STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1024

Corey Statham,
Relator,

vs.

Capitol Beverage Sales,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed May 27, 2008
Affirmed
Worke, Judge

Department of Employment and Economic Security
File No. 4090 07

Corey Statham, P.O. Box 65180, St. Paul, MN 55165 (pro se relator)

Capitol Beverage Sales, 6982 Highway 65 NE, Fridley, MN 55432 (respondent employer)

Lee B. Nelson, Department of Employment and Economic Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101 (for respondent Department)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

WORKE, Judge

Relator challenges the decision by the unemployment-law judge (ULJ) that he was discharged for misconduct and disqualified from receiving unemployment benefits after he failed to report to work, arguing that (1) he was not a full-time employee and the employer's absentee policy applied only to full-time employees, (2) his conduct was reasonable under the circumstances and only involved a single incident, and (3) the ULJ failed to acknowledge facts set forth in his request for reconsideration. We affirm.

D E C I S I O N

This court may affirm the decision of the unemployment-law judge (ULJ), remand the case for further proceedings, or reverse or modify the decision if

> the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:
>
> (1) in violation of constitutional provisions;
> (2) in excess of the statutory authority or jurisdiction of the department;
> (3) made upon unlawful procedure;
> (4) affected by other error of law;
> (5) unsupported by substantial evidence in view of the entire record as submitted; or
> (6) arbitrary or capricious.

Minn. Stat. § 268.105, subd. 7(d) (2006).

The ULJ determined that relator Corey Statham was disqualified from receiving unemployment benefits because he was discharged for misconduct from his employment as a helper on a beer-delivery truck at respondent Capitol Beverage Sales. Whether an

employee has 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." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). In making factual findings, the ULJ must make credibility determinations, which we accord deference and review the findings in the light most favorable to the decision. *Id.* The ULJ's findings will not be disturbed when they are substantially supported by the evidence. *Id.* But whether an act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

The ULJ found that relator engaged in employment misconduct because he failed to find transportation and failed to report to work for several days. Employment misconduct is "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).

Relator challenges the ULJ's finding that he worked full time, arguing that he was a part-time employee and that Capitol's absenteeism policy applied only to full-time employees. But the ULJ's finding is supported by the record. During the telephone hearing relator's supervisor testified that relator worked full time. When the ULJ asked relator if he worked full time, relator replied, "Well, 40 hours a week." This court will not disturb the findings when they are substantially supported by the evidence. The ULJ's finding is supported by relator's supervisor's testimony, and in, making factual findings, the ULJ makes credibility determinations. *See Skarhus*, 721 N.W.2d at 344.

Therefore, we will not disturb the ULJ's finding that relator worked full time. And even if there was no absenteeism policy, an employer has a right to expect that employees will work when scheduled. *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984). Thus, whether a policy existed, relator was still required to report to work.

Relator next argues that his conduct was reasonable under the circumstances—he did not have transportation to work, and he called in to report that he would show up after his vehicle was repaired. Absenteeism as a result of circumstances within the employee's control has been recognized as employment misconduct because it demonstrates a substantial lack of concern for the employer's interests. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290-91 (Minn. 2006). Similarly, an employee's failure to give proper notice of an absence may demonstrate a lack of concern for employment that constitutes disqualifying misconduct. *Edwards v. Yellow Freight Sys.*, 342 N.W.2d 357, 359 (Minn. App. 1984). The supreme court has held that taking an unauthorized extended leave of absence is disqualifying misconduct. *Tuff v. Knitcraft Corp.*, 526 N.W.2d 50, 51 (Minn. 1995).

Here, on February 5, 2007, relator called in and said that he could not report to work because he was experiencing car trouble. On February 6, relator called in and said that his situation had not changed and he would let Capitol know when he could return to work. On February 7 and 8, relator failed to call in or report to work. On February 8, relator's supervisor called relator and told him that his conduct was unacceptable and they needed to have a discussion. Relator's supervisor told relator to call him back the next morning, but relator never called. That was the last time relator's supervisor

communicated with relator. Relator was terminated on February 20 after he missed 12 consecutive days of work and failed to call in for ten days, despite his supervisor's request that he do so. Relator's absences were a result of circumstances under his control, he failed to give proper notice, and he essentially took an unauthorized extended leave from work. Therefore, the ULJ did not err in finding that relator was discharged for employment misconduct.

Relator concedes that his absences were partially his fault, but contends that Capitol was partially at fault for moving from St. Paul, where relator lives, to Fridley. The company moved in May 2006, relator's absences began in February 2007; if the move affected relator's ability to get to work he had ample time to find alternative transportation. Moreover, Capitol's representative testified that the company would have assisted employees who had difficulty getting to work after the move. Relator never requested assistance from Capitol; however, relator concedes that he was offered rides to and from work until his car was fixed, but he declined. The ULJ did not err in determining that relator was discharged for misconduct because he failed to find transportation to work.

Relator also argues that his absences were only a single incident that did not adversely impact the employer. While it is true that "a single incident that does not have a significant adverse impact on the employer" is not employment misconduct, here, there was more than a single incident and a significant adverse impact on the employer. Minn. Stat. § 268.095, subd. 6(a). Relator received a written warning in October 2006, indicating that relator provided late notice of an absence (one-day notice), which put a

strain on Capitol because little time was left to find a replacement. Further, it was noted that relator gave little or no notice in the past and was informed that his actions would not be tolerated in the future. Additionally, it is a reach for relator to argue that being absent for more than two weeks is a single incident. Finally, relator's absences had a significant adverse impact on the employer. The record shows that Capitol has 20 routes and each route has a driver and a helper. With one of the positions vacant, the truck routes cannot proceed unless someone fills in, and typically, there is not extra staff available. An absence puts an unnecessary strain on the employer; therefore, relator's argument that it was a single incident that did not adversely impact the employer fails.

Finally, although relator argues that the ULJ failed to acknowledge facts argued in his request for reconsideration, he does not specify the information the ULJ failed to consider. In his request for reconsideration relator noted that (1) he was not a full-time employee; (2) he notified Capitol on three days, so he did not have any reason to call in after that; (3) the company relocated, making his job unsuitable; (4) when he contacted Capitol he was told that he had been discharged; and (5) he did not do anything intentional or negligent. After reconsideration, the ULJ noted that a different result was not warranted. Each argument in relator's request for reconsideration was addressed by the ULJ during the telephone hearing and by this court on certiorari review. The ULJ did not fail to acknowledge any of the arguments relator presented on request for reconsideration.

Affirmed.