STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0771

Dinanden Doby,
Relator,

vs.

Per Mar Security Services,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 4, 2022
Reversed and remanded
Rodenberg, Judge[*]

Department of Employment and Economic Development
38176769-5

Charles H. Thomas, Southern MN Regional Legal Services, St. Paul, Minnesota (for relator)

Per Mar Security Services, c/o Valeu NSN LLC, Jorie NSN Cummis, Chicago, Illinois (respondent-employer)

Anne B. Froelich, Keri A. Phillips, Lossom R. Allen, Minnesota Department of Employment and Economic Security, St. Paul, Minnesota (for respondent-department)

Considered and decided by Johnson, Presiding Judge; Cochran, Judge; and Rodenberg, Judge.

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

NONPRECEDENTIAL OPINION

RODENBERG, Judge

Relator Dinanden Doby appeals from an order of an unemployment-law judge (ULJ) denying relator unemployment benefits. Relator argues that the ULJ abused its discretion by failing to assist him as a self-represented party in developing the record. We reverse and remand.

FACTS

Relator worked as a security officer for respondent Per Mar Security and Research Corp. from July 23, 2019, to February 26, 2020. His responsibilities included working security at a Menards store and staying with the Menards manager while they locked up the store and left for the night.

Respondent discharged relator after three incidents in February 2020 in which relator completed his timesheet before he had finished a shift, resulting in his entering more than the number of hours he actually worked. First, on February 5, relator wrote a clock-out time of 9:40 p.m. on the written record of his hours worked, but a Menards manager told respondent that he and relator had "left at about 9:30 p.m." Second, on February 25, an unnamed person saw relator leaving work at 9:23 p.m., but relator had written a 9:40 p.m. clock-out time for that shift. Finally, on February 26, respondent's payroll manager asked relator to text him a picture of relator's weekly timesheet which showed that he had prerecorded a 9:30 p.m. clock-out time for that shift. Relator was still working, and it was not yet 9:30 p.m.

Relator then applied for unemployment benefits with respondent Minnesota Department of Employment and Economic Development (DEED). A DEED administrative clerk found relator ineligible to receive unemployment benefits because relator had committed employment misconduct by prerecording his timesheets. Relator appealed and a ULJ conducted a telephone hearing.

Relator appeared pro se at the hearing. He advanced multiple mitigating circumstances. First, relator argued that respondent failed to train him on how to properly record and submit his timesheet. Second, other security officers and relator's site supervisor also prerecorded their timesheets. Third, respondent had not warned relator about the practice before terminating relator's employment. Finally, relator argued that respondent actually terminated his employment for retaliatory and discriminatory reasons. At the hearing, relator several times indicated a desire to produce evidence to support his arguments. The ULJ, as discussed in more detail below, moved past relator's expressions without instructing him about how to produce exhibits or witnesses.

Respondent also appeared pro se, represented by its human resources generalist, A.W. A.W. did not know about the telephone hearing in advance and testified based on respondent's payroll-system notes. The ULJ received 11 exhibits without objection. Neither party presented other evidence or witnesses.

In a written decision, the ULJ determined that relator had committed employment misconduct and was therefore ineligible for unemployment benefits. The ULJ found as a fact that relator should "reasonably know that time reports need to be accurate" and determined that relator's actions "were intentional or negligent." The ULJ also determined

that the "preponderance of the evidence is [that relator] would not have been discharged . . . if he had not falsified his time."

Relator requested that the ULJ reconsider and grant relator another hearing. He argued, in part, that he had evidence that the ULJ did not allow him to present and further argued that A.W. had no personal knowledge about the reasons his employment was terminated. The ULJ affirmed its earlier decision.

This certiorari appeal followed.

DECISION

Relator contends that the ULJ failed to assist him as a self-represented party in gathering and presenting evidence necessary to properly develop the record. Relator asserts that he was, as a result, prejudiced. He asks that we reverse and remand for a new hearing.

An individual discharged for employment misconduct is not eligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2020). Whether an employee's conduct is employment misconduct is a mixed question of law and fact. *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). Whether the employee committed a particular act is a question of fact, but whether that act constitutes employment misconduct is a question of law that we review de novo. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

On review of a ULJ's decision, we may affirm the decision, remand for further proceedings, or reverse or modify the decision "if the substantial rights of the petitioner may have been prejudiced." Minn. Stat. § 268.105, subd. 7(d) (2020).

An employee commits employment misconduct when the employee's intentional, negligent, or indifferent conduct seriously violates the employer's reasonable standards of behavior. Minn. Stat. § 268.095, subd. 6(a) (2020). Whether an employee committed a serious violation "is an objective determination: was the employer's expectation for the employee reasonable under the circumstances?" *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006). The circumstances of the case are key to determining this. *See Wilson*, 888 N.W.2d at 462.

We have held that a ULJ has "a duty to reasonably assist pro se parties" in presenting evidence and properly developing the record. *White v. Univ. of Minn. Physicians Corp.*, 875 N.W.2d 351, 355-56 (Minn. App. 2016). In *White*, the employer discharged White for employment misconduct for instances of emotional and lethargic behavior at work. *Id.* Like the parties here, White represented herself at the hearing. *Id.* She argued that her conduct resulted from her severe depression. *Id.* Yet despite the relevance of White's depression on whether she committed employment misconduct, the ULJ asked the employer only one question about White's depression. *Id.* at 357. Relying on the rule that requires a ULJ to "assist all parties in the presentation of evidence" and "ensure that all relevant facts are clearly and fully developed," we held that because White's depression was relevant and White was unrepresented, the ULJ had a duty to assist her in "the proper development of the record." *Id.*; Minn. R. 3310.2921.

Here, relator argued to the ULJ that his conduct was not employment misconduct because he had received no warnings and had not been properly trained, and because other security officers and his supervisor entered their time in the same way he did. He also

disputed the reason for his discharge. Those arguments are all relevant to whether, under the circumstances, relator's conduct seriously violated respondent's reasonable expectations. *See Jenkins*, 721 N.W.2d at 290.

The hearing transcript reveals several points at which relator conveyed a desire to produce more evidence. At the outset, and in response to the ULJ's inquiry about whether either party intended to call other witnesses, relator stated, "I do have a witness if needed, but I didn't know that I would need the witness today. . . . I didn't know if I'm gonna need the witness." The ULJ replied, "So not for now?" Seemingly unsure of himself, relator answered, "Not for now, I guess."

Later in the hearing, relator stated that he had "recordings . . . and things like that" and asked how he would "give it to [the ULJ]." The ULJ did not answer relator's question. Relator again asked about presenting his evidence before A.W.—unaware that a call would be coming or that a hearing would take place—joined the hearing. The ULJ replied, "We'll worry about it later."

It also appears noteworthy to us that, when the ULJ questioned A.W. about relator's arguments, A.W. appeared to rely on notes in the "payroll system here." She seemingly had no personal knowledge of what happened. For instance, A.W. testified that "we were notified [the site supervisor] said something to [relator]," but A.W. did not know who the supervisor was or when the supervisor discussed the issue with relator. Coupled with relator's multiple allusions to a desire to call a witness and produce "recordings . . . and things like that," the ULJ had notice of relator's desire—and his apparent need—to produce information relevant to his arguments at the hearing. Had the ULJ attempted to obtain the

records from which A.W. was testifying—which concerned things about which she had no personal knowledge—it is possible that relator would have had the opportunity to learn the answer to his earlier inquiries about how to produce witnesses and "recordings . . . and things like that."

Finally, when relator asked for a third time about how to present the "stuff that I said . . . earlier that I have, um for you," the ULJ proceeded without discerning what that "stuff" was or how relator might get it into evidence.

The case for reversal and remand here is at least as strong as was the situation in *White*. Here, relator asked several times how he might introduce at the hearing exhibits and testimony of non-party witnesses. While we recognize that the ULJ has a limited amount of time to devote to any individual case, relator explicitly asked how he would introduce evidence and his question was not answered. And when relator asked again about how he could get evidence into the record, the ULJ told him, "We'll worry about that later." Relator's legitimate questions were never answered.

The ULJ was obligated under *White* to "reasonably assist" relator in developing the record. The ULJ failed to do so.[1] We therefore reverse and remand for a new hearing so

[1] Appellant urges us to issue a precedential opinion, but we decline to do so. *White* establishes the standard that we apply here. The standard is that the ULJ "reasonably assist" pro se parties, and the standard therefore takes into account the unique circumstances of each case. Moreover, appellant's proposed syllabus point would greatly expand the holding in *White* and, given that the record establishes that reversal and remand is required under existing authority, there is neither the need nor the occasion to expand or modify the holding in *White*.

that the decision concerning relator's eligibility for unemployment benefits can be arrived at with a fully developed record.

Reversed and remanded.