STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1334

Shawn Smith,
Relator,

vs.

Hiawatha Metalcraft, Inc.,
Respondent,
Department of Employment and Economic Development,
Respondent.

Filed April 19, 2011
Affirmed
Stoneburner, Judge

Department of Employment and Economic Development
File No. 24476016-3

Shawn Smith, Minneapolis, Minnesota (pro se relator)

Hiawatha Metalcraft, Inc., Minneapolis, Minnesota (respondent employer)

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

Considered and decided by Wright, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Relator challenges the determination that he is ineligible for unemployment benefits, arguing that the unemployment-law judge (ULJ) erred by failing to facilitate testimony from one of relator's witnesses who was unavailable during the evidentiary hearing and by concluding that relator's employment was terminated for misconduct. We affirm.

FACTS

Relator Shawn Smith was employed by Hiawatha Metalcraft, Inc., from June 2008 until his employment was terminated on January 22, 2010, for violating the employer's policy prohibiting alcohol consumption and intoxication at work. Smith's application for unemployment benefits was denied. Smith appealed, and a telephone hearing was conducted by a ULJ.

At the hearing, a coworker testified that he entered the men's locker room on January 22, during the morning break, and saw Smith drinking from a can of beer. The coworker reported his observation to a supervisor who then walked into the locker room and saw Smith toss a beer can into the garbage. The supervisor reported the incident to the company president who then confronted Smith in the locker room. The president testified that he smelled a strong odor of an alcoholic beverage and saw an empty beer can in the garbage bin. When Smith opened his locker at the president's request, the president saw an unopened can of beer in Smith's backpack and immediately terminated Smith's employment.

Smith, who is chemically dependent and has been in treatment several times, testified that he did not bring any alcohol to work and did not drink alcohol at work on the day his employment was terminated. The ULJ did not find Smith's testimony credible and concluded that he committed employment misconduct, making him ineligible for unemployment benefits. The ULJ reaffirmed the disqualification on reconsideration, and this appeal by writ of certiorari followed.

D E C I S I O N

Smith asserts that the testimony on behalf of the employer was inconsistent and not credible, and the ULJ erred by precluding testimony from Smith's witness. This court may affirm a ULJ's decision or remand the case for further proceedings; this court may reverse or modify a ULJ's decision if the substantial rights of a petitioner may have been prejudiced because, among other things, the decision is affected by an error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008).

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).[1] Whether an employee engaged in

[1] There are several exceptions to the definition of employment misconduct, one of which is "conduct that was a direct result of the applicant's chemical dependency, unless the applicant was previously diagnosed chemically dependent or had treatment for chemical dependency, and since that diagnosis or treatment has failed to make consistent efforts to

employment misconduct is a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact, and the ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

The ULJ credited the testimony of the coworker, supervisor, and company president and found that Smith consumed alcohol while on the job on January 22, 2010. The ULJ concluded that "Smith provided no credible facts to support" his theory that the testimony on behalf of the employer was fabricated. From our review of the record, we agree. Smith claims that the ULJ erred by failing to account for a number of inconsistencies, but the only inconsistency Smith actually identified was that although the president stated in a letter that was submitted into evidence that *he* saw Smith throw a beer can into the garbage, at the hearing, the supervisor testified that he is the person who saw Smith throw the can into the garbage. The ULJ credited the supervisor's testimony. (Ex. 8.)

Smith argues that the ULJ erred by failing to hear testimony from a witness whom Smith wished to call on his behalf. An evidentiary hearing to determine eligibility for unemployment benefits is "an evidence gathering inquiry" and not an adversarial proceeding. Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009). The ULJ "must ensure that

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control the chemical dependency." *Id.*, subd. 6(b)(9) (Supp. 2009). But Smith does not argue on appeal that his conduct was the consequence of chemical dependency.

all relevant facts are clearly and fully developed." *Id.* The ULJ must order an additional evidentiary hearing if two conditions are met: first, the evidence not submitted at the prior hearing "would likely change the outcome of the decision" and second, "there was good cause for not having previously submitted that evidence." *Id.*, subd. 2(c) (Supp. 2009). This court defers to the ULJ's decision to deny an evidentiary hearing and may reverse only for an abuse of discretion. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007).

Smith claims that his witness, the union business agent (BA), would have testified that the supervisor failed to report to him about seeing Smith discard the beer can. Smith asserts that this testimony discredits the supervisor's testimony. But the supervisor's alleged failure to report the incident to the BA does not discredit his testimony. And even without the supervisor's testimony, the record supports the ULJ's finding that Smith consumed alcohol on the job. And Smith has not demonstrated good cause for failing to call the BA. *See* Minn. Stat. § 268.105, subd. 2(c). Smith told the ULJ at the beginning of the hearing that the BA was available on his cell phone. The ULJ asked Smith if he wanted to contact the BA. Smith replied that he "[didn't] really see the need for that" and that he would rather be the one to answer her questions. The ULJ stated that if Smith decided he wanted to contact the witness once he completed his testimony, he needed to let her know. Smith did not thereafter request that the ULJ contact the BA. Smith has not shown that testimony from the BA would have changed the outcome of the hearing or that the ULJ's failure to hold another evidentiary hearing to obtain the BA's testimony was an abuse of discretion.

Credibility determinations are within "the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus*, 721 N.W.2d at 345. The ULJ concluded that the testimony provided by Hiawatha's witnesses "was more clear, more reasonable, and the more plausible version of the events." Because we defer to the ULJ's credibility determinations, the ULJ's finding that Smith consumed alcohol at work is supported by the record.

The ULJ concluded that Smith's consumption of alcohol on company premises during work hours constitutes employment misconduct. An employee commits employment misconduct when his or her conduct seriously violates the standards of behavior the employer has the right to reasonably expect. Minn. Stat. § 268.096, subd. 6(a)(1); *see Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289–90 (Minn. 2006) (providing that employer's expectations must be reasonable under the circumstances).

Hiawatha has a policy prohibiting the possession, use, or sale of alcohol and controlled substances on its premises.[2] The policy is not arbitrary or unreasonable in light of Hiawatha's business of metal finishing of aluminum. The business uses overhead cranes to move aluminum material within the facility. Hiawatha has the right to expect that its employees will remain sober at work given the employer's interest in ensuring the safety of its employees. *See Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 775 (Minn. App. 2008) (affirming the denial of benefits to pilot who violated employer's policy

[2] Smith's argument that he should have been suspended rather than fired is without merit because it is based on Smith's contention that he was fired for having consumed alcohol off the job. The record demonstrates that termination of employment for consuming alcohol on the employer's premises was the employer's policy.

prohibiting consumption of alcohol within 12 hours prior to takeoff), *review denied* (Minn. Oct. 1, 2008). Smith was aware of the policy. "[R]efusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall*, 644 N.W.2d at 804. The ULJ did not err by concluding that Smith committed employment misconduct, making Smith ineligible for unemployment benefits.

Affirmed.