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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1120

Timothy Dehn,
Relator,

vs.

Brown Brothers Remodeling LLC,
Respondent,

Department of Employment and
Economic Development,
Respondent.

Filed April 8, 2013
Reversed and remanded
Hudson, Judge

Department of Employment and
Economic Development
File No. 29191323-3

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Brown Brothers Remodeling, LLC, Faribault, Minnesota (respondent)

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Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Kirk, Judge.

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

HUDSON, Judge

The unemployment law judge (ULJ) initially determined that relator was ineligible for unemployment benefits because he performed "side work" using company resources, constituting employment misconduct and denied his request for reconsideration. In this certiorari appeal, relator argues that there was no misconduct because the business owner gave him permission to perform the work in question and because the ULJ's findings are unsupported by substantial evidence in the record. Relator further argues that the ULJ failed to adequately consider new, corroborating evidence presented with relator's request for reconsideration. Because the new evidence would likely have changed the outcome had it been presented at the initial hearing and because relator had good cause for not previously submitting the evidence, the ULJ abused his discretion by denying relator's request for an additional evidentiary hearing. We reverse and remand for an additional evidentiary hearing.

FACTS

Relator Timothy Dehn was hired by respondent-employer Brown Brothers Remodeling, LLC (BBR), as a full-time, salaried plumber in March 2010. BBR is owned by two brothers, John and David Brown. Relator's immediate supervisor was Robert Myhran, operations manager at BBR. Myhran represented BBR at the evidentiary hearing that took place on March 27, 2012.

Relator was hired under a sub-corporation named BBR Plumbing and Install that was created to allow BBR to do plumbing installations and get a plumbing bond. BBR

Plumbing and Install was owned by John Brown and Jonathan Honerbrink, a former employee of BBR.

Relator missed work on November 23 and 25, 2011, ostensibly because he was going to Wisconsin for Thanksgiving. But Myhran testified that he made several visits past relator's house and discovered that relator's work van was being used intermittently while relator was supposedly in Wisconsin. At the hearing, Myhran claimed he checked on relator because he suspected that relator had been performing "side work." Myhran's suspicion had been aroused by relator's systematic failure to respond to phone calls; his rearranging scheduled appointments with BBR's customers without informing his supervisors; his failure to turn in inventory and mileage logs; and BBR's inability to account for inventory that had been placed in relator's van. Myhran admitted, however, that BBR had no written rule or policy requiring relator to provide detailed invoices, inventory logs, or mileage logs, and that no written warning had been issued to relator prior to his termination. On November 28, 2011, Myhran terminated relator for performing "side work" on November 23 and 25.

Relator claims that he was not performing "side work," but was performing work for Jonathan Honerbrink, part-owner of BBR Plumbing and Install and former employee of BBR, at the direction of John Brown. Relator stated that he performed a total of four jobs for Honerbrink, and was paid for each job with a $250 gift card for a total of $1,000. Relator claims that he was instructed by Brown not to tell Myhran about the work that he was doing for Honerbrink. Relator did not fully understand why the work was being kept secret, but assumed that it related to debts Brown may have owed to Honerbrink.

Myhran admitted that it was Honerbrink for whom he suspected relator was working; Myhran had been made aware in mid-November that relator had recently pulled a permit for a job of Honerbrink's. Myhran also conceded that at the meeting where relator was terminated, relator claimed that he had been working for Honerbrink with John Brown's permission. But Myhran also testified that John Brown had denied the existence of such an arrangement.

Other than their testimony, neither relator nor Myhran presented any other evidence at the initial evidentiary hearing. On March 28, 2012, the ULJ issued his decision concluding that relator was ineligible for unemployment benefits due to employee misconduct. The ULJ concluded that relator breached the duty of loyalty he owed BBR by using its vehicle and supplies to perform work for a competitor. The ULJ found that even if relator was given permission to perform "side work," he was not authorized to perform that work "on Brown Brothers' dime." The ULJ found that relator's testimony was not credible due to his "deceptive, vague, and ever-changing and evolving theories for his version of events." While acknowledging that BBR did not have concrete evidence of larger-scale wrongdoing, BBR was "clearly being ripped off by Dehn for a significant period of time and to a significant degree."

Relator filed a request for reconsideration of the ULJ's decision. Relator reiterated his claim that the work was performed for Honerbrink with the knowledge and permission of John Brown. Relator also contested the ULJ's determination that the work for Honerbrink was being performed "on Brown Brothers' dime," claiming that he did not use company materials or tools and performed the work in the evening or on

weekends. Relator also attached two signed letters, one from David Brown, co-owner of BBR, and one from Jonathan Honerbrink. David Brown wrote that relator was performing work for "another contractor" with the permission of John Brown. He further stated that relator "has performed all duties he has been asked to do on a day to day basis. I am all for reinstating unemployment benefits for Timothy Dehn." David Brown signed the letter as president of BBR, and purported to be writing on behalf of himself and his brother, BBR co-owner John Brown. In his letter, Honerbrink wrote that he had obtained permission from John Brown in April and again in June for relator to perform work for him.

The ULJ denied relator's request for reconsideration. The ULJ conceded that there was some evidence supporting relator's version of events, but determined that the preponderance of the evidence showed that relator had committed employee misconduct. Relator now appeals the ULJ's ultimate determination of ineligibility and the denial of relator's request for an additional evidentiary hearing.

D E C I S I O N

When reviewing a ULJ's eligibility decision, this court may affirm, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are affected by an error of law, unsupported by substantial evidence in view of the entire record, arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2012).

A discharged employee is eligible for unemployment benefits unless the discharge was for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2012). "Whether an

employee committed employment misconduct is a mixed question of fact and law." *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Determining the conduct engaged in by the employee is a question of fact, which this court reviews in the light most favorable to the decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). "[W]e will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id.* But whether that conduct constitutes employment misconduct is a question of law reviewed de novo. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

"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) (2012). "[C]onduct an average reasonable employee would have engaged in under the circumstances" is excluded from employee misconduct. *Id.*, subd. 6(b)(4) (2012).

Eligibility determination

First, relator argues that the ULJ erred in determining that relator committed employment misconduct because John Brown had given him permission to perform work for Honerbrink. But relator's testimony was contradicted by Myhran, who stated that John Brown denied giving relator permission to do work for Honerbrink. Thus according to Myhran's account, relator breached the duty of loyalty he owed to BBR by performing work for a competitor using BBR's van, which would constitute employee misconduct. *See Marn v. Fairview Pharmacy Servs. LLC*, 756 N.W.2d 117, 121 (Minn. App. 2008)

(breaching duty of loyalty owed to employer constitutes employment misconduct under unemployment-benefits statute), *review denied* (Minn. Dec. 16, 2008); *Rehabilitation Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304–05 (Minn. App. 1987) (holding that while an employee may prepare to compete against an employer, directly competing with the employer while still employed breaches duty of loyalty). The ULJ's decision therefore rested upon a credibility determination, and we defer to the credibility determinations of the ULJ when the evidence substantially sustains them. *Peterson*, 753 N.W.2d at 774; *Skarhus*, 721 N.W.2d at 344. We therefore cannot conclude that the ULJ's initial ineligibility determination was error given the evidence available at the hearing.

We note, however, that the ULJ reached certain conclusions that were not supported by substantial evidence. The ULJ has a duty to "ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2012). While the factual record regarding the work performed by relator on November 23 and 25 was fully developed, the record does not contain sufficient evidence to support the ULJ's conclusion that relator "was compensated on a full-time basis but worked only part-time for [BBR]," or that BBR was "clearly being ripped off by Dehn for a significant period of time and to a significant degree." Thus while we give deference to the findings of fact and credibility determinations of the ULJ, we do not rely upon factual findings that are "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d).

Request for reconsideration

Relator next argues that the ULJ should have reversed the initial determination when relator presented the letters from David Brown and Honerbrink in connection with his request for reconsideration. "In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing." Minn. Stat. § 268.105, subd. 2(c) (2012). The ULJ was therefore precluded by statute from considering the letters in deciding whether to reverse the initial eligibility determination.

But relator contends that, at a minimum, production of the letters warranted a new evidentiary hearing. "The [ULJ] *must* order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing 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) (emphasis added). We review a ULJ's decision to deny a request for an additional evidentiary hearing for abuse of discretion. *Skarhus*, 721 N.W.2d at 345.

Employee misconduct is defined as a serious violation of the standards of behavior an employer has a right to reasonably expect. Minn. Stat. § 268.095, subd. 6(a). In his letter, David Brown wrote that relator had permission to perform work for Honerbrink and that relator had performed all of the duties requested of him on a day-to-day basis. Brown signed the letter as president of the company and purported to speak on behalf of himself and his brother, the co-owner of the company. According to Brown's letter,

therefore, relator's conduct was *by definition* not employee misconduct, as it satisfied the standard of behavior his employer expected. *See id.*

Respondent DEED argues that even if relator did have permission from John Brown to perform work for Honerbrink, it was still misconduct given the ULJ's finding that the work was performed on company time and using company materials. But this finding was called into question by the new evidence. According to the letters from Brown and Honerbrink, relator was not working on company time when he performed work for Honerbrink, and he had generally performed the duties expected of him for BBR. Furthermore, relator had told his employer he was on vacation on November 23 and 25 and thus does not appear to have been receiving compensation from BBR for time spent performing work for another contractor. Finally, the ULJ's conclusion that relator was stealing company resources is difficult to reconcile with David Brown's statement, against his company's financial interests, that relator had performed all of the duties expected of him during the tenure of his employment, and that he deserved to have his unemployment benefits restored.[1] We conclude that the letters would likely have changed the ULJ's determination that relator committed employee misconduct by performing "side work" on company time using company resources.

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[1] While Brown's financial incentives may lend credibility to his letter, Brown's belief that relator should receive benefits is irrelevant to our determination. Unemployment benefits are paid from state funds, and thus any agreement between an employer and an employee is not binding in determining an applicant's entitlement to benefits. Minn. Stat. § 268.069, subd. 2 (2012); *see also Scheeler v. Sartell Water Controls, Inc.*, 730 N.W.2d 285, 288–89 (Minn. App. 2007) (holding that any agreement between an employee and employer attempting to ensure the employee's later eligibility for unemployment benefits is void as being contrary to law).

Respondent DEED also argues that, even if performing work for Honerbrink was not employee misconduct, relator committed misconduct by lying to his employer about his whereabouts. While employee dishonesty may constitute misconduct when it is connected with employment, there is no per se rule that employee dishonesty constitutes misconduct. *See* Minn. Stat. § 268.095, subd. 6(a)(1) (stating that behavior seriously violating reasonable employer standards of behavior constitutes misconduct); *Baron v. Lens Crafters, Inc.*, 514 N.W.2d 305, 307–08 (Minn. App. 1994) (holding that "[d]ishonesty that is connected with employment may constitute misconduct").

Here, relator testified that he was instructed by John Brown not to tell Myhran about the work being performed for Honerbrink, and he argues that "an average reasonable employee" would have lied to Myhran "under the circumstances," and thus lying to Myhran was not employee misconduct. Minn. Stat. § 268.095, subd. 6(b)(4). While further development of the record may be necessary to determine whether relator's dishonesty constituted employee misconduct, the letters from Honerbrink and David Brown corroborating relator's account contradicted Myhran's testimony that John Brown denied giving relator permission to perform work for Honerbrink. The letters thus lend credibility to relator's claim that John Brown did not want Myhran to know about relator's work for Honerbrink, and thus may have instructed relator not to inform Myhran about his work for Honerbrink. If relator was in fact instructed to lie to Myhran by his employer, his dishonesty would neither violate the "standards of behavior the employer has the right to reasonably expect" of relator nor demonstrate "substantial lack of concern" for his employment. *Id.*, subd. 6(a)(1), (2).

Respondent next contends that the letters should be disregarded because they were not notarized or on company letterhead. The ULJ is to consider "[a]ll competent, relevant, and material evidence, including records and documents in the possession of the parties that are offered into evidence." Minn. R. 3310.2922 (2011). "A judge may receive *any* evidence that possesses probative value . . . if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." *Id.* (emphasis added). "A judge is not bound by statutory and common law rules of evidence." *Id.* Given the relaxed evidentiary rules at an unemployment hearing, the fact that the letters were not notarized does not disqualify the evidence.

The evidence submitted with relator's request for reconsideration demonstrated that he was performing work for Honerbrink with permission from the owner of the company. The evidence further shows that relator's employer believed that, prior to his termination, relator was meeting the expectations of his employer on a day-to-day basis. On this record, we conclude that relator's new evidence would likely have changed the outcome of the initial hearing.

Our conclusion, however, does not entitle relator to a new evidentiary hearing unless relator also had good cause for failing to produce the letters at the initial hearing. Minn. Stat. § 268.105, subd. 2(c). The ULJ has a duty to "ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b). Relator was not represented at the hearing, and as a result the ULJ had "a duty to reasonably assist [relator] with the presentation of the evidence and the proper development of the record."

Thompson v. Cnty. of Hennepin, 660 N.W.2d 157, 161 (Minn. App. 2003) (citing Minn. R. 3310.2921 (2001)).

At the initial hearing, relator twice stated his desire to have John Brown testify to corroborate the fact that he had permission to perform work for Honerbrink. The ULJ had the authority to schedule an additional evidentiary hearing or continue the matter so that relator could subpoena either the owners of the company or Jonathan Honerbrink, or present additional evidence to fully develop the record. *Cf. Thompson*, 660 N.W.2d at 160, 161; Minn. R. 3319.2914 (2011) (governing the issuance of subpoenas to compel witness attendance at an unemployment hearing). But the ULJ took no action in this regard to assist with development of the record. Dehn's eligibility for unemployment benefits turned on whether he had permission from John Brown to perform work for Honerbrink and whether he had been instructed by Brown not to inform Myhran about that work. The record was incomplete on this question, and the ULJ breached his duty to assist relator to present evidence on this question or issue a subpoena to compel witness testimony. Had the ULJ either ordered an additional evidentiary hearing or simply continued the matter to allow full development of the record, relator would have been able to prepare and present the new evidence that was submitted with his request for reconsideration. We therefore conclude that relator had good cause for not previously submitting the two letters.

Because the new evidence submitted by relator with his request for reconsideration satisfied the requirements of Minn. Stat. § 268.105, subd. 2(c), the ULJ abused his discretion by failing to order an additional evidentiary hearing in response to

relator's request for reconsideration. On remand, the additional evidentiary hearing should address two questions: whether relator had permission to perform work for Honerbrink to determine whether the work constituted a breach of loyalty, and whether relator's dishonesty under the circumstances constituted employment misconduct.

Reversed and remanded.