STATE OF MINNESOTA
IN COURT OF APPEALS
A11-579

Paul Biretz,
Respondent,

vs.

SatCom Marketing, LLC,
Relator,

Department of Employment and Economic Development,
Respondent.

Filed December 12, 2011
Reversed
Connolly, Judge

Department of Employment and Economic Development
File No. 26371142-3

Paul Biretz, Minneapolis, Minnesota (pro se respondent)

Jessica E. Schwie, Jardine, Logan & O'Brien, P.L.L.P., Lake Elmo, Minnesota (for relator)

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

Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and Harten, Judge.*

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

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

CONNOLLY, Judge

Relator employer challenges the decision by the unemployment-law judge (ULJ) that respondent employee was eligible for unemployment benefits because he had been discharged for reasons other than misconduct. Because the ULJ's decision is not supported by substantial evidence in the record, we reverse.

FACTS

Relator SatCom Marketing, LLC is a telemarketing company that sells cable, Internet, and phone services for third-party customers. As part of the company's quality control measures, SatCom's customers may monitor and record phone calls made by SatCom's sales consultants. Any use of profanity during such calls is explicitly prohibited both by SatCom and SatCom's customers. SatCom also has a "Zero Tolerance" policy for threats and potentially violent incidents in the workplace. Respondent Paul Biretz began working for SatCom as a telephone sales consultant on July 20, 2009. Biretz was informed of the no-profanity and zero-tolerance policy in SatCom's handbook, which he received when he was hired.

On June 25, 2010, Biretz was about to use the public telephone located in the open, general area of the building where SatCom rents its offices, when M.D., a building caretaker, approached Biretz and asked if she could use the telephone. Biretz said he was using the telephone, but M.D. apparently picked it up anyway, made a quick call, and tried to hand the phone to Biretz. Biretz, a diabetic with a history of health problems, is very sensitive about germs and about people touching him. He was very upset and

disgusted because M.D. had touched the phone with her latex cleaning gloves, which he felt were filthy and had been used to clean bathrooms. Biretz did not want her to get close to him, hand him the telephone, or touch him, and he thought he made this clear to M.D. When she proceeded to hand him the telephone and put her hand on his shoulder, he began to argue with her.

M.D. claimed that Biretz began yelling at her, threatening her, and swearing at her, saying, "you f---ing . . ." and "get your f---ing hands off." Immediately following the incident, M.D. and Biretz met with SatCom's Human Resources Director (HRD). She reported that Biretz specifically admitted to his outburst, saying that he had lost control, and also admitted that he had used offensive language.

On July 1, SatCom terminated Biretz. Biretz applied for unemployment benefits, but was determined to be ineligible for benefits and to have been overpaid because he engaged in employment misconduct.[1] Biretz appealed, and a ULJ conducted an evidentiary hearing by telephone. At the hearing, Biretz was adamant that he never raised his voice and never swore at M.D. M.D. did not participate in the hearing because she is not a SatCom employee. The ULJ issued a decision granting Biretz unemployment

[1] We note that Biretz will not have to repay any benefits received, even if he is found to have committed employment misconduct. *See* Minn. Stat. § 268.105, subd. 3a(c) (2010) (providing that if a ULJ's decision awarding benefits is reversed on appeal, an applicant is not held ineligible for benefits already received and the effect of the reversal is the application of Minn. Stat. § 268.047, subd. 3 (2010) on the employer's future tax rate).

benefits, finding no employment misconduct.[2] In response to SatCom's timely motion for reconsideration, the ULJ affirmed his decision. SatCom appeals.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator may have been prejudiced because the findings, inferences, conclusion, or decision are "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d) (2010).

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). 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, but whether an act committed by an employee constitutes employment misconduct is a

[2] An earlier incident in which Biretz allegedly used profanity on an open telephone line in violation of another SatCom policy was also determined not to be misconduct. Because we conclude that the incident with M.D. was misconduct, we do not address the earlier incident.

question of law, which we review *de novo*. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court views the ULJ's factual findings in the light most favorable to the decision and gives deference to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court will not disturb the ULJ's factual findings when the evidence substantially sustains them. Minn. Stat. § 268.105, subd. 7(d)(5).

SatCom challenges the ULJ's conclusion that Biretz did not commit employment misconduct. An employer has the right to expect that an employee will act in compliance with reasonable policies and procedures, and a knowing violation of an employer's directives, policies, or procedures constitutes employment misconduct. *Schmidgall*, 644 N.W.2d at 804. Specifically, with regard to the M.D. incident, SatCom claims that the ULJ's findings are not supported by substantial evidence and that the ULJ improperly failed to consider hearsay evidence from the HRD as to M.D.'s statements.

The ULJ found that "Biretz did not use profanity to [M.D.] or raise his voice." He also dismissed the detailed testimony and evidence of SatCom in the record. "When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2010).

In his initial findings, the ULJ noted that the testimony of SatCom's HRD was "vague and primarily based on hearsay" and that Biretz's "testimony [was] more persuasive," and, on reconsideration, he stated that he "did consider SatCom's vague

hearsay evidence but determined that Biretz's direct testimony was more persuasive." A ULJ may consider hearsay "if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." *Marn v. Fairview Pharmacy Servs. LLC*, 756 N.W.2d 117, 122 (Minn. App. 2008) (citing Minn. R. 3310.2922 (2007)). Witness statements and notes from an employer's investigation regarding misconduct are relevant hearsay and the type of evidence properly considered by a ULJ—in fact, such investigations are often legally required. *See Peppi v. Phyllis Wheatley Cmty. Ctr.*, 614 N.W.2d 750, 752 (Minn. App. 2000) (finding that an employer has an affirmative duty to investigate complaints of sexual harassment).

We infer that, by finding the HRD's testimony "vague," the ULJ concluded that the testimony was not the type of evidence reasonably relied upon. "Vague" is defined as "[i]mprecise; indistinct; uncertain." *Black's Law Dictionary* 1689 (9th ed. 2009). But the record showed that her testimony was clear, distinct, and certain regarding Biretz's admissions that he lost control and used offensive language. The HRD conducted an investigation of the incident immediately after it occurred, interviewed both Biretz and M.D., took contemporaneous notes, and transcribed those notes into a letter to SatCom's president, which is included in the record. Notes from an investigation and testimony from the HRD about her personal interview with the two parties to the altercation are the kind of hearsay evidence upon which reasonable, prudent persons would rely.

Biretz argues that the testimony was vague because the HRD could not remember M.D.'s first name and because M.D. didn't speak fluent English. While it is true that the HRD initially referred to M.D. by an incorrect but similar name and admitted that M.D.

did not speak fluent English, the HRD had no difficulty understanding M.D.'s complaint and testified very clearly that M.D. was visibly shaken and reported that Biretz had sworn at her repeatedly. Biretz's termination letter clearly corroborates the HRD's testimony and demonstrates that other people witnessed Biretz's behavior toward M.D. The termination letter states: "[T]he President of SatCom Marketing [was made] aware that [M.D.] was continuing to feel threatened and that . . . employees of the bank . . . who witnessed the June 25 incident were also upset with SatCom." This detailed, consistent, and corroborated hearsay evidence is the type of evidence upon which reasonable, prudent persons would rely. Thus, the ULJ's characterization of the HRD's testimony as vague is not supported by substantial evidence in the record.

The ULJ's conclusion that Biretz's testimony was more "persuasive" than the HRD's testimony was based on his finding that the HRD's testimony was vague. But the HRD was both specific and consistent in her testimony that, following the incident, Biretz admitted to losing control and to using profane language with M.D. Biretz's testimony was not consistent. He changed his story and, in his testimony, insisted that he had neither raised his voice nor swore at M.D. This testimony was clearly inconsistent with Biretz's own prior, documented statements. Therefore, the ULJ's determination that Biretz's testimony was more persuasive and credible is not supported by substantial evidence in the record.

Substantial evidence in the record supports a finding that Biretz was terminated for employment misconduct. The termination letter and the notes and testimony of the HRD reflect that Biretz acted in an offensive and threatening manner toward the building

caretaker. SatCom had a "Zero Tolerance Policy for Threats and Potentially Violent Incidents" that prohibited verbal threats in the workplace by current employees on or near SatCom's premises. SatCom had the right to expect that Biretz would act in compliance with its reasonable policies and procedures, and Biretz's knowing violation of SatCom's policy constituted employment misconduct.

The ULJ's credibility determination that the HRD's testimony was vague and Biretz's testimony was more persuasive is not substantially supported by the record. Accordingly, the ULJ erred in determining that Biretz did not commit employment misconduct.

Reversed.