STATE OF MINNESOTA
IN COURT OF APPEALS
A11-927

Steve Hudalla,
Appellant,

vs.

TSI, Inc.,
Respondent,

Summit Orthopedics, Ltd. d/b/a Minnesota Occupational Health,
Respondents.

Filed March 26, 2012
Affirmed
Bjorkman, Judge

Ramsey County District Court
File No. 62-CV-10-11767

Mark A. Greenman, Law Office of Mark A. Greenman, Minneapolis, Minnesota (for appellant)

James P. McCarthy, Lindquist & Vennum, P.L.L.P., Minneapolis, Minnesota (for respondent TSI, Inc.)

Cecilie M. Loidolt, Debra L. Weiss, Damon L. Highly, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondent Summit Orthopedics, Ltd. d/b/a Minnesota Occupational Health)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges the district court's grant of summary judgment for respondent, arguing that the Minnesota Drug and Alcohol Testing in the Workplace Act (DATWA), Minn. Stat. §§ 181.950-.957 (2010), prohibits respondent from revoking his contingent job offer based on a confirmatory test result indicating that his marijuana-metabolite concentration was 10 nanogram/milliliter (ng/ml). Because appellant's marijuana test result was positive under DATWA, we affirm.

FACTS

In January 2010, appellant Steve Hudalla began working for respondent TSI, Inc., through a temporary employment agency. Two months later, TSI offered Hudalla a permanent position, contingent on his successful completion of a drug test. Hudalla submitted to a drug test administered by TSI's agent, respondent Summit Orthopedics, d/b/a Minnesota Occupational Health (MOH), through the MEDTOX laboratory. MEDTOX is certified by the Substance Abuse and Mental Health Services Administration (formerly the National Institute on Drug Abuse) (NIDA/SAMHSA), accredited by the College of American Pathologists (CAP), and licensed to perform drug testing by the New York State Department of Health (NYSDH).

MOH used an approved MEDTOX drug testing kit to screen Hudalla's urine sample, which revealed the presence of a marijuana metabolite. MOH forwarded the sample to MEDTOX to conduct a confirmatory test, which revealed a marijuana-metabolite concentration of 10 ng/ml. This result exceeds the 2 ng/ml threshold detection

level that CAP and NYSDH have verified as a positive marijuana test result at the MEDTOX laboratory. It also exceeds MOH's more conservative level of 5 ng/ml. MOH advised Hudalla of the positive result and gave him an opportunity to obtain a retest or explain the result. Hudalla declined to do either, and MOH reported the positive result to TSI, which revoked Hudalla's job offer.

Hudalla sued TSI, alleging that it violated DATWA by revoking his job offer because the 10 ng/ml test result is not positive as defined by DATWA. The district court granted TSI's motion for summary judgment, determining that any MEDTOX test result revealing a marijuana-metabolite concentration at or above 2 ng/ml is positive under DATWA. Hudalla challenges this decision on appeal.

Hudalla also sued MOH, asserting that it defamed him and was negligent in falsely reporting to TSI that he tested positive for marijuana. The district court granted MOH's summary-judgment motion, again on the basis that Hudalla's test result was in fact positive. On appeal, Hudalla lists MOH as a respondent but makes no arguments with respect to his claims against MOH or the district court's order granting summary judgment in favor of MOH.

D E C I S I O N

I. TSI's withdrawal of Hudalla's contingent job offer did not violate DATWA.

"We review a district court's summary judgment decision de novo. In doing so, we determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Riverview Muir*

Doran, LLC v. JADT Dev. Grp., LLC, 790 N.W.2d 167, 170 (Minn. 2010) (citation omitted).

Minnesota law permits employers to screen employees and job applicants for the presence of drugs and alcohol. Minn. Stat. § 181.951. An employer may make an offer of employment contingent upon successful completion of a drug test but may withdraw the offer only if an initial screening test and a confirmatory test both reveal a positive test result. Minn. Stat. § 181.953, subd. 11. DATWA ensures that the screening procedures are fair and accurate.

DATWA defines a "[p]ositive test result" as "a finding of the presence of drugs, alcohol, or their metabolites in the sample tested in levels at or above *the threshold detection levels contained in the standards of one of the programs* listed in section 181.953, subdivision 1." Minn. Stat. § 181.950, subd. 10 (emphasis added). Section 181.953, subdivision 1, lists NIDA/SAMHSA, CAP, and NYSDH:

> An employer who requests or requires an employee or job applicant to undergo drug or alcohol testing shall use the services of a testing laboratory that meets one of the following criteria for drug testing:
>
> (1) is certified by the National Institute on Drug Abuse as meeting the mandatory guidelines published at 53 Federal Register 11970 to 11989, April 11, 1988;
>
> (2) is accredited by the College of American Pathologists, 325 Waukegan Road, Northfield, Illinois, 60093-2750, under the forensic urine drug testing laboratory program; *or*
>
> (3) is licensed to test for drugs by the state of New York, Department of Health, under Public Health Law, article 5, title V, and rules adopted under that law.

(Emphasis added.)

Resolution of Hudalla's claims against TSI turns on whether MEDTOX's test result revealed a marijuana-metabolite concentration "at or above the threshold detection levels contained in the standards of one of the [statutorily enumerated] programs." *See* Minn. Stat. § 181.950, subd. 10. All three programs set threshold detection level standards for marijuana, albeit by different methods.

NIDA/SAMHSA publishes a list of recommended detection levels at or above which any certified laboratory using any certified testing technique may classify a test result as positive. For the marijuana metabolite, NIDA/SAMHSA recommends a cutoff level of 15 ng/ml. CAP, on the other hand, does not publish a universal list of cutoff levels but instead approves threshold detection levels for each laboratory it accredits based on the accuracy and precision of the laboratory's testing techniques:

> The laboratory must use defined cutoff values for screening and confirmation tests. Specific cutoff values are not defined by the CAP FUDT program. Cutoff values may be defined by the laboratory or at the client's request. The laboratory, however, must be able to analyze challenges in the CAP/AACC UDC forensic urine drug testing (confirmatory) survey at the reporting limits specified in the proficiency testing instructions.

College of American Pathologists, *Forensic Urine Drug Testing* 8 (2005), http://www.pathology.med.umich.edu/intra/Inspection_Resources/04-06-06%20Checklists%20and%20Commentaries/FDT10062005.doc. Thus, the laboratory is able to define what constitutes a positive test result as long as the detection level is at or above the threshold detection level approved by CAP for that laboratory. NYDHS takes a similar approach. It is undisputed that both CAP and NYDHS have inspected the MEDTOX laboratory and

determined that MEDTOX can accurately detect the presence of marijuana metabolite at a level as low as 2 ng/ml.

Hudalla contends that because NIDA/SAMHSA is the only one of the three programs that defines a positive test by reference to a universal list of cutoff levels, TSI was bound to observe its marijuana cutoff level of 15 ng/ml. We disagree. The legislature expressly permitted employers to use threshold detection levels that meet the standards of any one of three drug-testing programs. Minn. Stat. § 181.953, subd. 1. Hudalla's argument renders some words in the statute superfluous and injects other words into the statute that the legislature omitted. *See* Minn. Stat. §§ 181.950, subd. 10, .953, subd. 1. If the legislature had intended to define positive test results only according to NIDA/SAMHSA's standards and not that of CAP and NYDSH, it could have said so. Likewise, if the legislature had intended to refer to only universal, published threshold detection levels, it could have said so. Because the legislature did not do so, Hudalla's marijuana test result was positive under DATWA and his claims against TSI fail as a matter of law.

II. Hudalla has waived any appeal of his claims against MOH.

Issues not briefed on appeal are waived. *State v. Hurd*, 763 N.W.2d 17, 32 (Minn. 2009). Because Hudalla's appellate brief focuses solely on his DATWA claim rather than the defamation and negligence claims he asserted against MOH, he has waived any appeal of his claims against MOH.

Affirmed.