STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1335

Robert H. Larsen,
Relator,

vs.

First State Bank Southwest,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed May 23, 2022
Affirmed
Bjorkman, Judge

Department of Employment and Economic Development
File No. 46148767-3

Robert Larsen, Tyler, Minnesota (pro se relator)

First State Bank Southwest, Worthington, Minnesota (respondent employer)

Munazza Humayun, Anne B. Froelich, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Bjorkman, Presiding Judge; Bratvold, Judge; and Klaphake, Judge.*

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

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for employment misconduct, arguing that the ULJ's factual findings are based on false, misleading, and hearsay evidence. We affirm.

FACTS

Relator Robert Larsen worked full-time as a market president for respondent First State Bank Southwest. The morning of February 22, 2021, the bank's chief executive officer (the CEO) observed that Larsen was behaving oddly and saying strange things. Upon questioning, Larsen denied being intoxicated but acknowledged that he had been drinking "heavily" the night before. He added that he had not eaten breakfast so "it's real possible" he was still intoxicated. The CEO told Larsen that his behavior was unacceptable. Several days later, Larsen signed a disciplinary warning acknowledging the incident and that the CEO had offered to arrange treatment for Larsen if he needed it.

On March 26, a bank secretary observed Larsen slumped at his desk, apparently sleeping. Another employee took a picture of him sleeping. The secretary had to shake Larsen to wake him up. The CEO again advised Larsen to correct his behavior.

Also in late March, Larsen drove to a competitor bank where he used to work. The bank was closed, and Larsen placed a note on the door inviting people to call him for banking services and providing his work phone number.

On April 1, a law firm contacted the CEO and Larsen by email, threatening legal action because of the note and Larsen's retention of the competitor bank's customer files. The following day, the CEO offered Larsen the opportunity to resign, rather than being discharged from employment. Larsen elected to resign.

Larsen applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development (DEED) determined he was eligible for benefits because the bank discharged him for unsatisfactory work performance.

The bank appealed, asserting that Larsen was not discharged but had resigned. After a hearing at which both Larsen and the CEO testified, the ULJ determined that Larsen was discharged for employment misconduct and therefore ineligible for benefits. Larsen requested reconsideration, and the ULJ affirmed the decision. Larsen appeals by writ of certiorari.

DECISION

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2020). Whether an employee committed employment misconduct is a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). We review the ULJ's factual findings in the light most favorable to the decision and will not disturb them if evidence in the record substantially supports them. Minn. Stat. § 268.105, subd. 7(d)(5) (2020); *Gonzalez Diaz v. Three Rivers Cmty. Action, Inc.*, 917 N.W.2d 813, 815-16 (Minn. App. 2018). We review de novo whether a particular act constitutes employment misconduct. *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016).

I. The record substantially supports the ULJ's findings of fact.

Larsen challenges several of the ULJ's factual determinations on the ground that the CEO's testimony was untruthful and lacked a proper evidentiary basis. Larsen first contends the CEO gave false testimony about the day the ULJ found him to be intoxicated at work. He specifically challenges the credibility of the CEO's testimony that he offered Larsen a ride home that day, pointing out that the disciplinary warning he later signed says nothing about such an offer. This challenge is unavailing for several reasons. First, we defer to the ULJ's express determination that the CEO was more credible than Larsen. *See Vasseei v. Schmitty & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 749 (Minn. App. 2010). Second, the disciplinary warning was not offered as an exhibit at the hearing, so it is not part of the record on appeal. *See* Minn. R. Civ. App. P. 110.01 (defining record on appeal as "documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any"), 115.04, subd. 1 (providing that rule 110.01 applies to certiorari appeals). Third, and most important, Larsen's challenge does not undermine the ULJ's finding that Larsen was intoxicated while at work; Larsen himself testified that he had been drinking heavily the night before and might still have been under the influence when the CEO questioned him.

Larsen next argues that the CEO's testimony about him falling asleep at work on another occasion is hearsay. In a court proceeding, out-of-court statements offered for their truth are generally excluded from evidence unless they fall within an exemption or exception. Minn. R. Evid. 802. But a ULJ is not bound by the rules of evidence and is specifically permitted to receive 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 (2021). And the CEO's hearsay testimony about Larsen sleeping at his desk finds corroboration in Larson's own testimony that he saw the picture of himself with his head "slumped."

Finally, Larsen urges us to reverse the ULJ's decision because the CEO's testimony about the letter threatening legal action against Larsen and the bank was "false, misleading, and partially based on hearsay." We are not persuaded for two reasons. First, as discussed above, we do not second-guess a ULJ's credibility determinations, *Vasseei*, 793 N.W.2d at 749, and the ULJ was permitted to consider hearsay, Minn. R. 3310.2922. Second, the focus of Larsen's challenge—whether the threat of legal action was directed at just him or both him and the bank—is a largely immaterial detail. The evidence, including Larsen's own testimony, amply supports the pivotal finding that he went to a competitor bank and left a note soliciting that bank's customers, which precipitated a threat of legal action.

We observe that two documents feature prominently in Larsen's arguments: his disciplinary warning and the letter from the law firm. He contends the documents contradict the CEO's testimony. In relying on these documents, which he first submitted with his request for reconsideration, Larsen appears to argue that the ULJ erred by not granting him an additional hearing. But a ULJ orders an additional hearing based on new evidence only if it

> (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) (2020). Based on our examination of the documents, we discern no abuse of discretion or error in the ULJ's assessment that Larsen did not satisfy either requirement.

II. Larsen's actions constitute employment misconduct.

Employment misconduct is "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." Minn. Stat. § 268.095, subd. 6(a) (2020). It is not "simple unsatisfactory conduct" or "good faith errors in judgment if judgment was required." *Id.*, subd. 6(b)(3), (6) (2020). Larsen's acts of coming to work while noticeably intoxicated and placing a note on a competitor bank's building to solicit its customers were undisputedly intentional. And because those acts presented foreseeable risks of damage to his employer's reputation, loss of business for his employer, and even legal sanctions against his employer, they were serious violations of the standards an employer would reasonably expect of an employee.

Affirmed.