STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0099

Robert Sheffel,
Relator,

vs.

Gavilon Grain, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 27, 2018
Affirmed
Schellhas, Judge

Department of Employment and Economic Development
File No. 35827618-3

Robert Sheffel, Cannon Falls, Minnesota (pro se relator)

Gavilon Grain LLC, c/o TALX UCM Services, Inc., St. Louis, Missouri (respondent employer)

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

Considered and decided by Peterson, Presiding Judge; Cleary, Chief Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Relator challenges an unemployment-law judge's decision that he is ineligible for unemployment benefits. We affirm.

FACTS

Relator Robert Sheffel began working as a union laborer for respondent Gavilon Grain LLC (Gavilon) in March 2004. Gavilon's code of conduct and harassment policy prohibited harassing or threatening a fellow employee or retaliating against a fellow employee for reporting violations of Gavilon's policies. Gavilon also reserved the right to terminate any employee who engaged in retaliatory conduct toward another employee. In late 2012 or early 2013, Gavilon discharged Sheffel for harassing and intimidating other employees, including "threats directed towards other employees." But Gavilon offered reemployment to Sheffel, and in April 2013, he signed a "last-chance agreement," which provided that "any violation of any company policy . . . will result in the immediate termination of his employment," and accepted reemployment with Gavilon.

On July 28, 2017, Sheffel participated in a dispute between two coworkers, T.K. and C.L., regarding C.L.'s report of a safety concern to Gavilon. C.L. claims that Sheffel threatened him by stating, "If you want to argue about this, we can [go] outside the gates . . . when we get off tonight at 7." Multiple witnesses claimed to have heard this statement or some variation of it. After investigating the incident, Gavilon terminated Sheffel's employment for violating its code of conduct, harassment policy, and the last-chance agreement.

Respondent Minnesota Department of Employment and Economic Development (DEED) determined that Sheffel was ineligible for unemployment benefits because Gavilon discharged him for misconduct. Sheffel appealed the determination and an unemployment-law judge (ULJ) conducted a hearing. Gavilon's human-resources manager, R.R., and plant manager, R.K., represented Gavilon at the hearing. Sheffel did not deny that the dispute occurred but denied that he threatened C.L. Sheffel testified that he told C.L. that they could talk at any time because Sheffel was a "union steward." The ULJ found Sheffel's testimony not credible and the testimony of Gavilon's representatives credible. The ULJ therefore found that it was "more likely than not that Sheffel made the comment to [C.L.] and intended the comment as a threat of physical harm," and that Sheffel's conduct was a serious violation of the standards of behavior that Gavilon had a right to reasonably expect. The ULJ concluded that Sheffel committed employment misconduct and therefore was ineligible for unemployment benefits. Sheffel subsequently requested reconsideration, and the same ULJ affirmed.

This certiorari appeal follows.

D E C I S I O N

This court 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)(5) (Supp. 2017). Whether an employee engaged in employment misconduct is "a mixed question of fact and law." *Wilson v. Mortg. Res. Ctr.*, 888 N.W.2d 452, 460 (Minn. 2016). Whether a particular act constitutes

employment misconduct is a question of law, which appellate courts review de novo. *Id.* Whether an employee committed a particular act is solely a question of fact. *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 822 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010).

An employee is ineligible for unemployment benefits if the employee is discharged due to employment misconduct. Minn. Stat. § 268.095, subd. 4 (2016). "Employment misconduct means 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." *Id.*, subd. 6(a) (Supp. 2017).

Sheffel challenges the ULJ's determination that he engaged in employment misconduct. He first argues that the ULJ based its decision on "false statements made against [him]," noting that some of the witnesses mentioned "nothing to the effect of a threat." But the ULJ reviewed multiple witness statements about the incident. Three of the statements, including C.L.'s, mentioned hearing Sheffel's threat. In affirming the original decision, the ULJ noted that the witness statements were credible because "they were consistent and there was no reason why the witnesses would lie or make a false statement about what they heard." We defer to the ULJ's assessment of the witnesses' credibility. *See Kubis v. Comty. Mem'l Hosp. Ass'n*, 897 N.W.2d 254, 260 (Minn. 2017) (stating that "assessment of witnesses' credibility is the unique function of the trier of fact" (quotation omitted). Because nothing in the record contradicts the ULJ's credibility determinations, we conclude that the ULJ did not err by finding that Sheffel threatened C.L.

Without citation to any legal authority, Sheffel next argues that his last-chance agreement was void because it contained no end date. Even if the last-chance agreement was void, which we do not determine, Sheffel committed employment misconduct under Gavilon's policies and reasonable expectations and therefore is ineligible to receive unemployment benefits.

Sheffel also claims that R.R. and R.K. told Sheffel's union agent that Gavilon would not dispute Sheffel's application for unemployment benefits. Sheffel's claim is based on a statement allegedly made by a union representative—a third party unrelated to Gavilon. And Sheffel raised this issue for the first time on appeal. Because Sheffel failed to raise this issue below, we do not consider it. *See In re Minnegasco*, 565 N.W.2d 706, 713 (Minn. 1997) (declining to address issues not raised below).

"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). Gavilon had multiple policies that prohibited threatening coworkers and that explicitly prohibited retaliation against any employee who raised a concern or reported misconduct. Gavilon had a reasonable expectation that its employees would not threaten other employees while at work. *See id.* at 806 ("[A]n employee's decision to violate knowingly a reasonable policy of the employer is misconduct."). Due to Gavilon's policies and Sheffel's last-chance agreement, Sheffel knew that any employment misconduct would result in termination of his employment.

We conclude that the ULJ did not err in finding that Sheffel's threat to C.L. violated Gavilon's policies and reasonable expectations, and in concluding that Sheffel's threat

constituted employment misconduct. Because the ULJ's determination that Sheffel committed employment misconduct is supported by substantial evidence in the record, we affirm the ULJ's decision.

Affirmed.