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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2083**

Cliff Voge,
Relator,

vs.

Hannon Security Services, Inc. (1991),
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 29, 2011
Affirmed
Halbrooks, Judge**

Department of Employment and Economic Development
File No. 25526797-3

Cliff Voge, Minneapolis, Minnesota (pro se relator)

Hannon Security Services, Inc., Bloomington, Minnesota (respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Connolly, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that he is ineligible for unemployment benefits because he was terminated for employment misconduct and further argues that he did not receive a fair and impartial hearing. We affirm.

FACTS

Relator Cliff Voge was employed by respondent Hannon Security Services as a part-time security officer from January 2007 through June 13, 2010. Voge worked the overnight shift during the weekends and was responsible for conducting hourly rounds of the facility and observing security cameras. On June 13, 2010, Voge was discharged for sleeping on the job.

Voge applied for unemployment benefits but was deemed ineligible. Voge challenged that determination. At the August 2010 hearing, Voge appeared on his own behalf, and both Tamayo and Clay Narum, the human resources director, appeared on behalf of Hannon Security. Tamayo testified that he called Voge early in the morning of June 13 to remind Voge about some contractors who were coming in later that morning to paint in the parking lot. Because Voge did not answer Tamayo's phone calls, Tamayo drove to the facility. Because the lights were off, Tamayo testified that he could not tell if Voge's eyes were open or closed, but he stated that when Voge noticed him, he "got up and he was stumbling, he was almost falling down." Tamayo observed that Voge's eyes

were partially closed and that he appeared groggy. Tamayo also noticed that Voge had his personal alarm clock on the table next to him.

Voge testified that his personal cell phone was not operating that evening due to battery problems, and he did not receive any calls at the security desk between 3:30 a.m. and 4:30 a.m. Voge testified that during that time, he was also suffering from a rash, and during his shift, he applied ointment in the bathroom. Afterwards, he did not want to put on his uniform shirt until the ointment dried, so he went into the training room to sit near a fan and dry off his arms. Voge testified that he was awake when Tamayo came into the security office and that he said “hello” as soon as Tamayo walked in. He also testified that he regularly brought in his own clock radio because he did not think the one at the security desk was “valid.”

In her order, the ULJ found that the testimony of Hannon Security’s witnesses “was more credible because it was the more logical and plausible version of the events,” and it was “more forthcoming and clear.” The ULJ also found that Voge’s version of the events was not credible. The ULJ reasoned that the evidence supported a finding that Voge fell asleep on the job and that he was discharged for that action. The ULJ concluded that Voge’s behavior was intentional, negligent, or indifferent, and that it clearly displayed a serious violation of the standards of behavior that Hannon Security had a right to reasonably expect. Therefore, the ULJ concluded that Voge engaged in employment misconduct and is ineligible for unemployment benefits.

Voge requested reconsideration, arguing that the testimony of Tamayo was untruthful and that he was prevented from providing relevant testimony. For the first

time, he requested subpoenas of Hannon Security's business records. The ULJ denied the request, reiterating her credibility findings from the original determination. The ULJ concluded that she had conducted the hearing in a fair manner and allowed Voge to present his testimony. The ULJ also noted that she had informed Voge of his right to request a subpoena of witnesses or documents at the beginning of the hearing but that Voge never made any such requests. This certiorari appeal follows.

D E C I S I O N

This court reviews a ULJ's decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence in view of the record as a whole or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2010). Substantial evidence is "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

I.

Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). "Whether the employee committed a particular act is a question of fact." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We view the ULJ's findings of fact in the light most favorable to the decision and defer to the ULJ's credibility determinations, and we will not disturb factual findings if they are supported by

substantial evidence. *Id.* But whether an employee’s act constitutes employment misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). “Employment misconduct means 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) (2010).

Voge challenges the ULJ’s factual finding that he was sleeping on the job, arguing that Tamayo was not truthful. “Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.” *Skarhus*, 721 N.W.2d at 345. This court will affirm if “[t]he ULJ’s findings are supported by substantial evidence and provide the statutorily required reason for her credibility determination.” *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007). The ULJ concluded that the testimony of Tamayo regarding the events was more credible because “it was the more logical and plausible version of the events.” The ULJ also noted that Tamayo’s testimony was more forthcoming and clear, whereas Voge’s testimony was “less feasible[] and less forthcoming.” Because the ULJ supported her credibility findings, we defer to the ULJ’s assessment of the testimony.

Given the credibility resolution, we must determine whether the ULJ’s factual findings are supported by the record. Tamayo testified that he called Voge at least four

times over a one-hour period on Voge's personal and work phones but that Voge did not answer. Tamayo arrived and found Voge stretched out over two chairs with his feet up in a dark training room; and when Voge noticed Tamayo, he appeared to be groggy and sleepy. This testimony, specifically credited by the ULJ, provides substantial evidence in support of the ULJ's factual finding that Voge was sleeping on the job.

II.

Voge contends that he did not receive a fair and impartial evidentiary hearing. An evidentiary hearing by a ULJ is "a de novo due process evidentiary hearing." Minn. Stat. § 268.105, subd. 1(a) (2010). A fair hearing is one in which the ULJ fully develops the record, reasonably assists an unrepresented applicant in presenting a case, and explains the procedure and the terms used throughout the hearing. *Id.*, subd. 1(b); Minn. R. 3310.2921 (2009). A hearing may be considered fair if the parties are afforded an opportunity to give statements, cross-examine witnesses, and offer and object to evidence. *See Ywswf*, 726 N.W.2d at 529-30. A ULJ must give "both parties ample opportunity to offer testimony." *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 824 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010).

Voge argues that he was prevented from testifying about training-related issues and that the ULJ "was providing her own testimony." The record reflects that Voge was able to provide testimony regarding his training and the practices of other security officers, and Voge does not identify additional evidence that he would have submitted had he been given more time by the ULJ. And on multiple occasions, the ULJ asked Voge whether he had anything else to add to his testimony, to which Voge answered no.

After carefully reviewing the record of the proceeding, we are confident that Voge received a fair and impartial hearing in front of the ULJ.

III.

Voge argues that the ULJ erred by denying his request for a second evidentiary hearing and request for assistance with subpoenas. The ULJ may not consider evidence that was not submitted at the evidentiary hearing, except when determining whether to order an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(c) (2010). An additional evidentiary hearing is required only if the additional evidence would likely change the outcome of the case and if there was good cause for not previously submitting the evidence or if it would show that evidence submitted at the evidentiary hearing was likely false and affected the outcome of the decision. *Id.* “This court will defer to the ULJ’s decision not to hold an additional hearing.” *Ywswf*, 726 N.W.2d at 533.

Voge requested reconsideration on the ground that Tamayo was untruthful. He also requested assistance in subpoenaing business records and cellular phone records. The ULJ reaffirmed her earlier credibility determinations and noted that Voge did not request a subpoena for documents or witnesses at any point before or during the initial evidentiary hearing. On this record, the ULJ acted within her discretion in denying Voge’s request for an additional hearing and for subpoenas.

Affirmed.