartland Auto. Servs., Inc.*, 743 N.W.2d 626, 630–31 (Minn. App. 2008) (holding under previous exception to misconduct for single acts not having a significant adverse effect on employer, that fraudulent billing has significant adverse impact because employer can no longer trust an employee to manage the business’s financial transactions).

Here, the ULJ found that Deep Rock had “a reasonable interest and expectation that employees will be forthright and honest” in employment matters; that, to collect a commission, Simmons deliberately falsified company documents by creating a lease agreement for two coolers that one of Deep Rock’s customers, Commercial Asphalt, had previously purchased outright; and that Simmons’s deliberate falsification of company documents was a serious violation of Deep Rock’s expectations of its employees’ behavior. The ULJ concluded that Simmons had committed employment misconduct and was ineligible for employment benefits.

The record contains evidence supporting the ULJ’s factual findings. Simmons had a motive to dishonestly create a lease agreement for a fictitious transaction because he received \$25 for every cooler he placed with a customer pursuant to a lease agreement. Commercial Asphalt records indicated that, prior to 2009, it had purchased two water coolers from Deep Rock bearing the serial numbers 2202 and 2626 and that the coolers had not been relinquished or exchanged since purchase. Deep Rock documents dated April 27, 2010 indicate that Simmons created new lease agreements with Commercial Asphalt for two coolers with serial numbers 2202 and 2626. But the records from Deep

Rock do not list coolers with those serial numbers as having been on board Simmons's truck on April 27, and Simmons's supervisor testified that he did not see the coolers when checking Simmons's truck that morning.

Simmons testified that, to the best of his recollection, on April 27, while delivering water to Commercial Asphalt, someone requested two additional water coolers. Simmons argued that Commercial Asphalt had apparently previously replaced and returned the water coolers with serial numbers 2202 and 2626, that Deep Rock had refurbished those coolers, that these refurbished coolers had ended up back on his truck, and that when he signed up Commercial Asphalt to lease two coolers, he simply gave Commercial Asphalt the coolers that he had on his truck. Simmons testified that the coolers he placed with Commercial Asphalt on April 27 had been on his truck for an extended period, that his supervisors invariably failed to adequately inventory his truck in the morning, and that by sheer coincidence these coolers on his truck were Commercial Asphalt's refurbished units. He points to his testimony that Deep Rock's recordkeeping was sloppy and argues that the blame is on Deep Rock for failing to properly inventory its assets.

The ULJ found that Simmons's testimony was "self-serving and lacking in credibility" while the testimony of Deep Rock's employees was "clear, consistent, and unequivocal." This court defers to the credibility determinations of the ULJ. *Skarhus*, 721 N.W.2d at 344. We note here that company records substantially conflict with Simmons's testimony and support the testimony of the Deep Rock employees. Thus, the records are consistent with the ULJ's credibility determinations.

Deep Rock entrusted Simmons with the responsibility of conducting transactions with its customers while alone on a delivery route. It expected Simmons to represent the company honestly in managing its financial transactions. Simmons's conduct constituted an intentional falsification of company documents and caused a customer to erroneously pay rent for several months on two coolers it had previously purchased outright. Although the misconduct established was limited to a single incident, on the facts as found by the ULJ, Deep Rock could no longer trust Simmons with the sales responsibility. The record supports the conclusion that Simmons committed employment misconduct and was ineligible for unemployment benefits.

Simmons argues that at worst his conduct constitutes simple unsatisfactory job performance, reasonable conduct an average employee would have engaged in, or a good-faith error in performance, each of which is an exception to the general definition of employment misconduct. Minn. Stat. § 268.095, subd. 6(b)(3)–(4), (6) (2010). But, those statutory exceptions to employment misconduct apply when an employee attempts to adequately perform his job duties but fails to do so, not when an employee deliberately falsifies company documents. *See Bray v. Dogs & Cats Ltd. (1997)*, 679 N.W.2d 182, 185 (Minn. App. 2004) (discussing exceptions as applying when employee attempts to complete job duties but fails).

II. Evidentiary Hearing

The second issue is whether the ULJ erred in denying Simmons's request for an additional evidentiary hearing. An additional evidentiary hearing is necessary only if an involved party shows that new evidence "(1) would likely change the outcome of the

decision and there was good cause for not having previously submitted that evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.” Minn. Stat. § 268.105, subd. 2(c) (2010). We defer to a ULJ’s decision not to conduct an additional evidentiary hearing and will reverse that decision only if the ULJ abused its discretion. *Skarhus*, 721 N.W.2d at 345.

Here, Simmons requested an additional evidentiary hearing to introduce testimony from three Deep Rock employees that the company did not adequately document the location of its equipment and that route drivers were instructed to submit a new lease agreement whenever the driver was unsure whether the customer leased or owned the cooler. Simmons presented both arguments at the first evidentiary hearing, but they were rejected by the ULJ, who found Simmons’s testimony not credible. The ULJ denied the request because Simmons already had an opportunity to present such evidence and because the evidence would not alter the outcome of the case.

The record supports the ULJ’s conclusion. None of the witnesses could testify as to the events of April 27, 2010, to the coolers at issue, or to specifically what had been on Simmons’s truck on April 27. Although the testimony may have cast doubt on the reliability of Deep Rock’s internal records, this was not the only evidence relied upon by the ULJ. Simmons himself failed to fully document the transaction in question, and Commercial Asphalt’s records indicated the same coolers had been in place since 2009. Moreover, Simmons does not have good cause for not submitting the evidence at the first

evidentiary hearing. There is no claim that Deep Rock was hiding this potential testimony or otherwise obscuring its existence.

In sum, we conclude that there is substantial evidence in the record as a whole supporting the ULJ's decision that Simmons was discharged for employment misconduct and ineligible for unemployment benefits. We further conclude that the ULJ did not abuse its discretion in denying Simmons's request for an additional evidentiary hearing.

Affirmed.

Dated: