This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0822

Kyle E. Kirchner,
Relator,

vs.

Design Ready Controls,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed March 14, 2022
Affirmed
Halbrooks, Judge[*]

Department of Employment and Economic Development
File No. 41544362-3

Kyle E. Kirchner, Robbinsdale, Minnesota (pro se relator)

Design Ready Controls, Brooklyn Park, Minnesota (respondent employer)

Keri A. Phillips, Anne B. Froelich, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Halbrooks, Judge.

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

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that relator was ineligible for unemployment benefits because he was discharged for the misconduct of failing to report to work or perform work remotely. Relator asserts that (1) he did not commit employment misconduct and (2) the ULJ should have accepted evidence that relator submitted after the hearing. We affirm.

FACTS

In April 2019, relator Kyle E. Kirchner began employment with respondent Design Ready Controls (DRC) as an engineering test technician. In late March 2020, Kirchner failed to report to work for three days. Kircher did not contact anyone at DRC to notify them that he would be absent, despite a DRC policy that required him to do so. After his third day of missed work, Kirchner emailed his supervisor and requested that he be granted either a leave of absence or be permitted to work remotely. Kirchner explained that he was making the request because he was concerned about being exposed to COVID-19 at work and subsequently exposing his grandfather, who he helped take care of, to the virus.

DRC approved Kirchner's request to work remotely. On March 31, 2020, Kirchner's supervisor sent him an email outlining Kirchner's responsibilities and expectations while working remotely. The email stated that, in addition to Kirchner's existing job responsibilities and expectations, he would be expected to track and log the hours he worked and what he had worked on each day using an online form created by his supervisor. The email also noted that Kirchner was expected to "keep [DRC] informed,"

particularly in light of the fact that Kirchner had just failed to communicate when he would be absent, and that if Kirchner planned on taking a day off, then he should let DRC know in advance and not after the fact.

On May 31, Kirchner contacted his supervisor to inform him that he had gone to the hospital to receive medical treatment for a cat bite. He did not return home until June 11, and it was ultimately determined that he would use personal time off for the work time he missed. DRC expected Kirchner to return to work on June 15, but did not receive any communication from Kirchner on that day. The following day, Kirchner reported that his email and VPN were not working and that he could only access the internal messaging system, Microsoft Teams. DRC asked its IT department to look into the issue, and IT discovered that after Kirchner logged off of the VPN on June 11, he did not log on again until June 16. On June 18, DRC contacted Kirchner to verify that his system access had been restored, but did not get a response. The following morning, DRC attempted to contact Kirchner several times. His supervisor and a human-resources representative ultimately reached him around noon, at which point they informed him that he was being discharged from his employment.

Kirchner applied to receive unemployment benefits from respondent Minnesota Department of Employment and Economic Development (DEED). DEED issued a determination that Kirchner was discharged for employment misconduct and was therefore ineligible to receive unemployment benefits. Kirchner appealed the determination, and a ULJ held a telephone hearing. At the hearing, Kirchner's supervisor testified that, as detailed above, after Kirchner began working remotely there were several instances in

which DRC did not receive any communication from Kirchner and was unable to contact him on a workday. In addition, his supervisor and an HR representative testified that, despite the clear expectation that Kirchner would track and log his hours and work, he failed to consistently do so, and did not log anything for the days that led to his termination in June. Kirchner did turn in some work product after his termination, but the documents related to a previous project.

Kirchner testified that he did not have access to the VPN from June 11 until June 17, and therefore could not access his email during that time frame. He also testified that he did not have email access on June 18 or 19, but attempted to communicate with DRC using Microsoft Teams. As to his work log, he testified that he had been logging his information, but that at some point he and his supervisor decided that it was redundant to have Kirchner both fill out his log and discuss his work during a weekly call. As a result, he stopped filling out the log and instead provided the information during the call. Finally, Kirchner testified that he had notes that reflected what he had been working on, but that he kept those on his work computer which he did not have access to after his termination.

The ULJ determined that Kirchner was ineligible for unemployment benefits because he was discharged for employment misconduct. The ULJ found Kirchner's supervisor and the HR representative from DRC to be more credible and indicated that they "had better records and records that would show what Kirchner accomplished are very sparse," that it was "simply too incredible to believe Kirchner has no evidence of work performed over several days despite an express direction to keep a log," and that the documents that Kirchner did turn in following his termination from employment "were not

for work recently performed." The ULJ further determined that "[a]n employer can reasonably expect an employee will perform work when he is supposed to be working, log work as instructed, and be available while working remotely," but that Kirchner failed to do these things for several days, resulting in a serious violation of DRC's reasonable expectations that constituted employment misconduct.

Kirchner requested reconsideration on the basis that, following the hearing, he discovered Microsoft Teams messages from June 10, 16, 17, and 18 that demonstrated that he was in communication with DRC and provided evidence of the work he completed.[1] The request indicated that he discovered the messages saved on his iPhone. The ULJ denied the request for reconsideration. The ULJ determined that Kirchner failed to demonstrate good cause for failing to previously submit the evidence or that any evidence having an effect on the outcome was likely false. Kirchner appeals by writ of certiorari.

DECISION

When reviewing a ULJ's eligibility determination, we may affirm, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are affected by an error or law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2020). We review the ULJ's factual findings in the light most favorable to the decision and defer to the ULJ's credibility determinations. *Peterson v. Nw. Airlines Inc.*,

[1] Kirchner did not actually submit copies of the messages; the request for reconsideration states that he was unable to attach them to his request, and he did not otherwise attempt to submit copies of the messages. The messages are therefore not part of the record on appeal.

753 N.W.2d 771, 774 (Minn. App. 2008), *rev. denied* (Minn. Oct. 1, 2008). We "will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id.*

I.

Kirchner argues that the ULJ erred in determining that he was discharged for employment misconduct. An individual is ineligible for unemployment benefits if "the applicant was discharged because of employment misconduct." Minn. Stat. § 268.095, subd. 4(1) (2020). "Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job, that is a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." *Id.*, subd. 6(a) (2020). "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). And an employer generally "has a right to expect an employee to work when scheduled." *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986) (quotation omitted).

Kirchner argues that his actions did not amount to employment misconduct. He asserts that he "attempted to stay in contact and complete [his] work" and that rather than committing employment misconduct, he "engaged in merely unsatisfactory performance." It therefore appears that Kirchner is arguing that his actions were more akin to "simple unsatisfactory conduct," which under Minn. Stat. § 268.095, subd. 6(b)(3) (2020), does not constitute employment misconduct.

We are not persuaded. The ULJ found that "[f]or several days, Kirchner did not perform any substantial work, was unreachable, and did not communicate he was taking

time off . . . despite a prior, similar situation and express directions to communicate and log work." Kirchner does not challenge these findings, and we disagree that this conduct constitutes "simple unsatisfactory conduct" rather than employment misconduct. As the ULJ noted, Kirchner was explicitly required to keep in contact with DRC and log his hours and work. The email from Kirchner's supervisor granting Kirchner's request to work remotely clearly states that he was expected to keep in contact, track his hours and work using an online form, and notify DRC ahead of time if he was going to take time off. These were reasonable policies that DRC had the right to expect Kirchner to abide by. His conduct therefore constitutes employment misconduct. *Schmidgall*, 644 N.W.2d at 804.

II.

We defer to a ULJ's decision whether to grant an additional hearing and will reverse that decision only if the ULJ abused its discretion. *Vasseei v. Schmitty & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 750 (Minn. App. 2010). The ULJ's discretion is not absolute and "must be exercised within the statutory requirements." *Id.* Under the relevant statute, the ULJ

> must order an additional hearing if a party shows that evidence which was not submitted at the hearing:
> (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or
> (2) would show that the evidence that was submitted at the hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

Minn. Stat. § 268.105, subd. 2(c)(1)-(2) (2020).

Kirchner argues that the evidence he attempted to submit in his request for reconsideration "should be accepted" and "would clearly show that other evidence that was submitted was clearly false and would directly affect the outcome of the decision." The ULJ denied the request for reconsideration after determining that "Kirchner has not demonstrated good cause for failing to previously submit any evidence" and that he had "not shown evidence having an effect on the outcome of the hearing was likely false." We agree with the ULJ.

To demonstrate "good cause," an individual must show "a reason that would have prevented a reasonable person acting with due diligence from submitting the evidence." Minn. Stat. § 268.105, subd. 2(c). Kirchner's stated reason for not submitting the evidence earlier is that he did not remember that he had the messages on his phone until after the ULJ issued the decision. The record supports the ULJ's decision that this was not good cause. Kirchner was plainly aware that he used the Microsoft Teams application during his employment, particularly because during the relevant time period he claimed that he could not access his email and was communicating solely through Microsoft Teams. A reasonable person acting with due diligence would have been able to discover and submit the evidence, and Kirchner therefore did not show good cause for failing to submit the messages earlier.

The record similarly supports the ULJ's determination that Kirchner failed to establish that the evidence that had an outcome on the hearing was likely false. As noted above, Kirchner did not submit copies of the messages, and it is therefore unclear what information is contained in the messages. Kirchner merely asserts that he has evidence

that he sent messages to DRC on June 10, 16, 17, and 18. But Kirchner was discharged for not working or being in communication with DRC for the week of June 15, and therefore any message sent on June 10 is irrelevant. Additionally, his supervisor testified that Kirchner sent him a message on June 16 to say his VPN was not working and sent him two messages on June 18 to ask a question about his personal time off. The record therefore already contained testimony that Kirchner sent messages on two of the three days that Kirchner claims to have sent messages. Finally, the purported evidence does not show that the evidence that had an impact on the decision was likely false. The ULJ found that the supervisor's testimony was more credible than Kirchner's, and that the testimony and records submitted by DRC showed that the work Kirchner completed was "very sparse" and that Kirchner failed to meet the expectations that he would perform work and log his hours and work. Kirchner's bald assertion that he has evidence that he sent messages on certain days is inadequate to establish that the supervisor's testimony and DRC's records were likely false. The ULJ therefore did not abuse its discretion in declining to order an additional hearing and by denying the request for reconsideration.

Affirmed.