STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0422

Sean D. Theelke,
Relator,

vs.

Maucieri Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 22, 2008
Affirmed
Toussaint, Chief Judge

Department of Employment and Economic Development
File No. 16190 06

Sean D. Theelke, 31817 Bayshore Drive, Breezy Point, MN 56472 (pro se relator)

Maucieri Inc., 34650 County Road 3, Cross Lake, MN 56442 (respondent)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic Development, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351 (for respondent DEED)

Considered and decided by Toussaint, Chief Judge; Hudson, Judge; and Worke, Judge.

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

TOUSSAINT, Chief Judge

Relator Sean D. Theelke challenges the decision of the unemployment law judge (ULJ) disqualifying relator from receiving unemployment benefits because he engaged in employment misconduct. Relator argues that his conduct does not constitute employment misconduct because it involved a single incident that did not have a significant adverse impact on his employer and that the ULJ's findings are unsupported by the record and depend on undocumented evidence. We affirm.

D E C I S I O N

The ULJ's determination must be affirmed unless the decision derives from unlawful procedure, relies on an error of law, is unsupported by substantial evidence, or is arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (2006). An applicant for unemployment benefits is disqualified if "the applicant was discharged because of employment misconduct." Minn. Stat. § 268.095, subd. 4(1) (2006).

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 the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). But whether the act committed by the employee constitutes employment misconduct is a question of law reviewed de novo. *Scheunemann*, 562 N.W.2d at 34. We review factual findings in the light most favorable to the decision. *See Schmidgall*, 644 N.W.2d at 804. "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on

appeal." *Skarhus v. Davanni's Inc*., 721 N.W.2d 340, 345 (Minn. App. 2006).

Relator was disqualified from receiving unemployment benefits because he engaged in employment misconduct by taking an unexcused absence from his position as a restaurant chef on October 21, 2006. He argues that his absence from work does not constitute employment misconduct because it was a single incident that did not have a significant adverse impact on his employer. Employee misconduct is defined as "any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee or (2) that displays clearly a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a) (2006). But a single incident that does not have a significant adverse impact on the employer is not employment misconduct. *Id.*

Here, relator deliberately chose not to report for work without first obtaining permission from his employer despite a prior warning that another unexcused absence would result in his termination. Relator also failed to identify any compelling circumstances that would have justified his unilateral decision to absent himself from work. As the ULJ concluded, this conduct constitutes employment misconduct because an employer has a right to reasonably expect that an employee will report for scheduled work. *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984); *see also Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986) (noting that absenteeism has been recognized as evidence of misconduct and even single unexcused absence may constitute misconduct).

Relator's contention that his conduct did not have a significant adverse impact on his employer is also unpersuasive. The employer testified that relator's absence resulted in significant hardship to the restaurant because he was the only chef qualified to manage the kitchen while other employees staffed a catering event on the day in question. Therefore, his conduct did have a significant adverse impact on the employer.

Next, relator challenges the ULJ's factual determinations that he had previously taken an unexcused absence in January 2006 and that his absence on October 21 was unexcused. With regard to the previous unexcused absence, relator claims that his employer was required to provide proof from his employee file that he had been disciplined. This finding was reached by weighing the credibility of conflicting testimony from relator and his employer. The ULJ concluded that the employer's testimony was more credible because relator "confirmed that he had been counseled and advised that if there was another incident he would be discharged. It seems unlikely that there would have been such a warning if there had not been an incident leading to the warning." This determination, though unsupported by documentation, was appropriate. The rules of evidence in unemployment benefit proceedings permit any evidence that possesses probative value, whether supported by documentation or not. Minn. R. 3310.2922 (2005). With testimonial support in the record, the ULJ's factual findings on this issue are not erroneous.

Relator also contends that he did not report for work because his employer had given him permission to take Saturday off. But there is nothing in the record to support this argument. In fact, relator's own testimony contradicts this assertion. At the hearing,

relator stated, "The feeling I got was . . . it didn't matter what the reason was I had to be there on [October 21]." Relator also admitted having a discussion with his employer about the consequences of failing to report for work that day. Accordingly, we see no error in this finding.

Affirmed.