STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0052

Richard Christensen,
Relator,

vs.

Benedictine Living Community of Mora,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 28, 2017
Affirmed
Smith, John, Judge[*]

Department of Employment and Economic Development
File No. 34939226-3

Jacob G. Peterson, McKinnis & Doom, Cambridge, Minnesota (for relator)

Benedictine Living Community of Mora, Cambridge, Minnesota (respondent)

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

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Smith, John, Judge.

[*] 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

SMITH, JOHN, Judge

We affirm the decision of the unemployment-law judge (ULJ) that relator is ineligible for unemployment benefits because he was discharged for employee misconduct.

FACTS

Relator Richard Christensen was employed as a maintenance technician by respondent Benedictine Living Community of Mora (BLCM) from June 21, 2005, to September 8, 2016, when he was terminated due to employment misconduct.

In October 2015, relator was issued a written warning because he ate meals two to three times a week at BLCM's cafeteria without giving the kitchen staff a meal ticket to indicate that he had paid for the meals. BLCM's manager discussed the issue with relator, who said he understood that he was not to take food from the kitchen without paying for it, and relator was put on probation. Subsequently, relator was seen with a tray of food four times in July and August, 2016. The manager checked the meal-ticket record and found that relator had not turned in a meal ticket for any of these meals.

On September 8, 2016, BLCM's manager met with relator to discuss whether relator ate food out of the kitchen without paying. Relator claimed that the only food he ate was a piece of chicken the kitchen staff offered him on August 31, which he ate in the kitchen in front of the kitchen staff. BLCM's manager felt that relator was being dishonest and discharged him.

Respondent Department of Employment and Economic Development (DEED) issued a determination of ineligibility on October 4, 2016, denying unemployment benefits

because relator was fired for employment misconduct. Relator appealed; the ULJ affirmed the denial of unemployment benefits, concluding that relator had been discharged for employment misconduct, and again affirmed on reconsideration. Relator now appeals on the ground that the ULJ improperly relied on hearsay evidence.

D E C I S I O N

"We review de novo a ULJ's determination that an applicant is ineligible for unemployment benefits. And we review findings of fact in the light most favorable to the ULJ's decision and will rely on findings that are substantially supported by the record." *Fay v. Dep't of Emp't & Econ. Dev.*, 860 N.W.2d 385, 387 (Minn. App. 2015) (quotation omitted). "This court . . . gives deference to the credibility determinations made by the ULJ." *McNeilly v. Dept. of Emp't & Econ Dev.*, 778 N.W.2d 707, 710 (Minn. App. 2010) (quotation omitted). "No burden of proof is allocated in unemployment-benefits proceedings." *White v. Univ. of Minn. Physicians Corp*., 875 N.W.2d 351, 354 (Minn. App. 2016) (citing Minn. Stat. § 268.069, subd. 2 (2016)).

I. The ULJ did not abuse its discretion in considering the hearsay testimony.

"Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *White*, 875 N.W.2d at 354. "Whether the employee committed a particular act is a question of fact. We view the ULJ's factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (citations omitted). Relator argues that the ULJ improperly relied on hearsay in finding that relator took full meals from the kitchen without paying for them.

> All competent, relevant and material evidence . . . that [is] offered into evidence, [is] part of the hearing record. A [ULJ] 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. . . . A [ULJ] is not bound by statutory and common law rules of evidence.

Minn. R. 3310.2922 (emphasis added). We conclude that the hearsay evidence presented in this case possessed probative value and was the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.

Relator objects specifically to the testimony of BLCM's manager and its culinary service director. The manager testified that several employees told him they saw relator eating a full tray of food on multiple days in July and August 2016. The manager checked the specific dates to see if relator had turned in a ticket for food on those days and learned that he had not. When the ULJ asked the manager "Who reported [the incidents] to you?" the manager stated that he had told his staff that they would remain anonymous, but would disclose the names if the ULJ wished to hear them. The ULJ said he would ask the culinary services director.

When she testified, she stated that, prior to relator's first incident report in October 2015, five cooks had reported to her that relator asked for trays of food even when he did not have a ticket. She also testified that relator had attempted to take meals without paying for them in 2016. The ULJ did not ask any further questions about the witnesses who reported that relator was taking full meals or seek any further corroborating evidence.

Relator testified that "the cooks were very adamant that they would not even prepare me a tray unless I gave them a ticket in advance. If there was a situation, they would not

allow me to take the tray out of the kitchen until they received the meal ticket." The ULJ found that relator's testimony was not credible because "[i]t was undisputed that, other than this issue, there were no other concerns with [relator's] employment. [Relator's] written warning in 2015 specifically states that [relator] was a good employee. If [relator] had not been continuing to violate [BLCM's] policy, there is no readily apparent reason that [BLCM] would discharge him."

Relator relies on *Posch v. St. Otto's Home*, 561 N.W.2d 564, 566 (Minn. App. 1997) (concluding that "[d]eference to the hearsay evidence . . . in this case is unwarranted" and that "[a]bsent . . . additional proof," employer had not shown gross misconduct). A determination of whether hearsay evidence should be given deference rests on whether the evidence can be found to be "uniquely reliable." *Id.* Hearsay evidence in the unemployment-law context is uniquely reliable if the statements are corroborated by any other hearsay statements, each statement is itemized with specific detail, the declarants do not have a reason to fabricate complaints, and the declarants do not have reason to color their observations to worsen the facts. *Holton v. Gnan Trucking, Inc.*, 379 N.W.2d 571, 574 (Minn. App. 1985)).

But *Posch* is distinguishable. Here, the ULJ specifically found that relator was a good employee, BLCM had no reason to fabricate claims against him, and his alternative explanation of BLCM's motive for fabricating the claims was not credible. Further, relator advanced no reason as to why the cooks would lie to the manager about relator taking food without paying for it. Four separate reports of relator taking food without turning in a meal ticket on specific dates were corroborated by the fact that there was no meal ticket entered

on those dates, and relator had a history of taking food without turning in meal tickets. Based on these findings, we conclude that the hearsay evidence in this case was more reliable than that in *Posch*, and was properly considered by the ULJ.

Viewing the factual findings in the light most favorable to the decision, we conclude that the hearsay evidence was the type of evidence "on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922. A manager cannot be in all places at once and must rely on the observations of employees who do not stood to gain from a termination. The testimony of the manager and the culinary services director indicates that multiple witnesses could have provided evidence if the ULJ had asked for it. The ULJ did not abuse its discretion in considering the hearsay testimony to determine that relator was not eligible for unemployment benefits.

Because the hearsay evidence was properly considered by the ULJ, we conclude that there was sufficient evidence for the ULJ to find that relator was discharged for employee misconduct. An employee's decision to knowingly violate a reasonable policy of the employer is misconduct. *Schmidgall v. FilmTec Corp*, 644 N.W.2d 801, 806 (Minn. 2002). Stealing from an employer underm*ines the employer's trust and has been found to be grounds for employee misconduct. See Skarhus*, 721 N.W.2d at 344 (concluding that a cashier who stole food once undermined her employer's trust). Taking food without payment after being admonished and warned about doing so "displays clearly . . . a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a)(2) (2016).

Because relator was already on probation for taking food without paying, was aware of BLCM's policy regarding paying for food from the kitchen, and was warned that further taking of food without paying would result in his termination, we conclude that he was discharged because of employee misconduct and is not entitled to unemployment benefits.

Affirmed.