STATE OF MINNESOTA
IN COURT OF APPEALS
A10-210

Eli Thigpen,
Relator,

vs.

Minneapolis Club,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed September 21, 2010
Affirmed
Muehlberg, Judge[*]

Department of Employment and Economic Development
File No. 23486021-3

Eli Thigpen, Circle Pines, Minnesota (pro se relator)

Minneapolis Club, Minneapolis, Minnesota (respondent)

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

Considered and decided by Toussaint, Chief Judge; Schellhas, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

MUEHLBERG, Judge

In this certiorari appeal, relator challenges the decision by the unemployment law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for misconduct after he failed to call in or report to work for four days, despite earlier warnings regarding his attendance record, and, in the alternative, if he quit, it was not for a good reason caused by the employer. Relator challenges the latter ruling. We affirm.

FACTS

Relator Eli Thigpen was employed as a cook for the Minneapolis Club. He was late or absent four times between October 25, 2008 and June 4, 2009 and received warnings and points pursuant to the employer's attendance policy, under which employees accrue points based on attendance infractions. After his tardy arrival on June 4, his employer warned relator that further incidents could lead to additional disciplinary actions up to and including termination. Relator failed to call in or report for scheduled work on July 8, 9, 10, and 13, and, on July 15, his employer notified him that he was terminated.

Relator applied for unemployment benefits, asserting that he quit because his employer reduced his work hours. The Minnesota Department of Employment and Economic Development (DEED) issued a determination of ineligibility, finding that his claim of reduced hours was not substantiated, and ruling that relator quit without good reason caused by the employer. Relator appealed, and a hearing was held. The ULJ found that relator worked 30 or 40 hours per week depending on business needs, but that

he was discharged for misconduct after he failed to call in or report for scheduled work for four days. On reconsideration, the ULJ affirmed as to the discharge-for-misconduct determination, but also ruled that even if relator quit work, he did not do so for good reason caused by the employer. Relator brought this certiorari appeal.

D E C I S I O N

When reviewing a decision by the ULJ, this court will determine whether a party's substantial rights were prejudiced because the findings, inferences, conclusion, or decision are affected by legal error or unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d)(4), (5) (2008). Findings that have substantial support in the record will be upheld, and this court defers to the ULJ's decisions regarding witness credibility and conflicting evidence. *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006). Questions of law are subject to de novo review. *Munro Holding, LLC v. Cook*, 695 N.W.2d 379, 384 (Minn. App. 2005).

Relator seems to argue that the ULJ improperly ruled that relator had been discharged because the initial determination by DEED was that he quit. When a determination of ineligibility is appealed, DEED schedules a "de novo" evidentiary hearing before the ULJ, who is to "ensure that all relevant facts are clearly and fully developed" and to make a decision based on all the evidence. Minn. Stat. § 268.105, subd. 1(a)-(c) (Supp. 2009). In other words, the ULJ holds a new hearing, as if the decision and findings in the determination of ineligibility had never occurred. *See Black's Law Dictionary* 789 (9th ed. 2009) (defining a de novo hearing as: "A new

hearing of a matter, conducted as if the original hearing had not taken place."). Therefore, the ULJ is not bound by the initial determination of ineligibility.

We next address the ULJ's finding that relator was discharged, rather than that he quit, as relator seems to assert on appeal. "A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee's." Minn. Stat. § 268.095, subd. 2(a) (Supp. 2009). "A discharge from employment occurs when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity." Minn. Stat. § 268.095, subd. 5(a) (2008).

At the hearing, relator testified that he did not intend to quit, but he was unable to get to work because he did not live on a bus line and did not have money to pay for gas. The employer testified that if relator had called in to report his absence, he would have been subject to further discipline but would not have been terminated, that work was available for him, and that he could have retained his job. The employer discharged relator for job abandonment when he failed to call in or report for scheduled work for a period of four days. The ULJ's finding that the employer discharged relator after he did not call in or report to work for four days is supported by substantial evidence in the record and is correct as a matter of law.

The ULJ next ruled that relator was ineligible for unemployment benefits because the discharge had been for employment misconduct. An employee who is discharged for employment misconduct is not eligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008); *see id.*, subd. 6(a) (Supp. 2009) (defining misconduct).

Excessive absences and tardiness can constitute misconduct. *McLean v. Plastics, Inc.*, 378 N.W.2d 104, 106-07 (Minn. App. 1985). An employee's failure to give proper notice of absences can also constitute misconduct. *Flahave v. Lang Meat Packing*, 343 N.W.2d 683, 686 (Minn. App. 1984). The ULJ did not err in ruling that relator's failure to call in or report for scheduled work for four days, when he had received previous warnings regarding his attendance record, constitutes misconduct rendering relator ineligible for unemployment benefits.

Finally, we address relator's assertion that he quit based on reduced hours. In the initial decision, the ULJ found that relator worked approximately 30 to 40 hours per week based on business needs. On reconsideration, the ULJ, after affirming the determination that relator had been discharged for misconduct, also ruled in the alternative and in response to relator's request for reconsideration that, even if relator voluntarily quit employment due to a reduction in hours, it was not for good reason caused by the employer because the terms of his employment contemplated that his work hours would fluctuate based on business needs. There was extensive, detailed testimony at the hearing regarding the hours that relator worked during every two-week pay period from December 2008 through his discharge in July 2009, and explanations as to the hours worked, including fluctuation for business reasons, which support the ULJ's findings. In any event, the ULJ's decision that relator was discharged for misconduct is upheld and therefore the sufficiency of any grounds for a quit is irrelevant.

Affirmed.