

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1212**

Jesse Spencer,
Relator,

vs.

Corporate Commission of Mille Lacs Band of Ojibwe Indians,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 26, 2011
Affirmed
Toussaint, Judge**

Department of Employment and Economic Development
File No. 23768045-5

Larry B. Leventhal, Josh A. Cooner, Larry Leventhal and Associates, St. Paul, Minnesota
(for relator)

Corporate Commission of Mille Lacs Band of Ojibwe Indians, Hinckley, Minnesota
(respondent)

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

Considered and decided by Toussaint, Presiding Judge; Peterson, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

TOUSSAINT, Judge

Jesse Spencer appeals from the unemployment law judge's (ULJ) determination that he was ineligible to receive unemployment benefits because he committed employment misconduct while employed by respondent Corporate Commission of Mille Lacs Band of Ojibwe Indians (Grand Casino). Spencer argues that his actions did not constitute misconduct. We affirm.

DECISION

I.

Spencer argues that the ULJ erred by granting Grand Casino's request for an additional evidentiary hearing to submit more evidence because the casino failed to show good cause for not submitting the evidence during the first hearing. The ULJ must order an additional evidentiary hearing if a party establishes that evidence not submitted at the prior evidentiary hearing either:

- (1) would likely change the outcome of the decision and there was good cause for not having previously submitted the evidence; or
- (2) would show that the evidence that was submitted at the evidentiary 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) (Supp. 2009). We review a ULJ's decision to hold an additional evidentiary hearing under an abuse-of-discretion standard of review. *See Skarhus v. Davanni's Inc.*, 721 N.W2d 340, 345 (Minn. App. 2006); *see also Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007).

After the first evidentiary hearing, the ULJ determined that Spencer was eligible to receive unemployment benefits because he had not committed employment misconduct. Grand Casino filed a request for reconsideration, and the ULJ granted the request and ordered a second evidentiary hearing. The ULJ stated that Grand Casino's submission of additional evidence of a policy that prohibited employees from being at the casino at any time while under the influence of drugs or alcohol "would likely show that evidence submitted at the [first] hearing was likely false and had an effect on the hearing." Specifically, the ULJ stated that "Spencer's testimony that he had never been told that he could not be at the work site while under the influence certainly appears likely to be erroneous."

The evidence shows that the ULJ relied on the second prong of Minn. Stat. § 268.105, subd. 2(c)—that other evidence would show that evidence received at a prior hearing was false and had an effect on the outcome—when the ULJ ordered an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(c). The ULJ did not rely on the first prong of Minn. Stat. § 268.105, subd. 2(c), and, thus, did not have to evaluate whether Grand Casino had good cause for not previously submitting the evidence.

We conclude that the ULJ did not abuse his discretion by granting Grand Casino an additional evidentiary hearing because the evidence Grand Casino sought to admit in the second hearing showed that Spencer's testimony was likely false and that his testimony had an effect on the outcome of the first hearing. Grand Casino sought to introduce a copy of an employee handbook provision that prohibits employees from being on casino property at any time while under the influence of alcohol and drugs.

Grand Casino also sought to introduce a receipt Spencer signed that stated he received and read the employee handbook. These documents showed that Spencer’s testimony at the first hearing—that he did not know that Grand Casino prohibited employees from being on casino property at any time while under the influence—was likely erroneous. Spencer’s likely erroneous testimony had an effect on the outcome of the first hearing because the ULJ relied on the testimony in his determination that Spencer was eligible to receive unemployment benefits. Thus, the ULJ did not abuse his discretion by granting Grand Casino an additional evidentiary hearing.

Spencer also contends that the ULJ erred by denying his request for an additional evidentiary hearing after the ULJ determined that he was ineligible to receive benefits. But Spencer cites no legal authority for this argument, and he does not attempt to satisfy the additional-hearing criteria or Minn. Stat. § 268.105, subd. 2(c). Therefore, we conclude that this argument is without merit.

II.

Spencer next argues that the ULJ erred by determining that he committed employment misconduct and, thus, was ineligible to receive unemployment benefits.¹ “Whether the employee committed an act alleged to be employment misconduct is a fact question, but the interpretation of whether that act is employment misconduct is an issue of law.” *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19-20 (Minn. App. 2003). This

¹ Spencer focused his appeal on whether he violated the casino’s alcohol and drug policy, but the “focus of the definition of misconduct is on standards of behavior the employer has the right to reasonably expect of the employee.” *Brown v. Nat’l Am. Univ.*, 686 N.W.2d 329, 333 (Minn. App. 2004) (quotation omitted).

court reviews questions of law under a de novo standard of review. *Id.* at 20. We review a ULJ's findings of fact in the light most favorable to the decision, and will rely on the findings if they are supported by substantial evidence. *Skarhus*, 721 N.W.2d at 344.

A person who is discharged because of employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct is “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.” Minn. Stat. § 268.095, subd. 6(a) (2010).

The ULJ found that Spencer went to Grand Casino while off duty to pick up his paycheck after he drank alcohol. Spencer admitted during the second evidentiary hearing that he was under the influence of alcohol. A Grand Casino manager documented Spencer's conduct during this visit, noting that Spencer smelled of alcohol, was swaying, spoke in a loud and slurred voice, and had a flushed face and bloodshot eyes. The ULJ found that Spencer refused an alcohol test but admitted to drinking alcohol before he arrived at the casino. The ULJ found further that Grand Casino had reprimanded Spencer three months earlier after he registered a blood-alcohol level of .137 percent during a work shift.

We conclude that the ULJ did not err by concluding that Spencer committed employment misconduct. The ULJ's factual findings related to Spencer's conduct are supported by substantial evidence in the record. Grand Casino had the right to reasonably expect that Spencer would not be on its premises at any time while under the

influence of alcohol. We find Grand Casino's expectation particularly reasonable in light of evidence that Spencer's behavior was so distracting and unacceptable that a manager asked Spencer to leave the casino premises. Therefore, the ULJ did not err by concluding that Spencer committed employment misconduct and, thus, was ineligible to receive unemployment benefits.

Affirmed.