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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0326**

Ronald G. Shellito,
Relator,

vs.

TCR Engineered Components LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed October 21, 2013
Affirmed
Larkin, Judge**

Department of Employment and Economic Development
File No. 30120811-4

Ronald G. Shellito, Pine City, Minnesota (pro se relator)

TCR Engineered Components LLC, Brooklyn Center, Minnesota (respondent)

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

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

UNPUBLISHED OPINION

LARKIN, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Relator Ronald Shellito worked for respondent TCR Engineered Components as a machinist from 2007 until 2012. In November 2011, Shellito failed to report to jail to serve a scheduled sentence. On July 21, 2012, he was arrested based on that failure, and he was incarcerated until August 6. TCR terminated his employment because he did not work his scheduled shifts while he was incarcerated.

Shellito established an unemployment-benefits account with respondent Minnesota Department of Employment and Economic Development (DEED) and applied for unemployment benefits. DEED issued a determination of ineligibility, concluding that Shellito was discharged for employment misconduct. Shellito challenged the determination. Following a telephonic hearing, the ULJ determined that Shellito was discharged for employment misconduct and was ineligible for benefits. Shellito requested reconsideration, and the ULJ affirmed the determination.

This certiorari appeal follows.

DECISION

This court may reverse or modify a 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) (quotation omitted).

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 we review 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 v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

An employer has a right to expect its employees to work when scheduled. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. App. 1984). “Absence from work under circumstances within the control of the employee, including incarceration following a conviction for a crime, has been determined to be misconduct sufficient to deny benefits.” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006). Whether an employee’s failure to report to work while incarcerated amounts to employment misconduct is a fact-based inquiry. *Id.* at 291.

Shellito argues, in essence, that the ULJ’s determination was not supported by substantial evidence because (1) TCR did not comply with its attendance policy, (2) his supervisors knew about his situation and told him that he would not be fired, and (3) co-workers were told they could keep their jobs and they were fired. He also asserts that DEED’s determination of ineligibility relied on untruthful testimony by his employer’s witnesses.

Shellito’s arguments regarding TCR’s conduct assume that if TCR had complied with its attendance policy or if his supervisors had kept their purported promises, he would not have been fired. But these arguments are irrelevant to the question of whether Shellito’s conduct constituted employment misconduct because, “the focus of the inquiry is the employee’s conduct, not that of the employer.” *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 316 (Minn. 2011). Thus, the issue here is not whether Shellito should have been discharged, but whether he is eligible for benefits. *See Brown v. Nat’l Am. Univ.*, 686 N.W.2d 329, 332 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

Moreover, Shellito's assertion that the ULJ relied on "untruthful claims" by certain TCR employees is unavailing because he does not identify any relevant fact that is in dispute. *See* Minn. Stat. § 268.105, subd. 1(c) (2012) ("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."). Shellito does not dispute that he was incarcerated because he knowingly failed to serve a scheduled jail sentence, that he therefore was unable to work during his scheduled shifts, or that TCR discharged him because of his failure to work those shifts.

The purpose of unemployment benefits is to assist workers "who are unemployed through no fault of their own." Minn. Stat. § 268.03, subd. 1 (2012). An individual whose illegal act results in his or her arrest and incarceration is at fault for a subsequent inability to report to work. *Smith*, 343 N.W.2d at 45. The evidence shows that Shellito's discharge was the result of his failure to report to work for his assigned shifts due to his incarceration. He was responsible for his unavailability for work, and that conduct amounts to a violation of the standards of behavior his employer had the right to reasonably expect of its employee.

Affirmed.