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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0023**

Michael Jackson,
Relator,

vs.

Famous Dave's of America Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 8, 2009
Affirmed
Johnson, Judge**

Department of Employment and Economic Development
File No. 21076084-3

Michael Jackson, 801 Central Avenue West, St. Paul, MN 55104-4825 (pro se relator)

Famous Dave's of America Inc., c/o Unemployment Services LLC d/b/a TALX, P.O.
Box 749000, Arvada, CO 80006-9000 (respondent)

Lee B. Nelson, Department of Employment and Economic Development, First National
Bank Building, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351 (for
respondent Department)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Famous Dave's of America Inc. terminated the employment of Michael D. Jackson because of allegations of sexual harassment raised by three female co-workers. Jackson sought unemployment benefits but was deemed ineligible on the ground of employment misconduct. We affirm.

FACTS

Jackson was an assistant manager for Famous Dave's from May 2007 to July 2008, initially at a restaurant in West St. Paul and later at a restaurant in Stillwater. Upon being hired, Jackson received a copy of the employee handbook, which includes a "non-harassment policy." The policy prohibits, among other things, "unwanted sexual comments, compliments, flirtations, advances, or jokes; sexual suggestions or remarks about a person's clothing, body, or sexual activity." The policy also provides that an employee "who violates this policy will be subject to appropriate disciplinary action, which may include immediate termination."

In October 2007, Jackson was given a written warning for misbehavior during a management training course. The warning stated that he had "exhibited disrespectful and unprofessional behavior in [his] demeanor, conversations, excessive tardiness and attentiveness." The warning reminded Jackson of his obligation to comply with the company's policies and expectations and stated that future violations "will result in further disciplinary action including termination."

Jackson began working at the Stillwater restaurant in April 2008. In early July 2008, a female server, S.M., complained of sexual harassment to John Donahue, the general manager of the restaurant. According to testimony at the agency hearing, Jackson would not “leave [S.M.] alone” and was “right by her side the whole time.” Jackson told S.M. that she “looked good,” and he asked her for a photograph of herself so that he could see what she looked like before she had her baby. Jackson also told S.M. to get rid of her fiancé. When S.M. declined his advances, he asked, “What, you don’t like a black guy?”

Another female server, L.S., testified that Jackson also engaged in unwanted conduct toward her. She testified that on one occasion, he looked her “up and down” and said, “Damn.” On another occasion, she overheard him say that she was “f---ing hot” and that he would date her if he were younger.

A third female server, D.S., experienced similar treatment. She testified that Jackson told her, “You can call me handsome.” D.S. also testified that Jackson made her uncomfortable by telling her about women whom he had dated.

Famous Dave’s discharged Jackson on July 16, 2008, “due to sexual harassment allegations.” Jackson applied for unemployment benefits. The Minnesota Department of Employment and Economic Development (DEED) initially determined that he was eligible for benefits. Famous Dave’s appealed that decision. A ULJ held an evidentiary hearing on two days in September and October 2008 and later issued a written decision concluding that Jackson is ineligible for unemployment benefits because he was

terminated for employment misconduct. Another ULJ affirmed that decision upon Jackson's request for reconsideration. Jackson appeals by way of a writ of certiorari.

D E C I S I O N

I. Determination of Ineligibility

Jackson argues that the ULJ erred by determining that he is ineligible for unemployment benefits. This court reviews a ULJ's decision denying benefits to determine whether the findings, inferences, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2007). The ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination whether an employee was properly found to be ineligible for unemployment benefits based on employment misconduct is a question of law, which is subject to a *de novo* standard of review. *Id.*

The ULJ determined that Jackson is ineligible for unemployment benefits because he was discharged for employment misconduct. A discharge for employment misconduct makes a person ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). "Employment misconduct" is defined as intentional, negligent, or indifferent conduct that clearly displays either "a serious violation of the standards of behavior the employer has the right to reasonably expect" or "a substantial lack of concern for the employment." *Id.*, subd. 6(a) (Supp. 2007).

The ULJ based her determination of ineligibility on her findings that Famous Dave's discharged Jackson "because he received a warning for exhibiting unprofessional

conduct, and because Famous Dave's BBQ Shack believed that he violated the Non-Harassment Policy." Jackson does not dispute that the alleged conduct, if proven, would constitute employment misconduct. Rather, he argues that the ULJ's findings are not supported by substantial evidence. More specifically, Johnson argues that the testimony of his supervisors and co-workers at the hearing was "completely false and fabricated." The ULJ, however, found the testimony of the Famous Dave's witnesses to be "more credible than that of Jackson." In particular, the ULJ noted that D.S. and L.S. gave detailed testimony regarding Jackson's conduct toward them and toward S.M. and that Jackson's blanket denial was "unconvincing in comparison." We must "view the ULJ's factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ." *Skarhus*, 721 N.W.2d at 344 (citation omitted).

Jackson also argues that the company's real reason for his termination was his race, which is African American. Jackson raised this issue during the agency hearing, but when the ULJ asked whether he had any evidence that he was discharged because of his race, Jackson acknowledged that he had none. In connection with this issue, Jackson contends that the ULJ erred by refusing to subpoena two witnesses who, at one time, were willing to testify in support of Jackson's theory of racial discrimination but "later changed their minds." The ULJ declined to subpoena the two witnesses because Jackson conceded that neither witness had provided Jackson with any specific reasons why they believed that Jackson was terminated because of his race. A ULJ "may deny a subpoena request 'if the testimony or documents sought would be irrelevant, immaterial, or unduly

cumulative or repetitious.” *Enterprise Comm., Inc. v. Department of Employment Econ. Dev.*, 724 N.W.2d 758, 763 (Minn. App. 2006) (quoting Minn. R. 3310.2914, subp. 2 (2005)). Given Jackson’s proffer, the ULJ’s denial of the subpoena request was not erroneous.

In light of the deference owed to the ULJ’s credibility determinations, the ULJ’s finding that Jackson engaged in employment misconduct is supported by substantial evidence.

II. Fairness of Hearing Procedures

Jackson also argues that the ULJ erred by failing to ensure that the hearing was fair because the ULJ did not permit his witnesses to testify. An evidentiary hearing is “not an adversarial proceeding,” but a ULJ “must ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b) (Supp. 2007). In conducting the hearing, a ULJ has a duty to “exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing.” Minn. R. 3310.2921 (2007). A hearing generally is considered fair and even-handed if both parties are afforded an opportunity to give statements, cross-examine witnesses, and offer and object to evidence. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529-30 (Minn. App. 2007).

Jackson argues that one of his witnesses, Alby Winsink, was connected to the September 2008 telephonic hearing but was not given an opportunity to testify. But Jackson states in his brief that he did not know that Winsink was on the line during the hearing. The transcript of the hearing shows that both Jackson and the ULJ believed that Winsink was not on the line. The ULJ did not err by not giving Winsink an opportunity

to testify at the September 2008 hearing because the ULJ never was presented with a request to permit Winsink to testify.

Jackson also argues that Winsink and two other potential witnesses, Regina French and Lucy Jacobson, were connected to the October 10, 2008, telephonic hearing but were not allowed to testify. Jackson's argument is consistent with his statement at the hearing that two of his witnesses had been on the line but had to drop off the line, either because they were on cellular telephones or because they had to go to work. The witnesses apparently did not identify themselves at the beginning of the hearing, and Jackson did not inform the ULJ of their presence while they were on the line. Again, the ULJ did not err by not allowing these three witnesses to testify at the October 2008 hearing because the ULJ never was presented with a request to permit them to testify.

In any event, it does not appear that the testimony of Winsink, French, or Jacobson would have been material. Jackson does not contend that they would have contradicted the testimony of D.S. and L.S. on which the ULJ based the finding of employment misconduct. Jackson contends only that the witnesses would have testified generally to Jackson's "professionalism, character, and integrity." In light of the evidence in the record about specific incidents that brought about Jackson's discharge, the character testimony that Jackson was not able to present would not have changed the outcome of the proceeding. *See Ywswf*, 726 N.W.2d at 534 (noting that additional hearing based on new evidence not warranted unless evidence might change outcome). Thus, Jackson has not demonstrated that he was not given a fair and even-handed hearing.

Affirmed.