STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1744

Jason Gannon,
Relator,

vs.

United Parcel Service, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed May 8, 2017
Affirmed
Toussaint, Judge[*]

Department of Employment and Economic Development
File No. 34653111-3

Marshall Tanick, Hellmuth & Johnson, PLLC, Edina, Minnesota (for relator)

United Parcel Service, Inc., c/o TALX UCM Services, Inc., St. Louis, Missouri (respondent)

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

Considered and decided by Johnson, Presiding Judge; Stauber, Judge; and Toussaint, Judge.

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

TOUSSAINT, Judge

Appellant challenges the denial of his application for unemployment benefits on the grounds that he did not commit employment misconduct and that the unemployment-law judge (ULJ) did not adequately assist him and provide him with a fair hearing. We affirm.

D E C I S I O N

We may reverse the decision of a ULJ "if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are . . . unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d) (2016). We review the ULJ's factual findings in the light most favorable to the decision and defer to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

I. Appellant Jason Gannon was discharged for employment misconduct.

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). The issue of whether an employee committed a particular act is a question of fact, viewed in the light most favorable to the decision and with deference to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344. We will not disturb the ULJ's factual findings if they are supported by substantial evidence. *Id.* Whether a particular act constitutes disqualifying misconduct is a question of law, which we review

de novo. *Stagg*, 796 N.W.2d at 315. Gannon disputes the ULJ's findings of fact and asserts that he did not commit misconduct.

A. Substantial evidence supports the ULJ's finding that Gannon was discharged for violating the United Parcel Service Inc. (UPS)'s policies by taking excessive breaks and harassing the receptionists at WAHU Student Living (WAHU).

1. Substantial evidence supports the ULJ's finding that Gannon took excessive breaks.

Gannon was discharged for taking excessive breaks and harassing customers while delivering packages for UPS. Security supervisor Jeff Goers created a spreadsheet detailing excessive gaps of time between Gannon making deliveries at WAHU and starting his truck to leave. The spreadsheet documented when the receptionists signed off on having accepted the packages, at which point Gannon should have left, and the actual times Gannon started his truck to leave. Goers found long gaps, often reaching an hour, between these times on a variety of days evidencing that Gannon was taking breaks. The ULJ found this documentation more credible than the testimony of Gannon that he was not taking excessive breaks. When asked about these gaps in time, Gannon responded that he was "providing customer service." Goers testified that while it was possible that Gannon was providing customer service, the length of Gannon's gaps exceeded any customer service that could be expected by UPS.

Gannon additionally argues that he stayed later at WAHU because he was asked to do so by the receptionists. But the receptionists stated that they never asked Gannon to stay longer, and that he was already in the habit of doing so by the time the new receptionist started. One of the receptionists stated in a letter to UPS that Gannon would hang out in

the lobby area for "an hour and a half to two hours." She also wrote that when she asked Gannon why he would sit at her desk for so long he said so he could get overtime. The other receptionist wrote similarly that he would "chill" in the lobby for about two hours each day, engaging in non-work-related conversations, using the tanning bed, playing on his phone, and going through the drawers. The ULJ found the letters from the receptionists to be more credible than Gannon's testimony, and we defer to this credibility determination. Therefore, there is substantial evidence to support the finding that Gannon took excessive breaks while at WAHU.

2. Substantial evidence supports the ULJ's finding that Gannon made sexually harassing statements.

"An unemployment law judge may receive any evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2015). The ULJ found that there was substantial evidence that Gannon had made sexually harassing comments to the receptionists at WAHU. This finding was supported mainly by the two written statements from the receptionists recalling a variety of things Gannon had said to them, generally regarding how long it would be before they would next have sex. Gannon argues that the receptionists' written statements were improperly admitted as hearsay. But a reasonable and prudent person could rely on the written statements of the receptionists, and therefore, under Minn. R. 3310.2922, the ULJ could receive this evidence.

Gannon next argues that the receptionists' written statements should not be considered credible because the receptionists did not testify and could not be questioned. But we will not question the credibility determinations of the ULJ. *Skarhus*, 721 N.W.2d at 344. Additionally, the ULJ's reasoning for finding the receptionists' written statements more credible than Gannon was because "[t]he receptionists had less of a vested interest in this matter than Gannon" and additionally "[t]heir written statements are consistent with each other and consistent with the other evidence." This credibility judgment is supported by sufficient reasoning. Therefore, we defer to the ULJ's judgment that the receptionists' written statements were credible.

Next, Gannon argues that the receptionists said he made harassing statements in order to retaliate against him for potentially filing a complaint against them for making harassing comments. Gannon additionally challenges the ULJ for believing the receptionists' written statements about harassment over his testimony. But Gannon's testimony that the receptionists were harassing is undermined by his text messages to his girlfriend. In a text where Gannon reveals to his girlfriend that he overheard the receptionists discussing a sexual incident in the hot tub, Gannon's many exclamation points seem to evidence his surprise at the information, and not sadness in his being harassed. Other text messages also evidence that Gannon may have had (or believed he had) some sort of friendly relationship with the receptionists as he was potentially invited to one of their birthday parties and would trade tans from WAHU for Blaze pizzas. Additionally, Gannon never did file a complaint, or even mention, that the receptionists at WAHU were

sexually harassing him. Therefore, there is substantial evidence to support the ULJ's finding that Gannon made sexually harassing comments to the receptionists at WAHU.

B. Gannon's conduct constitutes employment misconduct.

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) (2016). "As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Here, Gannon's conduct both in taking excessive breaks and in making sexually harassing comments to the receptionists at WAHU displays not only a violation of the standards of behavior that UPS could reasonably expect from its employees, but also a substantial lack of concern for his employment. In taking excessive breaks at WAHU by sitting on the couch watching TV, sitting in front of the receptionists chatting, or using the tanning bed, Gannon not only did not make the best use of his working time with UPS, but displayed unprofessional conduct on the part of a UPS delivery driver to UPS's customers. Additionally, Gannon's sexually harassing comments made UPS's customers uncomfortable with interacting with him, which also reflected poorly on UPS. UPS could reasonably expect its employees to not misuse their time on the job and to refrain from making inappropriate comments to customers. Gannon violated this reasonable expectation. And the extent to which he violated it, by continually wasting time and

making inappropriate comments, displays a substantial lack of concern for his employment. Therefore, the ULJ did not err in finding that Gannon was discharged for employment misconduct.

II. Gannon was not deprived of a fair hearing.

A ULJ is obligated to "assist all parties in the presentation of evidence." Minn. R. 3310.2921 (2015). Additionally, "[t]he unemployment law judge must ensure that all relevant facts are clearly and fully developed." *Id.* Applicable rules permit a ULJ to "receive any evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922. Under this rule, the fact that testimony is based on hearsay or concerns documents not presented as evidence does not mandate its exclusion but is a factor for the ULJ to weigh in judging the credibility of the witnesses. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532-33 (Minn. App. 2007) (discussing factors for ULJ to weigh in assessing credibility). Gannon has not demonstrated that the ULJ erred by admitting the receptionists' written statements.

Gannon cites to *Thompson* for the proposition that his case is problematic because the receptionists were not subpoenaed. But it is easy to distinguish *Thompson*, because in that case, the relator had "requested subpoenas to compel the witnesses' attendance, [and] they did not appear at the hearing." *Thompson v. County of Hennepin*, 660 N.W.2d 157, 160 (Minn. App. 2003). Gannon's case is distinguishable because he never requested subpoenas to compel the receptionists' attendance.

Gannon additionally cites to *White v. Univ. of Minn. Physicians Corp*. for support. But in *White*, this court reversed and remanded the ULJ's decision because the ULJ had not adequately developed the record. 875 N.W.2d 351 (Minn. App. 2016). In *White*, there was a variety of evidence that White may have had depression which caused her misconduct, but "the question of whether White's conduct was a consequence of her mental illness" was a relevant fact that was not developed in the record. Because the ULJ did not assist White in developing the record regarding this relevant fact, this court remanded for the ULJ to determine whether White's conduct was a consequence of her mental illness. *Id.* at 357. Unlike in *White*, the ULJ here did develop the record regarding the receptionists' claims. The ULJ considered Gannon's version of the events, and after such considerations found the receptionists' written statements to be more credible.

Gannon argues that the ULJ erred by relying on hearsay statements and not assisting him in requesting a subpoena for the testimony of the receptionists. Gannon also argues that there was a surveillance tape that UPS was aware of that would contradict the assertions that he was taking excessive breaks, and that the ULJ should have issued a subpoena for that. But Gannon did not request to subpoena the testimony of either the receptionists or the surveillance tape, and is now arguing for the first time that the ULJ erred by failing to sua sponte subpoena the two. The ULJ is neutral and not either party's advocate, even when the ULJ is assisting parties in the presentation of their evidence. *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 32 (Minn. App. 2012). And the ULJ stated at the beginning of the hearing, "[t]he parties have the right to request that the hearing be rescheduled so that documents or witnesses can be presented by

subpoena if necessary." Gannon did not request that the receptionists testify or that the surveillance tape be provided, and the ULJ was not required to sua sponte subpoena the testimony of the receptionists or the surveillance tape. Therefore, Gannon was not deprived of a fair hearing by the ULJ.

Affirmed.