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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0285**

John K. Hochstein,
Relator,

vs.

Video Surveillance Solutions, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed December 1, 2014
Remanded
Smith, Judge**

Department of Employment and Economic Development
File No. 31766955-3

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Considered and decided by Smith, Presiding Judge; Larkin, Judge; and Bjorkman,
Judge.

UNPUBLISHED OPINION

SMITH, Judge

We remand the determination that relator is ineligible to receive unemployment benefits due to employment termination resulting from employment misconduct because the unemployment law judge (ULJ) failed to determine whether relator was an independent contractor rather than an employee.

FACTS

Relator John Hochstein worked as a salesperson for respondent Video Surveillance Solutions, Inc. (VSS), from November 7, 2012 until March 6, 2013. He worked a variable, self-created schedule, ranging from one or two hours per week to 10 to 20 hours per week. Because of his limited work hours, he remained eligible to receive unemployment benefits under a previous eligibility determination.

In early March 2013, Hochstein was ordered to serve 90 days in jail after violating the terms of his probation from a 2006 criminal conviction. Hochstein requested work release, but his request was denied. In response to Hochstein's inquiry, VSS notified him that his position would no longer be available after he was released.

After being released from jail, Hochstein requested unemployment benefits, and an administrative clerk from respondent department of employment and economic development (DEED) determined that he was ineligible because he had quit his employment to serve a jail term. Hochstein appealed the determination, stating in a handwritten note that he received "no hourly wage or any type of benefit," and a ULJ convened an evidentiary hearing in November 2013.

During the hearing, Hochstein testified that his position with VSS was “strictly commission based selling to [his] own past customers.” The chief executive officer for VSS confirmed that Hochstein’s position “was commission only, so he made his own schedule.” When the ULJ asked whether Hochstein intended “to separate from employment with [VSS],” Hochstein responded, “Well, I was just strictly commission. I wasn’t really, I didn’t have any hourly wage and didn’t have any insurance. I didn’t have anything [except] for if I sold some of their products to one of my past customers I’d get a commission on it.” The ULJ replied, “Yeah, I understand that’s how it worked.”

The ULJ determined that Hochstein had been discharged for employment misconduct because “he would not be able to work for the employer by virtue of being incarcerated due to his parole violation.” Based on this determination, the ULJ ruled that Hochstein was ineligible to receive unemployment benefits and ordered Hochstein to repay overpaid benefits in the amount of \$5,765.

Hochstein appealed the ULJ’s determination with another handwritten note. The ULJ affirmed the ineligibility determination, stating that “[t]he terms of Hochstein’s compensation [are] not relevant to the issue of whether he quit or was discharged”

D E C I S I O N

I.

Hochstein contends that he should not have lost his preexisting entitlement to receive unemployment benefits as a result of the loss of his position with VSS because he was an independent contractor rather than an employee. An applicant who is discharged from employment for employment misconduct is ineligible to receive unemployment

benefits. Minn. Stat. § 268.095, subd. 4 (2012). “‘Employment’ means service performed by . . . an individual who is considered an employee under the common law of employer-employee and not considered an independent contractor” Minn. Stat. § 268.035, subd. 15(a) (2012). “Whether an individual is an employee or an independent contractor is a mixed question of law and fact. We review factual findings in the light most favorable to the decision. But where the facts are not disputed, a legal question is presented. We review questions of law de novo.” *St. Croix Sensory Inc. v. Dep’t of Emp’t & Econ. Dev.*, 785 N.W.2d 796, 799 (Minn. App. 2010) (citations omitted).

When determining whether an individual is an employee or an independent contractor, five essential factors must be considered and weighed within a particular set of circumstances. Of the five essential factors to be considered, the two most important are those:

A. that indicate the right or the lack of the right to control the means and manner of performance; and

B. to discharge the worker without incurring liability. Other essential factors to be considered and weighed within the overall relationship are the mode of payment; furnishing of materials and tools; and control over the premises where the services are performed.

Minn. R. 3315.0555, subp. 1 (2013).

Here, the ULJ did not address whether Hochstein was an independent contractor and did not make factual findings addressing the criteria for distinguishing employees from independent contractors. DEED asserts that this is because Hochstein waived the issue by failing to raise it before the ULJ. But the record reflects that Hochstein implicitly raised the issue several times, pointing out that he did not receive hourly wages from VSS, that he controlled his own schedule, and that he provided his own client list.

The fact that Hochstein, appearing pro se, did not specifically identify the issue does not waive it because the ULJ had “the obligation to recognize and interpret the parties’ claims.” *Miller v. Int’l Express Corp.*, 495 N.W.2d 616, 618 (Minn. App. 1993). We therefore remand for the ULJ to address the issue and make appropriate findings.

II.

Hochstein also contends that, even if he was an employee, his employment was not terminated for employment misconduct because the conduct which led the state to revoke his probation—his receipt of an email message—was not a voluntary act on his part. If the ULJ determines on remand that Hochstein was an independent contractor rather than an employee, this issue is moot and Hochstein’s preexisting eligibility for unemployment benefits must be restored. If, however, the ULJ determines that Hochstein was an employee, the issue of employment misconduct will arise again on remand. We therefore address it in the interest of judicial economy. *See, e.g., Midway Nat’l Bank of St. Paul v. Estate of Bollmeier*, 504 N.W.2d 59, 64 (Minn. App. 1993).

We review whether a particular act constitutes employment misconduct de novo. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). 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) (2012). “Absence from work due to incarceration for criminal acts is misconduct sufficient to disqualify an employee from

receiving unemployment compensation benefits.” *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 46 (Minn. App. 1984).

Hochstein argues that his mere receipt of an email message is not in itself a criminal act. Although this ordinarily may be true, Hochstein was prohibited from receiving emails as a result of his criminal act, and his incarceration for violating that prohibition therefore is ultimately a consequence of his criminal acts. Thus, if the ULJ determines on remand that Hochstein was an employee rather than an independent contractor, his determination that Hochstein is ineligible for unemployment benefits because Hochstein was terminated for employment misconduct would be valid as law of the case. *See Brezinka v. Bystrom Bros., Inc.*, 403 N.W.2d 841, 843 (Minn. 1987) (“Law of the case applies most commonly to situations where an appellate court has passed on a legal question and remanded to the court below for further proceedings. The legal question thus determined by the appellate court will not be re-examined on a second appeal of the same case.”).

Remanded.