STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2278

Kelly Kiernan,
Relator,

vs.

Caribou Coffee Company, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 12, 2013
Affirmed
Larkin, Judge

Department of Employment and Economic Development
File No. 30068511-3

Kelly Kiernan, West Fargo, North Dakota (pro se relator)

Caribou Coffee Company, Inc., c/o ADP-UCM/The Frick Company, St. Louis, Missouri (respondent)

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

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Cleary, Judge.

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

LARKIN, Judge

In this certiorari appeal, relator challenges an unemployment-law judge's (ULJ) determination that he is ineligible for unemployment benefits. We affirm.

FACTS

Relator Kelly Kiernan worked as a store manager for respondent Caribou Coffee Company Inc. from February 2005 to August 2012. Kiernan's employment ended after a Caribou district manager discovered that Kiernan was miscalculating inventory, which resulted in increased bonus payments to Kiernan. The district manager reviewed the correct inventory process with Kiernan and directed him to discontinue his incorrect method. Three days later, Kiernan again used the incorrect method. Caribou discharged Kiernan for falsifying the inventory count at his store.

Kiernan established an unemployment-benefits account with respondent Minnesota Department of Employment and Economic Development (DEED). DEED determined that Kiernan was eligible for benefits and mailed a determination-of-eligibility letter to Kiernan that informed him that the "determination will become final unless an appeal is filed by Wednesday, September 5, 2012." Kiernan moved to North Dakota for a new job on September 4. Caribou filed an appeal on September 5. DEED sent notice of the appeal and the September 19 hearing date to Kiernan at the address that it had on file for Kiernan, which was his sister's address in Minnesota. Kiernan did not respond or participate in the hearing. After the hearing, the ULJ determined, based on the evidence presented by Caribou, that Kiernan was discharged for employment misconduct

and that he therefore is ineligible for unemployment benefits. The determination resulted in an overpayment of unemployment benefits in the amount of $2,207.

Kiernan requested reconsideration and an additional hearing. He explained that he was "unaware . . . that [the hearing] was taking place" because he moved to North Dakota to take a new job and "assumed [he] would not be receiving additional communication from [DEED]." Kiernan further explained that he "learned about the hearing through mail that was at [his] sister's house" when he visited his sister the weekend of October 12-14. Kiernan argued that Caribou "took advantage of [him] not being present [at the hearing], and used completely untrue information to . . . defame and penalize [him]." The ULJ concluded that Kiernan did not show good cause for missing the hearing, denied his request for an additional hearing, and affirmed the determination of ineligibility. This certiorari appeal follows.

D E C I S I O N

This court 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)(5) (2012). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 288 Minn. 294, 299, 180 N.W.2d 175, 178 (1970).

I.

A ULJ must order an additional evidentiary hearing if the requesting 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.

Minn. Stat. § 268.105, subd. 2(c) (2012).

> If the involved applicant or involved employer who filed the request for reconsideration failed to participate in the evidentiary hearing . . . an order setting aside the decision and directing that an additional evidentiary hearing be conducted must be issued if the party who failed to participate had good cause for failing to do so.

Id., subd. 2(d) (2012). Good cause is defined as "a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing." *Id*. "A reviewing court accords deference to a ULJ's decision not to hold an additional hearing and will reverse that decision only for an abuse of discretion." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006).

On appeal, Kiernan asserts that "much of the information presented at the hearing in my absence by [the employer] was false." Kiernan also asserts that "[i]n all of the chaos of having to relocate [to North Dakota] on such short notice" he "did not forward the mail from [his] sister[']s [residence] until a later date." He states that he "had no idea that the hearing was taking place until the day of the hearing when [he] had completed [his] work shift to find a message from the hearing judge." He further states that he

"definitely would have made [himself] available had [he] been aware that this process was taking place."

But Kiernan does not dispute that DEED notified him that Caribou had until September 5 to appeal its determination that Kiernan was eligible for unemployment benefits or that he nevertheless moved out of state on September 4 without providing DEED with his new address. Moreover, Kiernan concedes that he did not instruct the post office to forward his mail and did not check his mail at his sister's address until the weekend of October 12-14 when he visited his sister in Minnesota.

The ULJ reasoned that Kiernan "did not update [DEED] with his North Dakota address until October 15, 2012, nearly one month after the September 19 hearing" and that forgetting to update his address "does not show due diligence, and therefore does not qualify as a good reason for the failure to participate in the hearing." Thus, the ULJ concluded that Kiernan did not show good cause for missing the hearing. We agree. A reasonable person in Kiernan's position, acting with due diligence, would have updated his address, forwarded his mail, or at least inquired of his sister regarding incoming mail—especially after leaving the state with notice that the eligibility determination was not final and that the employer could appeal. *See* Minn. Stat. § 645.08 (2012) (stating that in construing statutes of this state, "words and phrases are construed according to rules of grammar and according to their common and approved usage"); *The American Heritage Dictionary of the English Language* 1580 (3d ed. 1992) (defining diligence as "attentive care; heedfulness").

To the extent that Kiernan seeks a new hearing under section 268.105, subdivision 2(c), because "evidence that was submitted at the evidentiary hearing was likely false," we have closely reviewed his request for reconsideration and conclude that the ULJ did not err in refusing to grant an additional hearing on that ground. In sum, the ULJ did not abuse his discretion in denying Kiernan's request for an additional hearing.

II.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). 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) (2012).

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 a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* We review the ULJ's factual findings "in the light most favorable to the decision" and defer to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344.

On appeal, Kiernan provides nearly five pages of factual assertions to support his argument that "[m]uch of the information presented at the hearing . . . was false." Next,

he requests that we "consider [his] account of what happened." It appears that Kiernan wants this court to reverse the ULJ's determination that he was discharged for misconduct and is therefore ineligible for unemployment benefits based on the factual assertions in his brief. For example, Kiernan argues that his employer "chose to drum up a bogus reason for my termination."

If Kiernan seeks reversal of the misconduct and ineligibility determinations based on the factual assertions in his brief, his argument is unavailing. The time for an unemployment-benefits claimant to present evidence and challenge the employer's evidence is at the evidentiary hearing. *See* Minn. Stat. § 268.105, subd. 1(b) (2012) (explaining that "[t]he evidentiary hearing is conducted by an unemployment law judge as an evidence gathering inquiry" at which "all relevant facts are clearly and fully developed"). On appeal, this court does not consider evidence that was not presented at the evidentiary hearing. *See Imprint Techs., Inc. v. Comm'r of Econ. Sec.*, 535 N.W.2d 372, 378 (Minn. App. 1995) (stating that matters not received into evidence at an administrative hearing may not be considered on appeal). We therefore decline to consider Kiernan's factual assertions as a basis to reverse the ULJ's ineligibility determination. And because he offers no other argument in support of reversal, we affirm.

Affirmed.