STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0009

Eddie R. Gatson,
Relator,

vs.

Q Carriers Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed October 7, 2008
Affirmed
Lansing, Judge

Department of Employment and Economic Development
File No. 12387 07

Eddie R. Gatson, 6815 Brierfield Drive, Dallas, TX 75232-3620 (pro se relator)

Q Carriers Inc., 1415 Maras Street South, Shakopee, MN 55379-8800 (for respondent Q Carriers Inc.)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, Suite E200, 1st National Bank Building, 332 Minnesota Street, St. Paul, MN 55101-1351 (for respondent Department of Employment and Economic Development)

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

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

LANSING, Judge

By writ of certiorari, Eddie Gatson appeals an unemployment-law judge's determination that Gatson was discharged from his job as a long-distance trucker because of employment misconduct and that he is therefore disqualified from receiving unemployment benefits. Gatson also challenges the fairness of the hearing procedures. Because substantial evidence supports the determination that Gatson was discharged for operating a commercial vehicle in violation of company policy and federal regulations and because he received a fair hearing, we affirm.

F A C T S

Eddie Gatson, a long-distance trucker with seven years of experience, worked for Q Carriers Inc. from November 8, 2006, to July 25, 2007. Q Carriers gave him an employee handbook that outlined a zero-tolerance policy on the consumption of alcohol. The policy provided that a violation could result in disciplinary action "up to and including termination." Gatson signed the handbook's acknowledgement of receipt on November 6, 2006.

On July 24, 2007, Gatson admittedly consumed beer at about 11:00 a.m. Between 7:00 and 7:30 p.m., Gatson left Dallas on his delivery route. At a Texas weigh station, a police officer stopped Gatson. He conducted field sobriety and breathalyzer tests. The officer issued an out-of-service citation under federal regulations because he smelled

alcohol on Gatson's breath, but the citation did not list the breathalyzer results. Gatson was restricted from driving for twenty-four hours.

Gatson called Q Carriers, and he, as well as the officer, told the fleet manager about the incident. Q Carriers flew another driver from Minnesota to Texas to complete the route, which delayed the delivery by twenty-four hours. Q Carriers then discharged Gatson.

Gatson applied for unemployment benefits. The Department of Employment and Economic Development (DEED) denied his request based on its determination that Gatson had committed employment misconduct, and Gatson requested an evidentiary hearing. At the hearing, the unemployment-law judge (ULJ) asked the fleet manager questions about the events on July 24. When the director of operations began to answer the questions, the ULJ admonished him not to answer because it would cause confusion in the record. The ULJ then repeated the questions to the fleet manager.

Q Carriers' fleet manager testified that the officer told him that Gatson had blown a .009 on the breathalyzer. Gatson, however, stated that the officer said nothing about the breathalyzer results to the fleet manager and only said that he had smelled alcohol on Gatson's breath. Gatson also stated that the officer did not charge him with a criminal driving offense. The director of operations testified to Q Carriers' zero-tolerance policy and the out-of-service citation's effect on the delivery. He stated that Q Carriers discharged Gatson because he violated the zero-tolerance policy, he received an out-of-service citation, he could not drive the truck for twenty-four hours, and Q Carriers had to

fly another driver to Texas to complete the delivery. Neither Gatson nor Q Carriers submitted the out-of-service citation as evidence.

The ULJ concluded that Q Carriers discharged Gatson for employment misconduct and that he was disqualified for unemployment benefits. Gatson requested reconsideration of the decision and submitted the citation. On reconsideration, the ULJ concluded that the original decision was correct. Gatson filed this certiorari appeal.

D E C I S I O N

When reviewing a ULJ's decision, we may affirm or remand the case for further proceedings. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2007). Reviewing courts may also "reverse or modify the decision" if the petitioner's substantial rights may have been prejudiced by a finding, inference, conclusion, or decision that violates a constitutional provision, exceeds DEED's statutory authority or jurisdiction, is made on unlawful procedure, is affected by an error of law, is unsupported by substantial evidence in light of the entire record, or is arbitrary or capricious. *Id.* Gatson challenges the evidence supporting the determination of employment misconduct and the procedural fairness of the hearing.

I

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). Employment misconduct includes "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) (Supp. 2007). A single incident of misconduct does not constitute "employment misconduct" under the statute if the incident "does not have a significant adverse impact on the employer." *Id.*

The determination of whether an employee engaged in employment misconduct "is a mixed question of fact and law." *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). Determining whether the employee performed the "act alleged to be employment misconduct is a fact question." *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19-20 (Minn. App. 2003). Factual findings are viewed from the perspective that is most favorable to the ULJ's decision and will not be disturbed if substantial evidence supports the decision. *Jenkins*, 721 N.W.2d at 289; *see also* Minn. Stat. § 268.105, subd. 7(d)(5) (authorizing reversal when decision is unsupported by substantial evidence). Determining whether the act amounts to "employment misconduct is a question of law on which a reviewing court remains free to exercise its independent judgment." *Risk*, 664 N.W.2d at 20 (quotation omitted).

The record supports the ULJ's determination that Gatson's alcohol consumption amounted to employment misconduct. Responsible consumption of alcohol is presumed knowledge for employees. *See Risk*, 664 N.W.2d at 20-22 (holding that even though employee did not lose his commercial driver's license or receive DWI conviction, his act of driving under influence was employment misconduct). Truck drivers have a "duty and obligation to [their] employer[s]" not to drive "while under the influence of alcohol during working hours." *Id.* at 20.

First, Gatson admitted to drinking alcohol on July 24 around 11:00 a.m. even though he would be driving that evening. Second, he knew of Q Carriers' zero-tolerance policy on alcohol consumption and the possible penalties for violating it. Third, regardless of his alcohol concentration, Gatson admitted to receiving the out-of-service citation and even submitted it with his request for reconsideration. This citation is issued if a driver violates federal regulations. Under federal regulations, commercial-vehicle drivers must not "[u]se alcohol, be under the influence of alcohol, or have any measured alcohol concentration or detected presence of alcohol, while on duty or operating, or in physical control of a commercial motor vehicle." 49 C.F.R. § 392.5(a)(2) (2007).

As an experienced truck driver, Gatson knew of the federal regulations. Despite federal regulations and Q Carriers' zero-tolerance policy, Gatson drank alcohol. *See Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 777 (Minn. App. 2008) (holding that pilot's decision to drink while on flight-reserve status in violation of company policy was employment misconduct). Gatson displayed indifference to Q Carriers' reasonable employment interests, which amounts to employment misconduct.

The single-incident exception does not apply to Gatson's actions because his conduct caused Q Carriers a significant adverse impact. Q Carriers had to fly another driver to Texas to complete the delivery, which was twenty-four hours late. Even if the delivery had been on time, Gatson's conduct raised issues of future trust and safety. *See Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (holding that single act of theft had significant adverse impact on employer because employer could not entrust cashier with her job responsibilities). As in *Skarhus*, Q Carriers could no longer

rely on Gatson to abstain from consuming alcohol as required by law. Because Q Carriers suffered a significant adverse impact, the single-incident exception does not apply, and the record supports the ULJ's determination of employment misconduct.

II

An evidentiary hearing is "not an adversarial proceeding," and the ULJ "must ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (Supp. 2007). The ULJ is obligated to conduct the proceedings in a way "that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2007). Gatson asserts that his hearing was unfair in four ways.

First, Gatson challenges the relevancy and the admissibility of the director of operations' testimony. DEED promulgates its own evidentiary-hearing rules, and these rules do not have to "conform to common law or statutory rules of evidence and other technical rules of procedure." Minn. Stat. § 268.105, subd. 1(b). Thus, "[a]ll competent, relevant, and material evidence" may be considered as part of the record. Minn. R. 3310.2922 (2007). A ULJ may receive hearsay into evidence if it has probative value that may be relied on by "reasonable, prudent persons . . . in the conduct of their serious affairs." *Id.* Due process considerations also apply to all aspects of the proceeding. *See Juster Bros. v. Christgau*, 214 Minn. 108, 119, 7 N.W.2d 501, 507 (1943) (noting that due process requires "opportunity to be present during the taking of testimony or evidence, to know the nature and content of all evidence adduced in the matter, and to present any relevant contentions and evidence the party may have").

The record does not support Gatson's contentions that the ULJ improperly relied on the director of operations' inadmissible hearsay about the July 24 events or that his remaining testimony was irrelevant. Although the director of operations answered some questions that the ULJ directed to the fleet manager, the ULJ repeated the questions to the fleet manager after perceiving that the wrong person had answered. This redirection of the questions indicates that the ULJ disregarded the initial answers and relied instead on the fleet manager's responses. And the director of operations' testimony was relevant insofar as it provided information on the zero-tolerance policy, the delivery delay, the substitute driver, and the reason for discharge. Gatson received due process because he had the opportunity to cross-examine the director of operations and the fleet manager, as well as present other evidence. The record supports the conclusion that the ULJ did not rely on inadmissible evidence in reaching her decision and that Gatson's right to a fair hearing was not prejudiced by the director of operation's improperly answering questions asked of the fleet manager.

Gatson's second argument is that his hearing was unfair because the ULJ did not admit the out-of-service citation into evidence. Evidence that is not submitted at a hearing cannot be considered in a request for reconsideration unless it is offered "for purposes of determining whether to order an additional evidentiary hearing." Minn. Stat. § 268.105, subd. 2(c) (Supp. 2007). The ULJ is charged with the responsibility of ordering an additional evidentiary hearing if the evidence "would likely change" the decision's outcome, provided that good cause exists for not submitting the evidence

previously, or if the evidence would show that submitted evidence "was likely false" and affected the decision's outcome. *Id.*

The failure to admit the citation into evidence did not result in an unfair hearing for Gatson. Gatson submitted the citation with his request for reconsideration, but, for two reasons, the admission of the citation does not trigger an additional evidentiary hearing. First, the citation would not change the outcome of the ULJ's decision. The citation's existence was undisputed at the hearing, and this fact alone establishes that Gatson violated Q Carriers' zero-tolerance policy and federal regulations. Additionally, the record provides no basis for finding that good cause exists for the earlier failure to submit the citation. The ULJ determined that other than confirming the citation's existence, the citation provided no other relevant evidence that would warrant holding the record open to obtain the citation. Second, because the citation did not indicate Gatson's alcohol concentration, it could neither contradict the fleet manager's testimony nor prove that his testimony was likely false. Thus, the decision not to admit the citation did not impair Gatson's opportunity for a fair hearing.

Third, Gatson argues that the ULJ erroneously relied on the fleet manager's testimony that Gatson had blown a .009 on the breathalyzer. Although the ULJ mentioned Gatson's alcohol concentration, that information was not essential to the ULJ's determination. The ULJ based the misconduct decision on the issuance of the citation, which both parties agreed occurred; Gatson's awareness of Q Carriers' zero-tolerance policy; and Gatson's violation of the zero-tolerance policy and federal

regulations. Thus, Gatson's argument does not provide a basis for reversal. *Cf.* Minn. R. Civ. P. 61 (stating that harmless error is not ground for reversal).

Fourth, Gatson contends that the ULJ was biased and did not protect his rights. The ULJ "must ensure that all relevant facts are clearly and fully developed" and protect the parties' rights to ensure that a fair hearing occurs. Minn. Stat. § 268.105, subd. 1(b); Minn. R. 3310.2921. During the hearing, parties can present, examine, and cross-examine witnesses; offer documents or exhibits; and object to exhibits or testimony. Minn. R. 3310.2921. We are unable to find support in the record for Gatson's contention that the ULJ was biased in favor of Q Carriers and did not protect Gatson's rights. All facts surrounding the July 24 incident were fully developed. The ULJ requested the fleet manager's attendance after learning that he was not participating in the telephone hearing. The ULJ also repeated questions and obtained answers from the fleet manager after learning that the director of operations had initially answered some of the questions. The ULJ only closed the record after learning that the citation provided no additional evidence. The ULJ protected Gatson's rights by not allowing witnesses without personal knowledge of the documents to testify. The ULJ confirmed with the parties that no testimony occurred during the tape change. We find no basis in the record to conclude that the ULJ was biased or that Gatson received an unfair hearing.

Affirmed.