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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1777**

Josh L. Parrow,
Relator,

vs.

Yellow Transportation Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 16, 2008
Affirmed
Connolly, Judge**

Department of Employment and Economic Development
File No. 8050 07

Josh L. Parrow, 5470 Blackberry Trail, Apt. 321, Inver Grove Heights, MN 55076 (pro se relator)

Yellow Transportation Inc., c/o TALX UCM Services Inc., P.O. Box 283, St. Louis, MO 63166-0283 (Respondent)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101 (for respondent department)

Considered and decided by Minge, Presiding Judge; Lansing, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator argues that he was improperly dismissed from his job as a truck driver for employment misconduct and wrongly denied unemployment benefits. Because the unemployment law judge's (ULJ) decision that relator was discharged for employment misconduct is substantially supported by evidence in the record, we affirm.

FACTS

Relator Josh L. Parrow began working full-time for respondent Yellow Transportation Inc. as a dock worker and city truck driver on June 12, 2006. Relator admits that he was involved in six motor-vehicle accidents within an eight-month period.

The first accident occurred on August 2, 2006. Relator was backing his truck into a dock when he hit a vine and grass-covered fence. The fence caught the truck's fender and bumper on the driver's side. Although respondent considered this to be a preventable accident, it did not issue a warning because the accident was not serious and relator was a new employee.

The second accident occurred two weeks later on August 14, 2006. Relator was driving a truck on Kellogg Blvd. when he struck a car that was parked somewhat in the driving lane. Relator hit the vehicle hard enough to push it into two other cars. Respondent issued relator a warning letter because it deemed this accident preventable. The letter informed relator that "[f]urther violations of this type [would] result in additional discipline, up to and including discharge." Relator argued that he was driving within the speed limit and just did not notice the car sticking out into the street. He also

stated that he received a ticket for the incident that was later dismissed because the state could not prove that the car he struck was not parked more than 18 inches from the curb.

Two months later, relator was involved in a third motor-vehicle accident when he struck a hanging tree limb on Minnehaha Ave. Respondent did not issue a warning for this incident because it determined that this accident was not preventable. Relator stated during the telephone hearing that “the supervisor for the city came out and he did measure that tree limb and came to the conclusion that the tree limb was too low to be on a regulated truck route and the City of St. Paul should have been trimming those trees.”

On December 30, 2006, relator was involved in another motor-vehicle accident. While pulling a trailer out from a warehouse, relator struck the trailer and the trailer door was damaged. As a result, the load had to be moved to another trailer. Respondent deemed this to be a preventable accident and issued a warning letter informing relator that further violations could result in discharge.

The fifth accident occurred on February 26, 2007. Relator was driving his truck northbound on I-35 when “the dolly [he was] hauling became separated from the tractor’s pindle hook. The safety chains caught the dolly, sending [the] unit into a spin until crashing into the center guardrail, causing damage to the tractor as well as the dolly.” Because respondent considered this accident preventable, the company issued another warning letter. Relator “[swore] up and down that [he] latched everything the way it was supposed to be latched.”

The sixth, and final accident, occurred on March 27, 2007. Relator backed his tractor into a pick-up area where another truck was already parked. The driver of that

truck asked relator to move his vehicle so that he could get into his truck. “While pulling forward [relator] hit the mirror of the other vehicle, bending the mirror out and breaking the glass.” Respondent believed this accident to be preventable and suspended relator on March 28, 2007, pending an investigation into the incident. Relator was discharged on April 9 2007.¹ A Department of Employment and Economic Development (DEED) adjudicator initially determined that relator was not disqualified from receiving benefits. Respondent appealed that determination, and a de novo hearing was held. The ULJ reversed the initial determination and concluded that relator was discharged for employment misconduct and was therefore disqualified from receiving unemployment benefits. Relator filed a request for reconsideration with the ULJ, who affirmed the initial decision. This certiorari appeal follows.

D E C I S I O N

When reviewing the decision of a ULJ, this court may affirm the decision, remand it for further proceedings, or reverse or modify it if the substantial rights of the petitioner 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) (2006).

¹ This discharge was later converted to a 47-day suspension lasting from March 28 to May 13, 2007. Relator returned to work for respondent on May 14, 2007 in a non-driving position.

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. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court views the ULJ's factual findings in the light most favorable to the decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court also gives deference to the credibility determinations made by the ULJ. *Id.* As a result, this court will not disturb the ULJ's factual findings when the evidence substantially sustains them. Minn. Stat. § 268.105, subd. 7(d). But whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo. *Scheunemann*, 562 N.W.2d at 34.

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). Employment misconduct means “any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2006).

Relator argues that “[o]n the outset it would appear that [I am] possibly guilty of employee misconduct. But as other facts, which were not covered in the original phone hearing transcripts as presented in the above statement of facts, it becomes obvious that [I] did not intentionally nor willfully commit employee misconduct.” This court will not consider matters not argued and considered by the court below. *Thiele v. Stitch*, 425

N.W.2d 580, 582 (Minn. 1988). Therefore, the statements of fact first presented by relator in his appellate brief will not be considered on appeal. Furthermore, relator's argument that he did not intentionally or willfully cause these accidents is inconsequential. Respondent accused him of being negligent, not malicious. The ULJ determined that "[relator's] actions show negligence. [Relator] could not have been paying good attention to his driving. [He] had preventable accidents that Yellow Transportation counted against him."

This decision is supported by the record. Minnesota law specifically provides that negligent conduct that is a serious violation of the standards of behavior that an employer has a reasonable right to expect from its employees is employment misconduct. Minn. Stat. § 268.095, subd. 6(a). Relator was involved in four preventable motor-vehicle accidents in an eight-month period for which he received letters warning him that further violations could result in discharge. These were serious violations of the type of behavior that respondent expects from its drivers. The ULJ accurately summarized the incidents:

[Relator] hit a stationary parked car in a parking lane that he should have been observing and avoiding. [Relator] damaged a trailer door which he could have avoided by being careful. [Relator] could have had a serious accident and endangered public safety when the gear came loose on I-35W. [Relator] claims he secured it, but the evidence is that it was not secured properly. The last incident was not as serious. However, the straight truck was stationary and [relator] could have avoided damage to the mirror by careful observation. [Relator] exhibited a pattern of unsafe driving and not taking adequate precautions.

Based on the foregoing analysis, we conclude that the ULJ's conclusion that relator was discharged for employment misconduct and therefore disqualified from receiving unemployment benefits is supported by substantial evidence in the record.

Affirmed.