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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-756**

David DuBay,  
Relator,

vs.

County of Watonwan,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

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

Department of Employment and Economic Development  
File No. 26582832-3

David DuBay, St. James, Minnesota (pro se appellant)

Peter D. Bergstrom, South Haven, Minnesota (for respondent County of Watonwan)

Lee B. Nelson, Amy R. Lawler, 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; Wright, Judge; and  
Schellhas, Judge.

## UNPUBLISHED OPINION

**BJORKMAN**, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that he is ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

### FACTS

Relator David DuBay was a deputy sheriff for Watonwan County from September 2008 to July 2010, when he was terminated for numerous instances of insubordination and inappropriate conduct toward women while on duty. Respondent Minnesota Department of Employment and Economic Development (DEED) denied DuBay's application for unemployment benefits, determining that he was ineligible because he was discharged for employment misconduct. DuBay appealed the ineligibility determination to a ULJ.

The ULJ conducted an evidentiary hearing. DuBay's supervisor, Sheriff Gary Menssen, testified about the complaints he received about DuBay's conduct and the repeated warnings that he and other county employees gave to DuBay about soliciting dates while on duty. The complaints included DuBay asking women on dates, making women feel uncomfortable, aggressively pursuing them, and, in one case, extending an invitation to a "clothing optional" party. The county corroborated Menssen's testimony with a letter and an August 2009 performance evaluation that outlined the complaints against DuBay and warned him to refrain from this conduct in the future. DuBay admitted that he asked women on dates while on duty, was warned by his superiors not

to do so, and nevertheless invited a gas-station clerk to attend a party with him in October 2009, while he was on duty.<sup>1</sup> Yet DuBay maintained that the county did not fire him for misconduct; rather, Menssen terminated him due to DuBay's efforts to defeat Menssen's reelection bid.

The ULJ found that despite being warned on at least three occasions not to solicit dates while on duty, Dubay solicited dates from a nurse at a local hospital, intimidated and solicited three female drivers whom he pulled over, and invited a gas-station clerk to a "clothing optional" party—all while Dubay was on duty. Additionally, the ULJ found that Dubay complained about Menssen and the sheriff's department to another county employee while he was on duty at a homecoming dance on October 2, 2009. Based on these facts, the ULJ concluded that DuBay was discharged for employment misconduct and was consequently ineligible for unemployment benefits. This certiorari appeal follows.

## **D E C I S I O N**

On appeal, we may affirm a ULJ's decision or reverse and modify the decision if the petitioner's substantial rights have been prejudiced because the decision is not supported by substantial evidence, is arbitrary or capricious, derives from improper procedure, or is affected by error of law. Minn. Stat. § 268.105, subd. 7(d) (2010). We review the ULJ's factual findings in the light most favorable to the decision and will not

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<sup>1</sup> This incident triggered an investigation that led the county to begin the termination process. Dubay was placed on paid suspension from January 2010 to July 2010, during which time the Veteran's Preference Hearing Board considered whether Dubay could be terminated pursuant to Minn. Stat. § 197.46 (2008). Dubay was terminated on July 27, 2010.

disturb findings that are supported by substantial evidence. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). When determining whether substantial evidence supports the findings, we defer to the ULJ's credibility determinations. *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006). We review a ULJ's legal determinations de novo. *Stagg*, 796 N.W.2d at 315.

DuBay challenges the ULJ's determination that he was discharged for employment misconduct and asserts that the ULJ's decision reflects bias against him. We address each argument in turn.

**I. The ULJ did not err in determining that DuBay was discharged for employment misconduct.**

An employee who is discharged for "employment misconduct" is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct is "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). "Whether the employee committed a particular act" presents a fact question, but whether the act constitutes employment misconduct is a question of law. *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

We first turn to the ULJ's factual findings. DuBay argues that the ULJ based its findings on inadmissible evidence from the Veteran's Preference Hearing Board's report. But each of the ULJ's findings is supported by testimony presented during the

evidentiary hearing. Most notably, Menssen testified that the department warned Dubay not to solicit dates while on duty; that numerous women, including other law enforcement professionals, complained that DuBay solicited and intimidated them while on duty; and that a county employee reported that Dubay had publicly criticized the police department. The ULJ's findings, therefore, are not clearly erroneous.

DuBay complains that, in making her factual findings, the ULJ ignored key evidence. But we discern no error in the ULJ's implicit rejection of Dubay's unsubstantiated contention that Menssen fabricated DuBay's misconduct to discredit him in the upcoming sheriff's election. And Dubay's assertions that he was never charged with sexual harassment and improved his performance in some respects in 2009 do not detract from the evidence supporting the ULJ's misconduct determination.

DuBay also argues that the ULJ did not fairly determine the witnesses' credibility. "When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2010). The ULJ expressly found that the testimony offered by the county was more credible than DuBay's because it was "more comprehensive and offered a more probable sequence of events." And the ULJ stated that DuBay's testimony "that he did not ask the [gas-station clerk] on a date, but rather asked her to attend a party, is not persuasive." These findings comply with the statutory requirement.

Having determined that the record supports the ULJ's findings of fact, we consider whether DuBay's actions constituted employment misconduct. DuBay argues that his

conduct was not a serious violation of the county's standards because he was not disciplined at the time the various women lodged their complaints and that the final incident with the gas-station clerk was isolated. We are not persuaded. First, "an employee's expectation that the employer will follow its disciplinary procedures has no bearing on whether the employee's conduct violated the standards the employer has a reasonable right to expect or whether any such violation is serious." *Stagg*, 796 N.W.2d at 316. Second, the ULJ determined that the incident with the gas-station clerk was not isolated, and even if it was, a single incident in which an employee deliberately acts adversely to the employer's interests may constitute misconduct. *See Colburn v. Pine Portage Madden Bros.*, 346 N.W.2d 159, 161 (Minn. 1984). Third, a law-enforcement entity has a legitimate expectation that its officers will not solicit dates while on duty, conduct themselves in a manner that threatens the comfort and privacy of citizens, or publicly criticize supervising officers. The ULJ's findings reveal DuBay's repeated and serious violations of these basic standards and a substantial lack of concern for his employment. On this record, we conclude that DuBay was terminated for employment misconduct and is ineligible for benefits.

## **II. The ULJ's decision does not derive from bias.**

DuBay argues that the ULJ's decision should be reversed because it reflects bias toward women and traditional dating values. Because he provides no evidentiary or legal support for this assertion, we do not consider it in this appeal. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that an assignment of

error in a brief based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

**Affirmed.**