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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1275**

Matthew Lennander,
Relator,

vs.

Phoenix Distributing, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 19, 2011
Affirmed
Peterson, Judge**

Department of Employment and Economic Development
File No. 24667665

Matthew S. Lennander, St. Paul, Minnesota (pro se relator)

Matthew James Pfohl, Edina, Minnesota (for respondent Phoenix Distributing)

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

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

UNPUBLISHED OPINION

PETERSON, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible to receive unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Relator Matthew Lennander worked full-time as a sales associate for respondent Phoenix Distributing, Inc., when he was discharged from employment. Relator was determined to be eligible for unemployment benefits, and respondent brought an administrative appeal of the determination.

During the evidentiary hearing before the ULJ, relator's west-district manager testified that on February 23, she overheard relator discussing inappropriate information with a customer while he was working on the sales floor. After the customer left the store, the west-district manager asked relator to step into the backroom. The store manager was also present when the west-district manager presented relator with a written warning and asked him to correct his behavior. When presented with the warning, relator denied engaging in any inappropriate behavior and asked the west-district manager to provide examples of his inappropriate comments. Relator was dissatisfied with the west-district manager's response and became very defensive and confrontational. Relator indicated that the information was "bulls--t," called the west-district manager a liar, and stated that he could speak to his friends as he wanted. The west-district manager

reported relator's reaction to the company's human-resource director, who instructed her to terminate relator for insubordination.

Relator disputed all of the west-district manager's testimony at the hearing. Specifically, relator denied having an inappropriate conversation with a customer, denied making any of the statements attributed to him, and denied engaging in defiant or insubordinate behavior. Due to the conflicting testimony, the ULJ asked if the store manager was available to testify. The store manager was located and brought into the room with the west-district manager and human-resource director to give his testimony. The store manager testified that he did not overhear relator's conversation with the customer, but he was present when the west-district manager gave relator the written warning. The store manager's testimony corroborated the west-district manager's testimony that relator called "corporate"¹ a bunch of liars, stated that he could speak to his friends as he wanted, and engaged in obstinate and insubordinate behavior.

Based on the testimony presented, the ULJ determined that relator was ineligible for unemployment benefits because he was discharged for employment misconduct. Relator requested reconsideration and submitted additional evidence to refute the west-district manager's credibility. After reconsideration, the ULJ affirmed the finding of employment misconduct and the determination of ineligibility. This certiorari appeal followed.

¹ "Corporate" is a reference to corporate staff.

DECISION

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). 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.” *Id.*, subd. 6(a) (Supp. 2009). Whether an employee’s acts are employment misconduct is a question of law, on which this court exercises its independent judgment, but whether an employee committed an act alleged to be employment misconduct is a fact question. *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19-20 (Minn. App. 2003). “This court views the ULJ’s factual findings in the light most favorable to the decision. This court also gives deference to the credibility determinations made by the ULJ. As a result, this court will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citations omitted), *review denied* (Minn. Oct. 1, 2008).

With respect to credibility, the ULJ found:

[Relator] was discharged after two incidents occurring in one day. The first incident involved disclosing information he should not have disclosed to a customer. [Relator] denies discussing his pay, staffing changes, or his unhappiness about his job with the customer. While it may be true [the west-district manager] did not [hear] everything [relator] said to the customer, her testimony that she heard him discuss matters concerning pay and staffing changes was more credible. [The west-district manager] presented [relator] with a written

warning shortly after the event and it seems unlikely she would fabricate a reason to write him up. And although [relator] stated he did not say the things [the west-district manager] claimed, he admitted he did not recall all of the issues he discussed with the customer that day. Finally, [relator] defended his actions to [the west-district manager] by claiming he can say whatever he wants to friends and customers. Therefore, the preponderance of the evidence is [relator] did discuss issues he should not have discussed. However, [relator] was not discharged until he became argumentative with [the west-district manager] and refused to abide by Phoenix policies. [Relator] denies he called anyone at Phoenix liars, claims his comment about a lawsuit was not a threat, and denies refusing to change his behavior. [The store manager] confirmed [relator] referred to corporate as liars, was obstinate when asked to follow policies, and made other disrespectful statements directed at [the west-district manager]. Therefore, [the west-district manager's] recollection of the events appears to be more credible and the preponderance of the evidence is [relator's] conduct displayed a serious violation of the standards of behavior Phoenix had a right to reasonably expect.

Relator does not claim that insubordinate behavior is not employment misconduct. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002) (stating that “[a]s a general rule, refusing to abide by an employer’s reasonable policies and requests amounts to disqualifying misconduct”); *see also Snodgrass v. Oxford Props., Inc.*, 354 N.W.2d 79, 80 (Minn. App. 1984) (holding that an employee’s insubordinate behavior can constitute employment misconduct). Rather, relator challenges the ULJ’s decision to credit the version of events put forth by the west-district manager, rather than relator’s version of events. But the ULJ specifically found that the west-district manager’s recollection of the events was more credible, and this court defers to the ULJ’s credibility determinations and resolutions of conflicts in testimony. *Yswsf v. Teleplan Wireless Servs., Inc.*, 726

N.W.2d 525, 529 (Minn. App. 2007) (conflicts in testimony); *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (credibility determinations). In light of the deference owed to the ULJ's credibility determinations, the west-district manager's testimony at the hearing is substantial evidence supporting the ULJ's finding that relator's conduct was insubordinate.

Relator also challenges the ULJ's failure to consider additional evidence submitted with his request for reconsideration. "In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing" Minn. Stat. § 268.105, subd. 2(c) (Supp. 2009). The ULJ must order an additional evidentiary hearing if the relator demonstrates that (1) the additional evidence "would likely change the outcome of the decision and there was good cause" for not previously submitting it, or (2) the additional evidence would show that evidence "submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision." *Id.* This court defers to the ULJ's decision not to order an additional evidentiary hearing and will reverse that decision only for an abuse of discretion. *Skarhus*, 721 N.W.2d at 345.

The evidence submitted with the request for reconsideration included two unsigned statements purportedly written by relator's store manager and a coworker. Relator submitted the store manager's statement to show that his testimony at the hearing was influenced by the presence of the west-district manager and to refute the ULJ's findings that, during his encounter with the west-district manager, relator "refer[red] to

managers and/or corporate staff as liars” and “stated something to the effect of, ‘I can speak to my friends and customers as [I] want to.’” The ULJ found that the statement from the store manager submitted on reconsideration did not vary significantly from the store manager’s sworn testimony and concluded that the fact that “[i]t states [relator] made comments referring to [the west-district manager] as a liar, rather than corporate,” “has no effect on the outcome.” The ULJ also noted that “even if [relator] did not include customers in the statement, it was a statement expressing defiance to [the west-district manager’s] concerns and the inaccuracy is not significant.” In addition, the ULJ concluded that the additional evidence relating to relator’s conversation with a customer “would not have an impact on the outcome of this matter” because “[relator] was not discharged because of this conversation.” Because the ULJ found that the additional evidence submitted would not change the outcome of the matter, it did not order an additional hearing.

Relator does not argue that the ULJ abused its discretion by failing to conduct another evidentiary hearing. Rather, he argues that the ULJ “clearly did not read through [relator’s] request for reconsideration or [the store manager’s] statement fully, because [the store manager’s] statement does not say that [relator] referred to [the west-district manager] as a liar instead of corporate.” According to relator, the store manager’s statement “clearly states that [relator] said, ‘I do not appreciate being accused of lying.’” But this quotation does not appear in the copy of the store manager’s statement submitted on reconsideration. The statement states:

[Relator's] comment about liars was directed at [the west-district manager] and [the east-district manager] and was in relation to what was being said about his interaction with customers. He did not initially call them liars. [Relator's] statement about liars was in response to [the west-district manager's] questioning if he . . . was calling them liars because he said their statements were not true.

Thus, the ULJ's finding on reconsideration that the store manager's written statement would not affect the outcome of the decision is supported by the record and is not clearly erroneous.

Relator also challenges the ULJ's finding on reconsideration that "[relator] unnecessarily escalated the encounter with [the west-district manager] by challenging her and attempted to make her look foolish; he also called her a liar. [Relator] crossed the line between disagreeing with a supervisor and being defiant and insubordinate." Relator argues that he did not unnecessarily escalate the dispute and that he "was explaining [himself] in defense of another accusation [the west-district manager] made toward [him], not expressing defiance" or being insubordinate. As support for his claim, relator points to his testimony at the hearing and the additional evidence submitted with his request for reconsideration. But relator's testimony was contradicted by the west-district manager. The ULJ specifically found that the west-district manager's testimony was more credible than relator's, and we must defer to the ULJ's credibility determination. *Skarhus*, 721 N.W.2d at 344.

Relator's appendix includes documents that are being offered for the first time on appeal. Because this evidence was not presented to the ULJ, we cannot consider it on appeal. *See* Minn. R. Civ. App. P. 110.01 (restricting record on appeal to papers filed

with previous decision-maker, exhibits, and transcripts); Minn. R. Civ. App. P. 115.04, subd. 1 (providing that rule 110.01 applies to certiorari appeals); *McNeilly v. Dep't of Emp't & Econ. Dev.*, 778 N.W.2d 707, 709 n.1 (Minn. App. 2010) (applying Minn. R. Civ. App. P. 110.01, 115.04).

Affirmed.