STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2190

Jason J. Tank,
Relator,

vs.

Heartland Conservation Services, Inc.,
Respondent,

Department of Employment & Economic Development,
Respondent.

Filed July 29, 2013
Affirmed
Worke, Judge

Department of Employment & Economic Development
File No. 29877000-3

Jasper Berg, IAJ Law, LLC, Woodbury, Minnesota (for relator)

Heartland Conservation Services, Inc., Alexandria, Minnesota (respondent employer)

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

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Kirk, Judge.

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

WORKE, Judge

In this certiorari appeal from a decision by an unemployment-law judge (ULJ) that relator was ineligible for unemployment benefits because he was discharged for

misconduct for using company equipment and labor to perform work on relator's own property, relator argues that he had permission to use company resources, that his conduct fell within an exception for reasonable errors of judgment, and that the ULJ's findings were not supported by law or substantial evidence. We affirm.

FACTS

Relator Jason Tank was employed by respondent Heartland Conservation Services, Inc. (Heartland) beginning in June 2004. Relator worked as a project manager and supervised employees. Relator's cousin, Terry Tank, is the owner and manager of Heartland. In April 2012, relator directed two new employees to plant trees on land that relator owned. After an employee showed Tank photographs of the tree-planting operation, relator was informed via text message that he was terminated from employment.

Relator applied for unemployment insurance benefits, and was found eligible. Heartland appealed the determination, asserting that relator was terminated for employment misconduct because he stole from the company. At a telephone hearing before a ULJ, Tank appeared as the representative of Heartland, and relator appeared and was represented by counsel.

At the hearing, Tank testified that relator stole 1,425 trees valued at $10,875 and six hours of employee labor. Tank testified that these figures were estimates based on the number of trees he believed were ordered but not billed to anyone else, and based on the amount of time it should have taken those employees to plant that number of trees. Tank

admitted that after learning about the incident, he terminated relator without ever speaking to him.

Relator admitted that he lacked permission to use two Heartland employees to plant trees on his land, but stated that he believed it was a permissible use of company resources as a training exercise. Relator stated he thought he and Tank had an agreement that allowed him to use company resources without requesting permission and that he witnessed Tank using company employees and equipment on Tank's own property multiple times. Relator stated that he did not intend to invoice the company for labor costs.

Regarding the theft of trees, relator testified that he planted only 775 trees valued at $330 on his property. An invoice was generated for the trees, and relator intended to pay for their value. Relator submitted a copy of the work order and invoice to the ULJ. Relator testified that Tank must have known about his tree order because an invoice was created for it, and only Tank had access to the accounting software to create the invoice. Relator submitted affidavits from two former employees who stated that the invoicing system was password protected for Tank's sole use. Tank denied that he created the invoice and insisted that relator did not have permission to take the trees. At the close of the hearing, the record was left open for the submission of additional documents by the parties.

Following the hearing, the ULJ issued a decision reversing relator's eligibility determination and finding that he committed employment misconduct when he commandeered Heartland employees and equipment for his own personal use. The ULJ

found that relator did not steal trees from his employer because the evidence showed he intended to pay for the trees. But, the ULJ concluded that relator's testimony that he had permission to use company resources was not credible. The ULJ concluded that relator's use of company equipment and labor without permission was a serious violation of the standards of behavior Heartland had a right to reasonably expect, and therefore relator was ineligible for unemployment benefits. Relator requested reconsideration, and the ULJ affirmed the decision and denied the parties' requests for an additional evidentiary hearing. This certiorari appeal followed.

D E C I S I O N

On a certiorari appeal, this court may reverse or modify a decision of a ULJ "if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusions, or decision are . . . unsupported by substantial evidence in view of the entire record." Minn. Stat. § 268.105, subd. 7(d)(5) (2012).

To be ineligible for unemployment benefits, relator must have been discharged for "employment misconduct." Minn. Stat. § 268.095, subd. 4(a) (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). Whether an act was committed is a question of fact; but whether the act constitutes employment misconduct is a question of law, which this court reviews de novo. *Id.* On appeal, this court reviews the ULJ's fact findings in the light most favorable to the decision, giving deference to the ULJ's credibility determinations. *Id.*

"[T]his court will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id.*

Relator argues that the ULJ applied the wrong legal standard when deciding his case, asserting that the proper standard was first to determine whether his conduct was a "clear violation," then whether it was a "serious violation," and finally whether the employer's expectations for his conduct were "reasonable." Relator cites no legal authority for this test. "Employment misconduct" is defined by statute 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). This definition is the only legal definition of employment misconduct. *Id.*, subd. 6(e) (2012). Therefore, we conclude that the ULJ did not err when he applied this definition to the facts of relator's case.

Relator also argues that he did not commit employment misconduct because he was unaware of his employer's policy, and because relator witnessed Tank using company employees and equipment for his own use. Relator testified that he "never had to ask exclusive permission to use the equipment, that was part of our contract agreement, or verbal agreement." However, Tank testified that when he hired relator, he told him that he needed to request permission before taking company equipment for personal use. "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). "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 [ULJ] must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2012). We agree with the ULJ that relator's testimony was not credible because it was not "plausible," and stating that "[i]t is not logical that because a company owner takes personal benefit from company resources, that [relator] believed he as an employee was also allowed to do so without getting authorization." Therefore, we conclude the ULJ's credibility determination was adequately explained and supported.

Relator also argues that he did not commit employment misconduct because the alleged misconduct was not an "issue between an employer and employee." Rather, "it was a squabble between business partners who were also family members." For support, relator cites portions of the hearing transcript wherein relator and Tank both refer to Heartland property as "ours" and the fact that Tank knew that relator sometimes purchased products for Heartland using his own money. However, relator did not make this argument to the ULJ. Arguments not made to or considered by the ULJ are normally not reviewable on appeal.[1] *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988).

Relator further argues that he intended to confer with Tank about the tree-planting incident later in the season, and that typically he would make decisions independently and then later discuss those decisions with Tank. However, the ULJ found that relator needed to request permission from Tank *prior to* using Heartland employees and

[1] We further note that, were relator to prevail on this argument, he would be ineligible for unemployment benefits because a true business partner would not qualify for unemployment insurance benefits. *See Jenson v. Dep't of Econ. Security*, 617 N.W.2d 627, 630 (Minn. App. 2000) (setting forth a five-factor test to determine whether a partner is effectively an employee for purposes of eligibility for unemployment benefits), *review denied* (Minn. Dec. 20, 2000).

equipment. The record supports this finding, and we conclude it is irrelevant whether relator intended to seek Tank's permission after the fact. Moreover, relator admitted that he never intended to invoice Heartland for the use of its employees and equipment, which contradicts relator's assertion that he would settle up with Tank later.

Relator also argues that because he was discharged by text message, because he was not initially given a reason for his discharge, and because a police report was filed three months after his discharge, he did not commit employment misconduct. Relator cites no legal authority for this argument. Whatever happened after relator was discharged has no bearing on whether he committed employment misconduct. *See Brown v. Nat'l Am. University*, 686 N.W.2d 329, 332 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004) (stating that "the operative event that determines qualification for unemployment compensation benefits in these circumstances is discharge from employment," and that the court on review is "not concerned with whether or not the employee should have been discharged but only with the employee's eligibility for benefits after termination of employment").

Finally, relator argues that his conduct fell within several exceptions to the definition of employment misconduct: the exception for good faith errors of judgment under Minn. Stat. § 268.095, subd. 6(b)(6) (2012); the exception for "conduct an average reasonable employee would have engaged in under the circumstances" under Minn. Stat. § 268.095, subd. 6(b)(4) (2012); and the exception for "simple unsatisfactory conduct" under Minn. Stat. § 268.095, subd. 6(b)(3) (2012). However, we concur with the ULJ's determination that relator's conduct, evincing a belief that he could appropriate company

resources without permission, was unreasonable. Moreover, theft of company resources, no matter how minimal, demonstrates a substantial lack of concern for employment. *See Skarhus*, 721 N.W.2d at 344 (concluding that theft of product valued at less than four dollars amounted to employment misconduct because it resulted in the employer's inability to trust the employee).

Affirmed.