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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0814

Roger A. Bacchus,
Relator,

vs.

Minn. Dept. of Administration,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 24, 2012
Affirmed; motion denied
Connolly, Judge

Department of Employment and Economic Development
File No. 28938970-4

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Considered and decided by Connolly, Presiding Judge; Hooten, Judge; and Kirk, Judge.

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

CONNOLLY, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that relator was discharged for misconduct and is ineligible for unemployment benefits; relator also moves to strike portions of the brief of respondent Department of Employment and Economic Development (DEED). Because we agree that relator's act in applying for unemployment benefits for a week during which he had worked was misconduct, we affirm; because the portions of DEED's brief that relator wants stricken are records and documents available to the public and were in any event not considered in deciding this appeal, we deny the motion.

FACTS

In September 1997, relator Roger Bacchus began to work for respondent Minnesota Department of Administration (MDA) as a technology contracts negotiator. He independently negotiated contracts worth millions of dollars. By June 2011, his weekly income was $1,359.60.

Before the Minnesota government shutdown in July 2011, relator opened an unemployment-benefits account with respondent DEED. He applied for and received the maximum weekly benefit, $578, for the second week of the shutdown, July 11-15, and for three days of the following week, July 18-20. The shutdown ended on July 20; on July 21-22, relator worked and did not receive benefits.

Relator worked the week of July 25-29, earning $1,359.60. On Monday, August 1, he applied for unemployment benefits for that week, answering "No" when the

application asked if he had worked or had a paid holiday during that week. Relator received an unemployment benefit of $578 for July 25-29, and DEED billed MDA for that amount. Relator retained the benefit until November 2011, when he was notified that he had been overpaid.

MDA discharged relator for "misrepresentation of his employment status to obtain unemployment benefits." Relator again applied for unemployment benefits; DEED determined him to be eligible, and he began receiving benefits. MDA challenged the determination. After a telephone hearing, a ULJ found that relator had been discharged for misconduct, was ineligible for benefits, and had been overpaid $5,202. In response to relator's request for reconsideration, the ULJ affirmed the previous decision.

By writ of certiorari, relator challenges the decision, arguing that he did not commit employment misconduct because his act was inadvertent and that the ULJ erred in considering previous ethics complaints against relator and in not admitting one of relator's exhibits.[1]

D E C I S I O N

Whether an employee engaged in conduct that disqualifies the employee from receiving unemployment benefits presents a mixed question of fact and law: whether an employee committed a particular act is a question of fact, but whether that act constituted employment misconduct is a question of law, subject to de novo review. *Stagg v. Vintage*

[1] Relator also moved to strike copies of two of his unemployment-benefits applications and data on unemployment-benefits applications and statistics during the July 2011 government shutdown. Because all the items relator seeks to strike are available to the public and none is necessary to our decision, relator's motion is moot and is denied.

Place, *Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). A ULJ's factual findings are viewed in the light most favorable to the decision and are not disturbed if the evidence substantially sustains them. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

I. The Finding of Employment Misconduct

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). "[C]onduct that was a consequence of the applicant's . . . inadvertence" and "conduct an average reasonable employee would have engaged in under the circumstances" are not misconduct. Minn. Stat. § 268.095, subd. 6(b)(2), (4) (2010). Relator does not dispute the finding that he applied for and received benefits for a week during which he worked, but he argues that answering "No" when asked if he had worked during that week was both "a consequence of [his] inadvertence" and "conduct an average reasonable employee would have engaged in" and was therefore not employment misconduct that would disqualify him from collecting unemployment benefits.

The ULJ questioned relator about his view that answering "No" when asked if he had worked during the week of July 25-29 was inadvertent.

> ULJ: . . . [S]o how was it inadvertent[?] . . .
>
> R: I wasn't paying attention to the system when I went into the system because I wasn't sure if I should get paid for that week or not.
>
> . . . .

ULJ: . . . [The] first question [on the payment request is,] did you work or have a paid holiday during that [week] . . . and you answered no. Why did you answer no[?]

R: I do not recall a paid holiday at the time sir.

ULJ: It asks did you work or have a paid holiday.

R: Like I said sir I was not paying attention, I was all confused about what was going on and I was not sure I was gonna get paid for that week and it was very confusing at the time.

ULJ: Okay, what was confusing about not being paid[?] . . .

R: Well, working with the system sir because it was very sensitive. . . . I know I shouldn't [have] applied for unemployment but at the time I didn't think of it I just made a good faith error in applying for it.

. . . .

ULJ: . . . [S]o it looks like the payment request was entered on August 1, 2011. Is it possible that's when you requested benefits[?]

R: It is possible sir.

ULJ: . . . [A]nd when did you return to work[?]

R: On I think it was July 21.

ULJ: So how many days would that be, July 21 to August 1[?]

R: I'd say it was about ten days.

. . . .

ULJ: I'm trying to understand why you [did] not stat[e] you were working and receiving earnings when you requested benefits for that week when you had already been working for about ten days . . . .

> R: I was not sure if I would get unemployment or if I would get paid for that period of time. . . . [I]t was certainly my mistake. I shouldn't [have] done that. . . .I would have been better off not doing it because I never expected that I would have been terminated for such a good faith error. It's certainly my fault.

When asked if he had anything to add, relator said,

> . . . It was human error and I apologize for that and like I said it was certainly my mistake. I was totally shocked and amazed that [because of] a small error like this after I have worked there for fourteen years and saved this organization millions of dollars . . . I would be terminated . . . .

"Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus*, 721 N.W.2d at 345. The ULJ did not find relator's testimony credible.

> [Relator's] version of the events, however, was not credible and was implausible. It is highly unlikely that [he] did not know he was requesting benefits for the week of July 24, 2011, a week that he worked. The evidence shows that [he] returned to work on July 21, 2011, and he did not request benefits for the week of July 24, 2011 until ten days later on August 1, 2011. Additionally, [he] did not inform [DEED] that benefits for the week of July 24, 2011 were deposited to his unemployment debit card until after he was informed of the overpayment in November 2011. It was only then that [he] paid back the overpayment. Moreover, [he] was not an uneducated lay person. He was in a high level position responsible for multi-million dollar contracts.

Relator relies on *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 540 (Minn. App. 2011) (affirming ULJ's determination that bar employee who inadvertently forgot to card one customer whom she recognized as being old enough to drink had not committed misconduct). But *Dourney* is distinguishable. In *Dourney*, an employee who was

distracted when taking orders from a new menu simply forgot to do a normal part of her job and request customers' identification. *Id.* Relator did not forget to do a normal part of his job; he deliberately said that he had not worked during a particular week when he had worked, and he applied for unemployment benefits for that week.

While relator said he was "confused," he did not answer the ULJ's question as to why he was confused over whether he would be paid for a week during which he worked. He said that he should not have applied for unemployment for that week and that doing so was a good-faith error, but his reason why he should not have applied was that he "never expected [he] would have been terminated" for a $578 error when he negotiated contracts worth millions. He thought the error was trivial, but he did not testify that it was not deliberate; or that he forgot on August 1 that he had worked the previous week, July 25-29; or that he worked that week without any expectation of being paid; or that he thought he would be entitled to unemployment benefits for a week during which he worked. *Dourney* quoted and affirmed the ULJ's finding that there was "no evidence of any . . . inappropriate behavior." *Id.* Relator's behavior in stating that he had not worked during a week when applying for unemployment benefits for that week was not inadvertent.

Relator also argues that "[his] conduct was that of an average, reasonable person." He relies on *Hanson v. Crestliner, Inc.*, 772 N.W.2d 539, 544 (Minn. App. 2009) (reversing ULJ and concluding that employee "absen[t] without notice due to the unexpected hospitalization of his mother [had engaged in] conduct the average reasonable employee would have engaged in under the circumstances"). But *Hanson*,

like *Dourney,* is distinguishable: the employee in *Hanson* failed to notify his employer of his absence because he was dealing with his mother's medical emergency. Relator, in an effort to obtain unemployment benefits to which he was not entitled, said he had not worked during a week when he had worked, and he offers no evidence to support his implication that average, reasonable employees lie when claiming unemployment benefits.

Relator's conduct was neither inadvertent nor that of an average, reasonable employee: he committed misconduct under the statute.

II. The ULJ's Evidentiary Decisions

Relator argues that the ULJ "allowed himself to confuse the relevant issues" by inquiring into the employer's statement that relator "[had] been disciplined for unethical conduct in the past." But the employer's testimony made it clear that relator's discharge was based exclusively on the unemployment-benefits issue. The ULJ's opinion does not mention any of relator's past conduct and concerns only his applying for and receiving unemployment benefits for a week during which he had worked. The ULJ demonstrated no confusion as to the relevant issues.

Relator relies on Minn. Stat. § 268.105, subd. 1(b) (2010) (providing that a ULJ "must ensure that all relevant facts are clearly and fully developed"), to argue that the ULJ erred by not admitting relator's exhibit 11, which included relator's performance ratings for 2008, 2009, and 2010, and correspondence pertaining to two other employees who had also attempted to receive unemployment benefits to which they were not entitled. The ULJ said:

> I don’t think those documents you submitted are necessary. . . . [T]hose documents about the other individuals for the same or similar issues . . . [are] definitely not material to the issue [here], because the conduct at issue is not their conduct but [your] conduct, [and] your performance was not one of the reasons for the discharge. I don’t think [the performance reviews] will be relevant either.

Nothing in exhibit 11 pertains to relator’s attempt to obtain unemployment benefits for the week of July 24 or to his discharge. He was not prejudiced by the ULJ’s rejection of the exhibit.

We see no basis for overturning the ULJ’s conclusion that relator’s application for unemployment benefits during a week that he worked was misconduct.

Affirmed; motion denied.