STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2085

James A. Millis,
Relator,

vs.

Martin Engineering Company,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed September 10, 2012
Affirmed
Halbrooks, Judge

Department of Employment and Economic Development
File No. 28082866-3

James A. Millis, Gilbert, Minnesota (pro se relator)

Martin Engineering Company, Neponset, Illinois (respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

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

HALBROOKS, Judge

Relator challenges a determination by an unemployment-law judge (ULJ) that he was discharged for misconduct, arguing that (1) the evidence does not support the ULJ's finding that he failed to advise his employer that he would be absent from work after being arrested for arson; (2) the ULJ improperly based the misconduct determination on a finding that relator had committed arson, rather than focusing on whether respondent had given notice of his absences due to incarceration; and (3) the ULJ erred by denying his request to submit additional evidence regarding his communications with a supervisor about his absences. We affirm.

FACTS

Relator James Millis was employed as a service technician by respondent Martin Engineering Company from February 4, 2008, until he was discharged on June 22, 2011. On Thursday, June 16, 2011, there was a fire at relator's home. In the early morning hours of Friday, June 17, relator was arrested on suspicion of arson. He remained incarcerated until the following Tuesday, June 21.

Martin Engineering has an attendance/tardiness policy that requires employees to notify their supervisor if they will be absent from work:

> If you cannot work or arrive on time, you must call your supervisor immediately. Notifying the switchboard operator or a fellow employee is not enough. If your supervisor is unavailable, leave your message on his/her voice mailbox, including your name and a detailed reason for the absence. If you are personally unable to call due to illness,

> emergency, or other good reason, you must have someone call for you.

Under the policy, "[a]bsence from work for two (2) consecutive days without notifying [one's] supervisor or the Human Resources manager is considered a voluntary resignation." According to human resources manager Lisa Hoogerwerf, Millis should have reported his absences while he was incarcerated to his supervisor or to her. Millis did not contact Hoogerwerf or his supervisor during his incarceration. On Wednesday, June 22, Hoogerwerf sent Millis a letter terminating his employment because of his violation of the company's attendance policy.

Territory manager Tom Heinz was aware that Millis had been arrested and visited him in jail on June 18. Millis testified at the hearing that he believed that Heinz had advised the appropriate parties at Martin Engineering that Millis would be absent from work:

> Q: What did you tell [Heinz]?
> A: Well, he knew that I was not going to be at work, that I had been arrested for alleged arson, that I would be incarcerated for the, you know, the weekend and the following start of the next week. And I was . . .
> Q: (Cross conversation.)
> A: . . . under the impression that, you know, he had conveyed that to the higher authorities at Martin's. You know, whether it be his responsibility or not, I, you know I didn't have the means to communicate, you know, so.

Hoogerwerf conceded that Heinz told managing director Mark Huen that Millis had a fire at his home and would be absent from work on June 17, but testified that Heinz did not advise anyone at Martin Engineering that Millis would be absent from work on June 20 and 21 and that it was not Heinz's responsibility to do so.

Following his discharge from employment, Millis applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development (DEED) denied Millis's application for benefits on the basis that he had been discharged for misconduct. Millis appealed, and a hearing was held before a ULJ. Millis and Hoogerwerf each testified at the hearing; Heinz did not. Following the hearing, the ULJ issued a written decision, determining that Millis was discharged for misconduct and is therefore ineligible for benefits. Millis sought reconsideration, and the ULJ affirmed its decision. This certiorari appeal follows.

D E C I S I O N

This court reviews a ULJ's decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence in view of the record as a whole or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d)(4), (5) (2010). Substantial evidence is "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

I.

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). "Employment misconduct means 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." *Id.*, subd. 6(a) (2010). 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). We view the ULJ's findings of fact in the light most favorable to the decision and defer to the ULJ's credibility determinations, and we will not disturb factual findings if they are supported by substantial evidence. *Id.* But whether an employee's act constitutes employment misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

An employer has a right to expect an employee to work when scheduled. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. App. 1984). In fact, "a single absence from work may constitute misconduct." *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986). Moreover, "[a]bsence from work under circumstances within the control of the employee, including incarceration following a conviction for a crime, has been determined to be misconduct sufficient to deny benefits." *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006); *see also Smith*, 343 N.W.2d at 45 (holding that an employee's unavailability due to incarceration "amounted to disregard of attendance standards which his employer had a right to expect him to obey"). Similarly, an employee's failure to give proper notice of an absence constitutes disqualifying misconduct. *Edwards v. Yellow Freight Sys.*, 342 N.W.2d 357, 359 (Minn. App. 1984).

Millis challenges the ULJ's finding that he violated the attendance/tardiness policy, arguing that he reasonably believed that Heinz was reporting his absences to the appropriate people at Martin Engineering. In his brief, he reasserts his belief that Heinz had notified Hoogerwerf that Millis would be absent from work on June 20 and 21. Contrary to Millis's belief, however, Hoogerwerf testified at the hearing that Heinz did not make this notification. The ULJ credited this testimony in determining that Millis had not notified Martin Engineering that he would be absent on June 20 and 21. Substantial evidence supports the ULJ's finding.

In his brief, Millis asserts several factual assertions that were not made during the evidentiary hearing. Millis asserts that during the June 18 jail visit, Heinz, who was his former supervisor and a close friend, "gave [Millis] the assurance that Martin Engineering had been notified of the situation and that [Millis's] employment was not in jeopardy." And he asserts that Heinz did not indicate that "further notification to Martin Engineering would be necessary to ensure that corporate procedure was followed."

He also references a conversation that he had with Heinz after the ULJ issued the determination of ineligibility. He asserts that Heinz "again stated that [Hoogerwerf] was fully aware that [Millis] would be absent from work on June 20 and 21, 2011." Because these assertions were not part of the record before the ULJ, we do not consider them in reaching a decision in this appeal. *See Brisson v. City of Hewitt*, 789 N.W.2d 694, 697 (Minn. App. 2010) (declining to consider issue not raised to ULJ); *see also* Minn. R. Civ. App. P. 110.01 (defining record on appeal), 115.04, subd. 1 (providing that rule 110.01 applies to certiorari appeals).

Millis also asserts that the ULJ unduly focused on his incarceration and the reasons for it in determining that he had committed employment misconduct. We disagree. While the supreme court has recognized that incarceration can constitute misconduct and be sufficient to deny benefits, the determination of misconduct is a factual inquiry. *Jenkins*, 721 N.W.2d at 290. In *Jenkins*, the supreme court emphasized the advance notice the employer had of Jenkins's incarceration and the employer's willingness to work with Jenkins through the process. *Id.* at 291. In contrast, Martin Engineering did not have any notice until after Millis was incarcerated, and even then Millis failed to provide proper notice under Martin Engineering's policy. Because Millis failed to provide proper notice of his absences due to his incarceration, the ULJ did not err.

II.

A ULJ "must order an additional evidentiary hearing" if a party shows that additional evidence "would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence." Minn. Stat. § 268.105, subd. 2(c)(1) (2010). The statute does not define "good cause" for additional-evidence purposes, but it does define "good cause" in the context of a party's failure to participate in the hearing: "a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing." *Id.*, subd. 2(d) (2010).

Millis asserts that the ULJ erred by denying his request for an additional evidentiary hearing so that Heinz could testify. The ULJ determined that Millis had not shown good cause for failing to call Heinz to testify at the original hearing and that the

evidence was unlikely to change the outcome of the decision. Notably, the ULJ advised Millis at the beginning of the hearing of his right to a continuance to subpoena witnesses, and inquired at the end of the hearing whether there were any additional facts Millis wished to add to the record. Millis asserts that he did not ask Heinz to testify at the hearing because he believed that there was no dispute that Heinz had notified Martin Engineering that Millis would be absent on June 20 and 21 and because he did not want to cause Heinz trouble with his employment. We conclude that the ULJ did not abuse its discretion in determining that Millis did not show good cause for failing to have Heinz testify at the initial hearing.

Affirmed.