

*This opinion will be unpublished and  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  
A11-2308**

Michael W. Winter,  
Relator,

vs.

Intrepid Manufacturing & Engineering, LLC,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed August 27, 2012  
Affirmed  
Stoneburner, Judge**

Minnesota Department of Employment and Economic Development  
File No. 28109127-3

Clifford S. Anderson, Hellmuth & Johnson, P.L.L.C., Edina, Minnesota (for relator)

Michael C. Wilhelm, Briggs & Morgan, P.A., Minneapolis, Minnesota (for respondent  
Intrepid Manufacturing & Engineering, LLC)

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

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and  
Connolly, Judge.

## UNPUBLISHED OPINION

**STONEBURNER**, Judge

Relator challenges the determination of an unemployment-law judge (ULJ) that his employment was terminated for employment misconduct, arguing that (1) the ULJ erred by crediting respondent-employer's witnesses' testimony, (2) his conduct did not rise to the level of employment misconduct, (3) the ULJ's reconsideration was cursory, arbitrary, and capricious, and (4) the ULJ erred by failing to order an additional evidentiary hearing. We affirm.

### FACTS

Relator Michael Winter was employed as a sales representative by Donlyn Manufacturing Minnesota LLC in December 2009. He was supervised by Donlyn's general manager Bruce Knight. On January 3, 2011, Winter and Knight became employees of Intrepid Manufacturing & Engineering, LLC, Donlyn's successor. Knight continued to supervise Winter until Greg White became Intrepid's CEO in March 2011 and took over as Winter's supervisor until May 23, 2011, when Intrepid's general manager, Denise Weis, became Winter's supervisor.

In late December 2010, Winter suffered a seizure. On January 27, 2011, Winter had surgery to remove a non-malignant brain tumor. He returned to work five or six days after the surgery, but he was prohibited by law from driving for three months from the date of the seizure. Knight later testified that, during the time he supervised Winter, he had never disciplined Winter for insubordination or misconduct. But Knight testified that, shortly after Winter returned to work after his surgery, he observed Winter lose his

temper. Knight testified that Winter raised his voice and used profanity and required three or four minutes to calm down and leave Intrepid's premises.

Intrepid's executive administrator, Katherine Hanson, testified that she had been "noticing things" about Winter and mentioned it to Intrepid's human-resources consultant, Kit Thiewes. At Thiewes's instruction, Hanson began to document her observations of Winter's behavior with notes to his personnel file. Hanson testified about a telephone conversation she had with Winter on March 16, 2011, documented with a note to the file. Hanson testified that, during this telephone contact, Winter became enraged when she asked for documentation of his ability to return to work: Winter shouted and hung up on Hanson. White testified that he was sitting next to Hanson when this conversation occurred and that he could hear Winter shouting. White testified that he called Winter back and explained that the documentation was needed, and Winter agreed to provide it.

Hanson testified about another telephone conversation with Winter that occurred on June 15, 2011, in which Winter complained about Weis and stated that Weis did not know how to be a sales manager. Winter "disrespected" Weis and called her a b--ch. The call was apparently triggered by a conflict between Weis and Winter over Winter's practice of contacting potential customers in person, which involved a substantial amount of travel time and expenses, and Weis's instructions to make more of the initial contacts by telephone.

Weis and White testified that on June 13, 2011 they learned for the first time that Brooks Ekstrom, an important Intrepid customer, was planning to visit Intrepid on June

16. Winter, the sales representative for Brooks, had not advised Weis and White about the visit. Winter testified that he first learned about Brooks's intended visit from a coworker on the evening of June 13.

Weis and White were concerned that Winter had not informed them about the meeting and thought Winter was concealing the information from them: they did not immediately tell Winter that they knew about the meeting. And Winter, who thought that Weis and White were concealing the meeting from him, did not tell Weis and White that he knew about the meeting until three o'clock on the day before the meeting. Weis testified that Winter told her that he had known about the meeting "for a week."

Weis, White, and Winter met prior to the meeting with Brooks to prepare for the meeting. Winter testified that, in addition to addressing Brooks's concerns, Winter brought up his on-going dispute with Weis about how to best recruit new customers and questioned White and Weis about commissions that Winter claimed were due. Weis and White testified that Winter became enraged and would not let Weis talk. White testified that he repeatedly told Winter to be quiet and let Weis talk. White testified that Winter's behavior was so upsetting that White had to leave the room to "collect himself." Winter denies that he became angry, shouted, or failed to let Weis talk. He testified that he agreed to try Weis's approach, although he told her that it would not be successful. This meeting ended when representatives from Brooks arrived.

Weis and White assert that Winter was unprofessional and rude during the meeting with Brooks, remaining silent and playing with his cellular telephone. Winter agrees that he was quiet at the meeting but testified that after his telephone rang once, he turned it off

and placed it on the table in front of him and did not text or otherwise use the phone during the meeting.

On the morning of June 17, Weis, White, and Thiewes exchanged emails about the appropriate role for Winter at Intrepid. Weis stated that “it just won’t work” for him to remain in sales, but questioned whether he could be used in the “quoting” department. Thiewes was concerned about Winter’s behavior and asked for more information about what had occurred on June 16. White responded with his description of what had occurred, stating that “[t]his is not the kind of person we need on our team. He is obviously not willing to listen or be flexible to change and perform according to what is asked of him.” White then telephoned Winter and terminated his employment. White followed the telephone call with a termination-of-employment letter, stating that “[t]he events of this past week and your past patterns of volatile behavior with co-workers and Management have led to this decision.” White referenced Winter’s failure to inform Weis or White that a major customer was coming for a site visit, Winter’s behavior at the customer meeting, and Winter’s “aggressive, loud and extremely insubordinate” behavior toward Weis at the meeting prior to the customer meeting.

Winter applied for unemployment-compensation benefits. Respondent Minnesota Department of Employment and Economic Development (DEED) issued a determination of ineligibility based on information from Intrepid that Winter’s employment was terminated for employment misconduct. Winter appealed. After a lengthy telephone hearing, the ULJ found Winter ineligible for benefits based on the ULJ’s determination that he was discharged for employment misconduct. On reconsideration, the ULJ denied

Winter's request for an additional evidentiary hearing and affirmed the determination of ineligibility. This certiorari appeal followed.

## D E C I S I O N

### I. Standard of Review

This court may affirm the decision of the ULJ, remand the case for further proceedings, or it may reverse or modify the ULJ's decision if "the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are . . . unsupported by substantial evidence in view of the entire record as submitted." 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 Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

"Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quoting *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002)). Whether an employee committed a particular act is a question of fact, but whether that act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Schmidgall*, 644 N.W.2d at 804; *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). This court reviews the ULJ's factual findings in the light most favorable to the

decision and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

## **II. Employment misconduct**

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). Employment misconduct does not include, among other things, simple unsatisfactory conduct or good faith errors in judgment. *Id.*, subd. 6(b)(3), (6) (2010).

## **III. Credibility determinations**

Winter first argues that the record does not support the ULJ's determination that Intrepid's witnesses were more credible than Winter. This court views factual findings in the light most favorable to the decision and defers to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344. And this court will only reverse or modify the ULJ's decision if Winter's substantial rights were prejudiced because the ULJ's determinations are unsupported by substantial evidence. *See* Minn. Stat. § 268.105, subd. 7(d). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Minn. Ctr. for Env'tl. Advocacy*, 644 N.W.2d at 466.

In assessing the credibility of witnesses, the ULJ should consider, among other things:

1. Will a witness gain or lose if this case is decided a certain way?
2. What is the witness's relationship to the parties?

3. How did a witness learn the facts? How did he or she remember and tell the facts?
4. What was his or her manner?
5. What was his or her age and experience?
6. Did the witness seem honest and sincere?
7. Was the witness frank and direct?
8. Is the testimony reasonable compared with other evidence?
9. Are there any other factors that bear on believability and weight?
- [10. The factfinder] should rely upon [his or her] own experience, good judgment, and common sense.

*Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007)

(quoting 4 *Minnesota Practice*, CIVJIG 12.15 (2006)). The record demonstrates that the ULJ engaged in a thoughtful analysis of the evidence, using the appropriate factors to determine that Intrepid's witnesses' testimony about the circumstances surrounding Winter's discharge was more credible than Winter's testimony. The ULJ specifically noted that Intrepid's witnesses' testimony was "concise and followed a more logical chain of events" while Winter's testimony was "rambling and less detailed" than the testimony of Intrepid's witnesses. Despite Winter's exhaustive critique of the testimony of Intrepid's witnesses and his assertion that his own theory (that he was fired due to Intrepid's financial situation) is much more credible, we decline to substitute our judgment for that of the ULJ on credibility issues. That a party offers a plausible alternative explanation of what occurred does not compel the trier of fact to accept that explanation. *State v. Larson*, 393 N.W.2d 238, 241-42 (Minn. App. 1986).

Winter also asserts that the ULJ's finding that his testimony about some events was not credible is inconsistent with the ULJ's finding credible Winter's testimony about the Brooks visit. But the record supports the ULJ's finding on this issue, and Winter has



no authority for the implied assertion that a factfinder must accept all or none of a witness's testimony as credible.

**A. Pattern of insubordination**

Winter also challenges the ULJ's findings on credibility in relation to the ULJ's conclusion that Winter's behavior displayed a pattern of insubordinate behavior. Winter argues that the ULJ clearly erred in this determination because it is undisputed that Intrepid did not give Winter any warnings about his alleged insubordinate behavior before terminating his employment. Winter speculates that Intrepid fabricated the evidence that was presented as documentation of incidents that allegedly occurred before the June 16 meeting and asserts that Intrepid's witnesses lied about those incidents. But the ULJ credited the testimony of Hanson, White, and Weis, who all testified about inappropriate behavior by Winter before and during the June 16 meeting. The evidence supports the ULJ's determination that Intrepid considered Winter's behavior on these occasions inappropriate and insubordinate even though Winter was not warned or disciplined at the time it occurred. Intrepid's employee-conduct-and-work rules provide that "[i]nsubordination or other disrespectful conduct" can result in disciplinary action "up to and including termination of employment."

**B. Conduct at June 16 meeting**

The ULJ held, in the alternative, that absent a pattern of inappropriate behavior, Winter's conduct at the June 16 meeting alone is sufficient to support a determination of employment misconduct. Winter argues that when this "incident is properly viewed as a *single* incident, Winter did not engage in intentional employment misconduct as a matter

of law.” Because the record supports the ULJ’s finding of a pattern of conduct, we decline to address Winter’s argument that his discharge was caused by a single incident.

**C. Determination of employment misconduct**

The ULJ’s findings that Winter engaged in multiple incidents of insubordinate or disrespectful conduct are supported by substantial evidence in the record, and we conclude that the conduct constitutes employment misconduct. The record demonstrates that Winter’s employment was terminated because of his employment misconduct. The ULJ did not err in determining that Winter is ineligible for unemployment benefits.

**D. Determination on reconsideration**

Winter claims that the ULJ’s review of his request for reconsideration was “cursory” and that the ULJ “ignored much of Winter’s reconsideration submission . . . , merely stat[ing] in conclusory fashion that [it] had ‘fully considered the request and determined that the decision . . . is factually and legally correct.’” He asserts that “it is evident that the ULJ did not address many of the issues raised by Winter upon reconsideration.” He concludes by stating that “[t]he ULJ’s failure to consider all of Winter’s submissions and arguments was neither ‘rational’ nor involved merely a difference of ‘opinion.’”

An agency ruling is arbitrary and capricious if the agency relied on factors not intended by the legislature. *Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Commr’s*, 713 N.W.2d 817, 832 (Minn. 2006). Put another way, an agency determination is arbitrary and capricious “where the agency has exercised its will, and not

its judgment.” *Lakeland Tool & Eng’g, Inc. v. Engle*, 450 N.W.2d 349, 353 (Minn. App. 1990).

Winter mischaracterizes the ULJ’s order on reconsideration. The order plainly demonstrates that the ULJ engaged in a thorough exercise of reconsideration and did not merely exercise the ULJ’s will. The ULJ specifically noted that Winter was not discharged for a single incident and that the record supported the determination that Winter engaged in insubordination on multiple occasions. And Winter provided no authority for his assertion on appeal that the ULJ should have discussed his other arguments more thoroughly. Winter’s arguments in his request for reconsideration were very similar to, if not exactly the same as, his arguments before the ULJ in the original proceeding. Winter does not cite any authority that requires the ULJ to engage in a complete, written reevaluation of all of the same arguments presented in the original evidentiary hearing.

**E. Denial of request for an additional evidentiary hearing**

Winter also argues that the ULJ erred by failing to order an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(c) (2010), provides in relevant part:

The unemployment law judge must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that 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.

The ULJ denied Winter's request for an additional evidentiary hearing "because Winter did not show good cause for failing to submit the evidence earlier and it would not likely change the outcome or show that evidence provided at the hearing was false and that the likely false information had an effect on the outcome."

Winter argues that the telephone records that he submitted to the ULJ with his request for reconsideration "show that both Hanson's and White's testimony simply is not believable, therefore, undermining the credibility of all their testimony during the hearing." But Winter does not explain how the telephone records undermine the substance of Hanson's and White's testimony. The records document telephone contact on March 16 and only show a discrepancy about the timing of the calls and who initiated some of the calls. An assignment of error based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (citing *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971)). Mere inspection does not support Winter's assertion that the telephone records would change the ULJ's credibility determinations that are based on the entire record.

**Affirmed.**