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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1278**

Joseph E. Zweber,
Relator,

vs.

Commonbond Housing Corp.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 5, 2008
Affirmed
Peterson, Judge**

Department of Employment and Economic Development
File No. 2881-07

Joseph E. Zweber, 1117 Seventh Street North, Apartment 3, St. Cloud, MN 56303 (pro se
relator)

Commonbond Housing Corp., 328 Kellogg Boulevard West, St. Paul, MN 55102-1900
(respondent employer)

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

Considered and decided by Peterson, Presiding Judge; Toussaint, Chief Judge; and
Kalitowski, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this certiorari appeal from the decision of an unemployment law judge (ULJ) that relator is disqualified from receiving unemployment benefits because he was discharged for misconduct, relator argues that (1) the findings of fact are erroneous, (2) the record was not adequately developed, and (3) his actions did not constitute misconduct. We affirm.

FACTS

Relator Joseph E. Zweber worked as a caretaker for CommonBond Housing. One of his duties was to sweep and mop the laundry room, which he generally did around 6:00 a.m. This required closing the laundry room for about 15 minutes.

As relator punched in for work on Saturday, January 20, 2007, he noticed a resident in the laundry room. Relator told the resident that he would be closing the laundry room and that the resident would need to leave. Relator came back in about five minutes with some of his cleaning equipment and again told the resident that he was going to be closing the laundry room. The laundry room contained a table with two chairs, and the resident was sitting on one of the chairs. The resident began yelling that he was not going to leave. Relator began sweeping the edges of the room while the resident was screaming. Relator took one of the chairs and put it on the table and then approached the resident and told him to get up.

The parties dispute what happened next. Relator claims that he put his hand on the back of the resident's chair and the resident stood up on his own and calmly moved over.

The employer claims that a video-surveillance recording from the laundry room shows relator “forcing the [resident] out of the chair, which did endanger the [resident].”

The video recording next shows relator and the resident standing in front of a row of machines having an animated conversation. Relator testified that he asked the resident to step aside so that he could continue sweeping, but the resident said that he would not move. Relator touched the resident’s right arm with his left hand to guide the resident out of his way, and the resident then began “jumping around and he turn[ed] around and he bang[ed] on the dryer and he start[ed] screaming that, you know, I hit him.” Relator testified that he went back to sweeping, and then “all of a sudden I look up, and the [resident] is shooting across the room.” The employer contends that the video shows relator “pushing the [resident] out of the way, forcing him to move out of the way, making contact with the [resident].”

The resident left the room and called the police. An officer was dispatched and spoke with relator and the resident but took no further action.

On Monday, January 22, the employer’s site manager, who had received a complaint from the resident alleging that relator physically assaulted him, told Kyle Hanson, the employer’s regional manager, about the incident. Hanson held a meeting with relator to get his version of the incident. After the meeting, Hanson viewed the surveillance video and concluded that relator’s behavior was intimidating and violent. Hanson consulted with the human-resources department and reviewed company policies, and on January 24, told relator that his employment was being terminated.

Relator filed for unemployment benefits, and the department initially concluded that he was discharged for reasons other than employment misconduct and was not disqualified from receiving benefits. The employer appealed, and a telephone hearing was conducted. The employer argued that relator was discharged for misconduct because his behavior violated its anti-harassment/offensive-behavior policy, which prohibits “hostile, intimidating, offensive, threatening, humiliating or violent behavior.” Violating the policy can result in sanctions “up to and including immediate termination without prior corrective action or notice.” The ULJ found that relator “pulled the chair out from under the resident,” argued with the resident, and then “lunged in an aggressive manner towards the resident, touching him in the arm,” which caused the resident to “stumble[] back, pulling a chair off the table while reaching for something to hold onto.” The ULJ concluded that when relator “pulled a chair out from under a resident and then either hit or acted like he was going to hit the resident, he clearly displayed a serious violation of the standards of behavior that [the employer] had the right to reasonably expect of its employees” and that relator was discharged because of employment misconduct. The ULJ affirmed the decision on reconsideration.

D E C I S I O N

This court may affirm the decision of the ULJ; remand for further proceedings; or reverse or modify if the relator’s substantial rights were potentially prejudiced because the findings, inferences, conclusion or decision were: “(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) (Supp. 2007).

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006).

Employment misconduct means 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.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Id., subd. 6(a) (2006).

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). Factual findings of the ULJ are reviewed in the light most favorable to the decision. *Id.* This court will not disturb factual findings of the ULJ that are supported by substantial evidence. *Id.* “A decision is supported by substantial evidence when it is supported by (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002). Whether an employee’s

actions 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).

I.

Relator challenges several of the ULJ's findings of fact. The ULJ found "that the video shows [relator] pulling the chair out from under the resident." In addition to the video recording, which supports the ULJ's finding, relator testified that the resident reacted by yelling and screaming, which is inconsistent with relator's testimony that the resident agreed to get up and voluntarily relinquished the chair, but supports the finding that relator pulled the chair out from under the resident.

The ULJ also found that relator and the resident argued. Relator testified that the resident was yelling and screaming, accused relator of hitting him, banged on a machine, and threatened to call the police. Relator testified that he asked the resident several times to move, but the resident insisted that he would not. This testimony and the video recording, which shows relator and the resident standing in front of a row of machines having an animated conversation, supports the finding that relator and the resident argued.

The ULJ also found that relator took a large step toward the resident and "lunged in an aggressive manner towards the resident, touching him in the arm. The resident stumbled back, pulling a chair off the table while reaching for something to hold onto." The video recording supports the ULJ's finding.

When considered in its entirety, there is more than some evidence that relator pulled a chair out from under a resident, argued with the resident, and then shoved the

resident when he would not move. Thus, the ULJ's findings are supported by substantial evidence, and relator has failed to show that they are erroneous.

II.

“The unemployment law judge shall ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b) (2006). Under department rules, “[s]ubpoenas are available to a party to compel the attendance of witnesses, the production of documents or other exhibits upon a showing of necessity by the party applying for subpoenas.” Minn. R. 3310.2914 (2007); *see* Minn. Stat. § 268.108(a) (2006) (giving commissioner power to issue subpoenas).

Relator claims that the fact that the resident's written account of the incident is not in the record demonstrates that the ULJ failed to ensure that the relevant facts were clearly and fully developed and that he was denied a fair hearing because department staff advised him against requesting a subpoena for the written report. At the hearing, relator said that he wanted the report to see whether the resident accused him of physical assault. The ULJ assisted relator in questioning the employer on this subject.

There does not appear to be any genuine dispute that the resident accused relator of physical assault. Relator testified that during the incident, the resident began yelling that relator hit him. The record also shows that the resident called the police, and an officer was dispatched. Relator claims that he was advised not to request a subpoena for the report, but there is no evidence that department staff prevented relator from seeking a subpoena or denied a request for a subpoena. Relator did not request a subpoena from

the ULJ during the hearing. Also, the record demonstrates that the surveillance video, rather than the resident's complaint, was the determining factor in relator's termination.

Because relator never requested a subpoena, he was not denied access to evidence. Because the ULJ helped relator question the employer's witness and elicit testimony that answered his question about the resident's report, she assisted relator in developing his case. Further, evidence in the record showed that the resident accused relator of physical assault. Relator has failed to show that any procedural error or irregularity occurred that had any impact on the fairness of the proceedings or the propriety of the result.

III.

Relator argues that his conduct did not constitute employment misconduct, but his argument is based on his claim that the ULJ's findings of fact are erroneous. Relator concedes that "[i]t is only common sense that employees can not pull chairs out from under residents nor push them so hard that they fly six feet backwards."

An employer has the right to expect behavior from employees that is not violent. Because violent behavior interferes with the normal operation of a business, it constitutes misconduct

....

An employer has the right to expect its employees not to engage in conduct that seriously endangers people's safety. Accordingly, physical confrontation is generally misconduct.

Shell v. Host Int'l (Corp.), 513 N.W.2d 15, 17-18 (Minn. App. 1994) (citations omitted).

The ULJ did not err in concluding that a physical altercation that included pushing a resident was a serious violation of the standards of behavior the employer has a right to expect. While this may have been a single behavioral incident, relator's physical

confrontation with the resident had a significant adverse impact on the employer because the employer needed to address the complaint raised by the resident, which interfered with the normal operation of the employer's business. Relator has failed to show that the ULJ erred in concluding that he committed employment misconduct.

Affirmed.