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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1500**

Richard Holmes,
Relator,

vs.

City of Minneapolis,
Respondent,

Department of Employment
and Economic Development,
Respondent.

**Filed May 16, 2011
Affirmed
Crippen, Judge***

Department of Employment and Economic Development
File No. 25328549-3

Richard J. Holmes, Minneapolis, Minnesota (pro se relator)

Ann Elizabeth Walther, Rice, Michaels & Walther, LLP, Minneapolis, Minnesota (for respondent City of Minneapolis)

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

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

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

UNPUBLISHED OPINION

CRIPPEN, Judge

Relator, who was denied eligibility for unemployment benefits due to a discharge for misconduct, contends that a different result is compelled by civil service standards and that he is entitled to call additional witnesses. Because relator has not shown merit to these claims, we affirm.

FACTS

Relator Richard Holmes's long employment as an electronic technician for respondent Minneapolis Park Board was terminated in May 2010 on evidence that he failed to do a job as instructed, falsely reported to the supervisor that the job had been done, and had been insubordinate. The unemployment law judge (ULJ) decided that relator was ineligible for unemployment benefits because he was discharged for misconduct.

The ULJ found that relator had failed to do a job as instructed in April 2010 and that he was insubordinate to his supervisor on several occasions; relator was cited for insubordination in 2008 and 2009 and suspended in April 2010.

The ULJ affirmed relator's ineligibility determination in a reconsideration order issued in August 2010. Reviewing relator's assertion that he had not been finally discharged under applicable civil service procedures, the ULJ concluded that the discharge was governed by unemployment law, which provides that a discharge occurs when an employee is suspended without pay for over 30 days. Here, relator was suspended without pay in April 2010, and was terminated effective when this suspension

expired. The ULJ also rejected relator's request that two additional witnesses should be heard, finding that "there is no showing that their testimony would likely change the outcome of the decision in this case."

Relator disputes only the ULJ decisions on the definition of discharge, pointing again to civil service standards, and on his request to call additional witnesses.

D E C I S I O N

The review implicates only the question of whether the ULJ's decision was made upon unlawful procedure or affected by other error of law. Minn. Stat. § 268.105, subd. 7(d) (2010).

1. Discharge

A person discharged because of employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Relator does not dispute that the conduct for which he was discharged was misconduct. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002) (stating that refusal to follow employer's reasonable policies and procedures is misconduct); *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (stating that conduct that undermines employer's trust in employee's ability to perform essential job functions is misconduct).¹ In relator's own words, "it appears that I have committed many of the infractions that the Respondent Minneapolis Park Board has alleged." Relator's challenges on credibility of evidence presented by respondent do not relate to the ULJ's findings or conclusions.

¹ Relator contends that the ULJ dwelled on 2008 and 2009 suspensions rather than conduct in April 2010, but it is evident in the judge's order that findings and conclusions encompassed all of the reported misconduct.

Relator argues that the ULJ erred by determining that he was discharged because, even at the time of the hearing before the ULJ, respondent had failed to follow proper procedures for terminating a civil service employee. But for purposes of unemployment benefits, a discharge occurs

when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity. . . . A suspension from employment without pay of more than 30 calendar days is considered a discharge.

Minn. Stat. § 268.095, subd. 5(a) (2010).²

Relator describes procedures required for civil service terminations, but he states no basis for determining that civil service law governs the unemployment-law provision, Minn. Stat. § 268.095, subd. 5 (2010). He also asks that this court consider evidence from a civil service hearing that occurred after the hearing before the ULJ. We cannot consider new evidence for the first time on appeal. *See Appelhof v. Comm'r of Jobs & Training*, 450 N.W.2d 589, 591 (Minn. App. 1990) (stating that evidence that ULJ did not receive at evidentiary hearing cannot be considered as part of record on appeal).

2. Additional Witnesses

This court will not reverse a ULJ's decision to deny presentation of additional testimony unless the decision constitutes an abuse of discretion. *Skarhus*, 721 N.W.2d at 345. The relevant statute mandates an additional evidentiary hearing only when it is

² Relator does not dispute the ULJ's decision that he was suspended without pay for 30 days; he notes his belief that he could have worked for the employer in another capacity, but he observes no words or actions of the employer that would lead to this belief.

shown that other evidence “would likely change the outcome of the decision.” Minn. Stat. § 268.105, subd. 2 (2010).

Relator argues that he is entitled to present testimony of two witnesses, one who was available for the hearing but not questioned and a second who was unavailable. But relator does not dispute the ULJ’s conclusion that relator failed to explain how the testimony of either witness would likely change the outcome of the case. Because relator failed to make that showing, the ULJ did not err in denying an additional evidentiary hearing.

Affirmed.