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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-942**

David W. Wiehoff,
Relator,

vs.

Federal Express Corporation,
Respondent,

Department of Employment and Economic Development,
Respondent.

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

Department of Employment and Economic Development
File No. 26270188-3

David Wiehoff, Minneapolis, Minnesota (pro se relator)

Federal Express Corporation, St. Louis, Missouri (respondent)

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 Stauber, Presiding Judge; Klaphake, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged from employment for misconduct, arguing that the ULJ's decision and findings are the products of unlawful procedure, that he was wrongfully terminated, and that he is entitled to damages. We affirm.

FACTS

Pro se relator David Wiehoff began working for respondent Federal Express Corporation in July 1996. On February 8, 2010, Wiehoff was involved in an accident while driving a Federal Express truck in the course of his employment duties as a courier. Wiehoff sideswiped a customer's parked vehicle. Wiehoff did not report the accident for eight hours, despite a Federal Express policy requiring that couriers report motor-vehicle accidents immediately. Wiehoff received a "deficiency letter" for failing to timely report the accident and was warned that three such letters within a 12-month period could result in termination of his employment. On August 5, 2010, Wiehoff was involved in another accident while driving a Federal Express truck. He received a second "performance reminder" for this incident.

On September 1, Wiehoff made disparaging remarks about his manager and Federal Express to two customers and informed the customers that he would call in sick the following day because his manager planned to ride with him on his delivery route. Wiehoff called in sick on September 2, and another employee took Wiehoff's route that

day. The two customers told the substituting employee what Wiehoff had said. Another courier driver who covered Wiehoff's route on September 3 had a similar encounter with the customers and reported the incident to Federal Express's operations manager. Wiehoff received a third deficiency letter, and on September 10, Federal Express discharged Wiehoff for unacceptable conduct and because he had three deficiency letters in a 12-month period.

After Wiehoff applied for and received unemployment benefits, an adjudicator for respondent Minnesota Department of Employment and Economic Development (DEED) determined that Wiehoff is ineligible for benefits because he was terminated for misconduct. Wiehoff appealed the determination, and after a hearing, a ULJ found that Wiehoff was discharged for employment misconduct and that this misconduct constituted a "serious violation of the standard behavior that Federal Express had the right to reasonably expect of its courier driver." Wiehoff requested reconsideration, and the ULJ's decision was affirmed. This certiorari appeal follows.

D E C I S I O N

When reviewing the decision of a ULJ, we 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).

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 an employee committed employment misconduct is a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). “Whether the employee committed a particular act is a fact question, which we review in the light most favorable to the decision and will affirm if supported by substantial evidence.” *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 539 (Minn. App. 2011). But “[d]etermining whether a particular act constitutes disqualifying misconduct is a question of law,” which we review de novo. *Stagg*, 796 N.W.2d at 315. We give deference to the ULJ’s credibility determinations. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

In challenging the ULJ’s decision, Wiehoff argues that (1) Federal Express breached a contract by wrongfully terminating his employment, (2) the ULJ’s decision violates the United States Constitution, and (3) the decision is the result of unlawful procedure. Wiehoff’s first two arguments are not properly before this court. First, unemployment-compensation proceedings before a ULJ or this court are not the proper forum for addressing Wiehoff’s claims that Federal Express wrongfully terminated his employment or that he is entitled to breach-of-contract damages. *See Stagg*, 796 N.W.2d

at 316 (holding that such claims are “necessarily brought in a different forum”). Second, Wiehoff’s constitutional arguments are not explained or supported by authority, and we discern no obvious prejudicial error. The arguments are therefore waived. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (explaining that assignment of error based on “mere assertion” and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection); *see also Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001) (stating that “pro se litigants are generally held to the same standards as attorneys”).

We next address the sole argument that is properly before this court: whether the ULJ’s decision that Wiehoff is ineligible for unemployment benefits is the product of unlawful procedure. An evidentiary hearing before a ULJ is “a de novo due process evidentiary hearing.” Minn. Stat. § 268.105, subd. 1(a) (2010). A fair hearing is one in which the ULJ fully develops the record, reasonably assists an unrepresented applicant in presenting a case, and explains the procedure and the terms used throughout the hearing. *Id.*, subd. 1(b) (2010); Minn. R. 3310.2921 (2009). A hearing is considered fair if the parties are afforded an opportunity to give statements, cross-examine witnesses, and offer and object to evidence. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529-30 (Minn. App. 2007). A ULJ must give “both parties ample opportunity to offer testimony.” *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 824 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010). But the rules governing the hearing need not “conform to common law or statutory rules of evidence and other technical rules of procedure.” Minn. Stat. § 268.105, subd. 1(b).

The ULJ received hearsay evidence that Wiehoff told customers that he hated his manager and Federal Express and denied Wiehoff's request for a continuance so he could call the customers as witnesses. The ULJ reasoned that Wiehoff "was responsible to have all his witnesses available for the evidentiary hearing" and that there was "no showing that these customers would testify that the statements by [Federal Express's witnesses were] inaccurate." Wiehoff contends that the ULJ denied him the opportunity to confront the witnesses against him and improperly received and relied on hearsay evidence. We disagree. Wiehoff's witness-confrontation argument is based on criminal-law doctrine that is inapplicable in a proceeding to determine eligibility for unemployment benefits. Moreover, a ULJ can consider hearsay "if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2009); *see also* Minn. Stat. § 268.105, subd. 1(b) (providing that the evidentiary standard in an unemployment hearing need not conform to the rules of evidence).

Wiehoff also contends that the ULJ unlawfully denied his subpoena requests. A ULJ has authority to "issue subpoenas to compel the attendance of witnesses and the production of documents and other personal property considered necessary as evidence in connection with the subject matter of an evidentiary hearing." Minn. Stat. § 268.105, subd. 4 (2010). The ULJ must give full consideration to a request for a subpoena and must not unreasonably deny a request for a subpoena. *Id.* If a subpoena request is initially denied, the ULJ must, on the ULJ's own motion, reconsider that request during the evidentiary hearing and rule on whether the request was properly denied. *Id.* "If the

request was not properly denied, the evidentiary hearing must be continued for issuance of the subpoena.” *Id.*

Wiehoff asked the ULJ to issue a subpoena for additional documents that he claimed he did not receive. The ULJ considered Wiehoff’s request and determined that Wiehoff had received the relevant documents and that the other requested documents either did not exist or were irrelevant. A ULJ “may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly repetitious.” Minn. R. 3310.2922. We conclude that the ULJ’s decision to deny the subpoena request was reasonable and that the ULJ properly conducted the hearing “as an evidence gathering inquiry” and “ensure[d] that all relevant facts [were] clearly and fully developed” within department rules. Minn. Stat. § 268.105, subd. 1(b).

Moreover, substantial evidence supports the ULJ’s determinations. *See* Minn. Stat. § 268.105, subd. 7(d). Witnesses for Federal Express testified that Wiehoff made disparaging remarks about his employer to customers. The ULJ found the testimony of the witnesses for Federal Express to be “more credible” than Wiehoff’s, noting that they had “no motive to lie” and that the testimony was corroborated by Mary Godfrey, the operations manager. We defer to the ULJ’s credibility determinations. *Skarhus*, 721 N.W.2d at 344. And, the testimony regarding Wiehoff’s disparaging remarks shows a serious violation of the standards of behavior that his employer had the right to reasonably expect.

The ULJ’s determination that Wiehoff was discharged for employment misconduct, specifically, for telling customers that he hated his manager and Federal

Express, is supported by substantial evidence, is not arbitrary or capricious, and is not the result of legal error. Thus, the ULJ correctly determined that Wiehoff is ineligible to receive benefits.

Affirmed.

Dated:

Judge Michelle A. Larkin