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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-876**

James Leebens,
Respondent,

vs.

Barber Coins and Collectibles, Inc.,
Relator,

Department of Employment and Economic Development,
Respondent.

**Filed February 13, 2012
Affirmed
Klaphake, Judge**

Department of Employment and Economic Development
File No. 26972189-3

James Leebens, Lakeville, Minnesota (pro se respondent)

Daryl J. Bergmann, Jessica Mabin, Business Legal Services, Bloomington, Minnesota
(for relator)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

In this unemployment compensation appeal brought by the employer, relator
Barber Coins and Collectibles, Inc., asks this court to reverse or remand an

unemployment law judge (ULJ) decision, claiming that (1) respondent James Leebens committed employment misconduct in his position as sales manager by making arrangements for a job interview with a competitor during work hours and by encouraging employees to apply for time off contrary to company policy, and (2) the ULJ failed to make sufficient credibility determinations in reaching its decision. Because the ULJ's decision is supported by substantial record evidence that relator's conduct did not constitute employment misconduct and because the ULJ's credibility determinations were sufficient and support the decision, we affirm.

D E C I S I O N

When reviewing a ULJ decision, this court may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator may have been prejudiced because the findings, inferences, conclusion, or decision are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2010).

Relator claims that respondent's actions constituted employment misconduct, for which he was properly dismissed from employment. “Misconduct” is defined for unemployment compensation purposes 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). 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, but whether an act committed by an employee constitutes employment misconduct is a question of law, which this court reviews de novo. *Stagg v. Vintage Place*, 796 N.W.2d 312, 315 (Minn. 2011). This court views the ULJ’s factual findings in the light most favorable to the decision, *id.*, and gives deference to the ULJ’s credibility determinations. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We will not disturb the ULJ’s factual findings when the evidence substantially sustains them. Minn. Stat. § 268.105, subd. 7(d)(5); *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008).

Here, the evidence supports the ULJ’s findings, which in turn support its decision that appellant did not commit employment misconduct within the meaning of the unemployment statute. Relator claims that respondent committed misconduct by encouraging his subordinate employees to meet work production goals so that they would not have to work on Saturdays, arguing that the record evidence shows that this encouragement was contrary to company policy and contrary to instructions given to respondent by his superiors. The record includes contradictory testimony on whether relator had a policy that prohibited respondent from encouraging his subordinates to seek Saturdays off after meeting company revenue expectations. Respondent testified that the company condoned this policy; relator’s employees testified that it did not. However, the

witnesses for relator testified in an inconsistent manner about whether the policy existed and how it applied, and the parties all agree that respondent lacked authority to approve time-off requests. As to the particular incident involving respondent's role in encouraging subordinate employees to request days off on December 16 and 17, 2010, the ULJ's findings are also supported by the evidence, based on the ULJ's credibility determinations. Under these circumstances, we affirm the ULJ's decision that respondent's conduct with regard to employees seeking time off work did not constitute misconduct. *See Skarhus*, 721 N.W.2d at 344.

The portion of the ULJ decision addressing respondent's single instance of making a personal telephone call at work is also supported by the evidence. Respondent testified that relator recorded all phone calls within the office and that he stepped out into a public area to make a single phone call to a competitor about a job interview. The ULJ concluded that while respondent may have made the call during work hours, it was not clear whether the call was made while respondent was on break, and, regardless, "a single short personal phone call during company hours" did not constitute employment misconduct under the unemployment law. The ULJ specifically found not credible relator's proffered evidence that respondent had made job solicitation calls on company time using company phones.¹ Again, the evidence substantially supports the ULJ's

¹ According to company president Leonard Barber, respondent made the call to the competitor during work hours and had made other phone calls to potential employers using company telephones, during company time, and in front of other subordinate employees.

finding that the conduct involved a single call from a cellphone in a public location and we agree with the ULJ's conclusion that this conduct did not constitute misconduct.

Relator also challenges the sufficiency of the ULJ's credibility determinations. Minn. Stat. § 268.105, subd. 1(c) (2010), addresses this issue and requires that "[w]hen the credibility of an involved party or witness . . . 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." Because relator submitted primarily testimonial evidence in this case, credibility determinations had a significant effect on its outcome. The ULJ made the following credibility determinations:

[Respondent's] testimony was more credible because it was detailed, specific, followed a more logical chain of events and was more consistent than the employer's testimony. The employer's testimony, as a whole, was not credible because many of the employer's witnesses contradicted each other and because the employer's testimony was less reasonable under the circumstances.

Addressing credibility again in its order denying relator's motion for reconsideration, the ULJ said, "The unemployment law judge found [respondent's] testimony more credible than the employer's and that credibility determination stands."

The record supports the ULJ's credibility determinations, as follows:

1. During the testimony of Robert Boyd, vice president of sales, Boyd listed "lack of [work] production" and taking too much personal time off as reasons for respondent's discharge, neither of which were reasons listed for respondent's discharge in any of the documents submitted by relator. The company president, Barber, also gave similar testimony.

2. Boyd stated that he discovered after respondent's dismissal that respondent had been soliciting employment from other firms while at work, but Boyd also stated that this conduct was a basis for respondent's dismissal. To this testimony, the ULJ said, "so what you're telling me under oath is that you considered the fact that he was talking to another company when you discharged him, but you didn't know that until a week after he was discharged." Boyd responded, "Well that doesn't make any sense."

3. When Boyd's testimony was imprecise as to the cause for respondent's discharge, relator's attorney told the ULJ that respondent was dismissed for approving employee time off requests in excess of his authority and for looking for another job on company time. However, another employee, administration manager Melissa Ross, testified that respondent lacked authority to approve time off requests. Ross testified that respondent was a "conduit" and that time off approval actually had to come from administration.

4. Ross testified that Boyd had given respondent a verbal warning not to encourage employee time off requests, but Boyd never testified to giving respondent a warning; Ross did not make note of any such warning in her daily log; and respondent denied receiving a warning. Barber also testified that he verbally warned respondent not to motivate employees by offering them time off.

5. The ULJ questioned the validity of the enumerated grounds for respondent's discharge because although the company kept detailed employee records, including recording employee phone calls, relator produced no documentary evidence to support its claims.

6. Respondent provided testimony that was logical and concise and was supported by other peripheral facts. With regard to his testimony that he did not contact company competitors on company phones, respondent stated that he did not use company phones for this purpose because he was aware that the company recorded employee phone calls.

For all of these reasons, the credibility determinations made by the ULJ have ample support in the record. *See McNeilly v. Dept. of Empl. & Econ. Dev.*, 778 N.W.2d 707, 710 (Minn. App. 2010) (stating “This court . . . gives deference to the credibility determinations made by the ULJ.”); *Frank v. Heartland Auto. Servs., Inc.*, 743 N.W.2d 626, 630 (Minn. App. 2008) (stating in unemployment misconduct case, “We generally defer to the ULJ’s credibility assessments and weighing of the evidence.”).

Affirmed.