STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0331

Richard Lee Kruegel,
Relator,

vs.

All-American Co-op,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed September 30, 2013
Affirmed
Schellhas, Judge

Department of Employment and Economic Development
File No. 30333022-4

Richard Lee Kruegel, Rochester, Minnesota (pro se relator)

All-American Co-op, Stewartville, Minnesota (respondent)

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

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

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

SCHELLHAS, Judge

Relator challenges the unemployment-law judge's decision that he is ineligible for unemployment benefits due to employment misconduct. We affirm.

FACTS

Relator Richard Kruegel worked for respondent All-American Co-op for about six months until All-American terminated him from his job as a grain laborer. Kruegel applied for unemployment benefits from respondent Minnesota Department of Employment and Economic Development (DEED), stating that All-American terminated him due to a work absence caused by "incarceration." DEED determined that Kruegel was ineligible for unemployment benefits. Kruegel appealed.

After a hearing, an unemployment-law judge (ULJ) determined that Kruegel was ineligible for unemployment benefits on the basis that All-American discharged Kruegel for employment misconduct: one day's absence from work due to his incarceration and anticipated indefinite, future absences due to incarceration. Kruegel requested reconsideration, and the ULJ affirmed.

This certiorari appeal follows.

D E C I S I O N

Kruegel challenges the ULJ's determination that he committed employment misconduct rendering him ineligible for unemployment benefits. We may reverse or modify a ULJ's decision if the substantial rights of the relator may have been prejudiced

because the findings, inferences, or decision are, among other things, unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2012).

An employee is ineligible for unemployment benefits if he is discharged for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2012). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). "Whether the employee committed a particular act is an issue of fact," *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011). Whether the facts constitute employment misconduct is a question of law, which this court reviews de novo. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). An appellate court reviews "the ULJ's factual findings in the light most favorable to the decision," *Stagg*, 796 N.W.2d at 315 (quotation omitted), and we "defer to the ULJ on credibility determinations," *Wiley v. Dolphin Staffing−Dolphin Clerical Grp.*, 825 N.W.2d 121, 124 (Minn. App. 2012), *review denied* (Minn. Jan. 29, 2013).

"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." Minn. Stat. § 268.095, subd. 6(a) (2012). The ULJ concluded that Kruegel committed employment misconduct by violating "a duty to attend work" due to his incarceration, finding him to be at fault for his September 17 absence and anticipated indefinite period of future absences arising from his potential future incarceration. We agree.

"Whether an employee's absenteeism and tardiness amounts to a serious violation of the standards of behavior an employer has a right to expect depends on the circumstances of each case." *Stagg*, 796 N.W.2d at 316. "Generally, a single absence without permission from the employer may amount to misconduct." *Hanson v. Crestliner Inc.*, 772 N.W.2d 539, 543 (Minn. App. 2009). "Absence from work due to incarceration is not misconduct that will disqualify an employee on a per se basis from establishing eligibility for the receipt of unemployment compensation." *Jenkins v. Am. Exp. Fin. Corp.*, 721 N.W.2d 286, 287 (Minn. 2006). But "[c]ommitting a crime that results in a period of incarceration may be evidence that an employee lacked concern for her employment." *Id.* at 291; *see, e.g.*, *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. App. 1984) ("Smith's unavailability for work due to his incarceration amounted to disregard of attendance standards which his employer had a right to expect him to obey."). "[A]n employer cannot be expected to hold a job open indefinitely." *Winkler v. Park Refuse Serv., Inc.*, 361 N.W.2d 120, 123 (Minn. App. 1985) (quotation omitted).

Prior to Monday, September 17, 2012, Kruegel had no work-attendance issues. On September 17, he did not attend work because he was incarcerated as a result of a dispute with his girlfriend over the weekend. After Kruegel's release from incarceration the afternoon of September 17, he informed his direct supervisor by telephone of the reason for his absence from work. He was unable to inform him sooner because of his incarceration.

Kruegel's September 17 incarceration fell during "harvest time," which was All-American's "busiest time" of year. Yet, Kruegel's supervisor testified that he did not decide to terminate Kruegel until Kruegel informed him on September 17 that he did not know when he could return to work and might be incarcerated again in the future. The supervisor testified that he explained to Kruegel that he needed employees who did not anticipate indefinite periods of absences. Kruegel testified that, when he called the supervisor, he informed him that he was available to work but that the supervisor told Kruegel that he already had been replaced. The ULJ found the supervisor's testimony to be more credible than Kruegel's because it was more plausible. At the time of the hearing before the ULJ, Kruegel faced criminal charges and, in a November 14, 2012 DEED questionnaire, Kruegel stated that he likely would "plead guilty t[o a] gross misdemeanor." We defer to the ULJ's credibility determinations. *See Wiley*, 825 N.W.2d at 124.

Kruegel argues that All-American's employee handbook did not state that employees would be terminated if they were incarcerated. No record evidence supports or refutes Kruegel's assertion. Regardless, the "general rule" regarding employment misconduct requires only that an employer's policies be "reasonable," *Schmidgall*, 644 N.W.2d at 804; the general rule does not require that such policies be set forth in employee handbooks. *Cf. Stagg*, 796 N.W.2d at 316 ("[W]hether an employer follows the procedures in its employee manual says nothing about whether the employee has violated the employer's standards of behavior.").

Kruegel argues that his criminal charges "have nothing to do with employee misconduct" or his job. But "[w]hen an employee fails to appear for work, due to an unanticipated period of incarceration, that failure is likely to result in disqualification from benefits, even if the employee obviously did not intend that result and returned to work as soon as he was able to do so." *Carlson v. Dep't of Emp't & Econ. Dev.*, 747 N.W.2d 367, 374 (Minn. App. 2008) (quotation omitted); *see also Stagg*, 796 N.W.2d at 315 ("[W]e will narrowly construe the disqualification provisions of the [unemployment-benefits] statute in light of . . . the policy that unemployment compensation is paid only to those persons unemployed *through no fault of their own*." (emphasis added) (quotations omitted)). As this court observed in *Smith*:

> Smith obviously did not intend to disqualify himself for unemployment benefits by failing to pay his speeding tickets. But his incarceration for failure to pay made him unavailable for scheduled work. [Smith's employer] had the right to expect [him] to work when scheduled, and could not be expected to hold his job open indefinitely . . . .

343 N.W.2d at 45.

We conclude that Kruegel's September 17 absence from work and anticipated indefinite, future absences from work constituted employment misconduct.

Affirmed.