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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-409**

David Franicola,
Relator,

vs.

Securitas Security Services USA, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 4, 2011
Affirmed
Johnson, Chief Judge**

Department of Employment and Economic Development
File No. 23357833-3

David Franicola, Minneapolis, Minnesota (pro se relator)

Securitas Security Services USA, Inc., Cincinnati, Ohio (respondent)

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

Considered and decided by Toussaint, Presiding Judge; Johnson, Chief Judge; and
Huspeni, Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Chief Judge

David Franicola was employed by Securitas Security Services USA, Inc., as a security guard. Securitas terminated his employment because he left his post while on duty to take a shower. An unemployment law judge determined that Franicola engaged in misconduct and, thus, is ineligible for unemployment benefits. We agree and, therefore, affirm.

FACTS

Franicola worked as a security guard for Securitas from April 2004 to August 2009. During the latter period of his employment, Franicola was assigned to patrol an operations center for a bank. He typically worked weekends and overnight shifts.

On August 9, 2009, Franicola filed an incident report concerning an argument with a co-worker that occurred in a locker room at the operations center as Franicola emerged from a shower. In response to the incident report, Securitas regional account manager Ben Howington watched a surveillance videotape and noticed that Franicola entered the locker room at 6:41 a.m. and left at 7:04 or 7:05 a.m. Franicola's shift ended that day at 7:00 a.m. Approximately one week later, Securitas terminated Franicola's employment because he left his post to take a shower before the end of his shift, which is a violation of company policy. The notice of termination also noted that Franicola "showed strong discourtesy towards another Securitas employee" and used inappropriate language.

Franicola applied for unemployment benefits. The Minnesota Department of Employment and Economic Development (DEED) made an initial determination that

Francicola is eligible for benefits. Securitas filed an administrative appeal of the initial determination, and an unemployment law judge (ULJ) held two evidentiary hearings in November and December 2009.

Francicola attempted to convince the ULJ that he did not take a shower while on duty. He testified that he used a restroom upon entering the locker room. He testified that another security guard contacted him on his security radio during this time and that he responded on his cell phone at 6:48 a.m. He testified that he took a one-minute shower beginning at 7:00 a.m. In his incident report describing the argument with his co-worker, Francicola wrote that he stepped out of the shower stall to dry off at 7:02 a.m. As he stepped out of the shower, Francicola encountered his co-worker, whom he feared because of a prior confrontation. Francicola testified that he and the co-worker argued for about two minutes before he dried off, dressed, and left the locker room. Upon questioning by the ULJ, Francicola agreed that he was in the locker room “from 6:41 to 7:05 or so.”

A Securitas human resources manager, Candace LeVesseur, testified that security guards may use a restroom while on duty without obtaining permission to leave their post. Both LeVesseur and Howington testified that they reviewed the surveillance video and saw Francicola entering the locker room at 6:41 a.m. Howington testified that Francicola exited the locker room at “four, five minutes after 7 a.m.” LeVesseur testified more generally that Francicola left the locker room “well past 7:00.”

In December 2009, the ULJ determined that Francicola engaged in misconduct and, thus, is ineligible for unemployment benefits. Francicola filed a request for

reconsideration. A second ULJ affirmed the first ULJ's order. Franicola appeals by way of a writ of certiorari.

D E C I S I O N

Franicola argues that the ULJ erred by determining that he engaged in misconduct and, thus, 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. *See* Minn. Stat. § 268.105, subd. 7(d) (2008). 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 is eligible for unemployment benefits is a question of law, to which we apply a *de novo* standard of review. *Id.*

The ULJ concluded that Franicola is ineligible for unemployment benefits because he was discharged for employment misconduct. An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). 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. 2009).

In this case, the ULJ found that Franicola showered while on duty. She noted the conflicting testimony but found that "the employer's version of events is more credible." The ULJ stated, "It is not plausible that it would take Franicola 18 minutes to use the

toilet, but then only 5 minutes to take a shower, argue with [his co-worker] for two minutes, dry off, get dressed, and leave the restroom.” The ULJ reasoned that “Securitas has the right to reasonably expect that its security guards will not be showering while on duty.” The ULJ found this expectation to be particularly reasonable because “Frnicola’s job duties included maintaining a physical presence on the property to deter crime, and responding quickly to emergencies.”

Frnicola challenges the ULJ’s decision on three grounds. First, Frnicola contends that he did not commit misconduct because he did not enter the shower until his shift ended at 7:00 a.m. This argument attacks the ULJ’s credibility determinations. The credibility of witnesses generally is the “exclusive province of the ULJ and will not be disturbed on appeal.” *Skarhus*, 721 N.W.2d at 345. This court will affirm a credibility determination if the ULJ’s findings are “supported by substantial evidence and provide the statutorily required reason for her credibility determination.” *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007). “When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of the case, the [ULJ] must set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c) (Supp. 2009). In this case, the ULJ set forth reasons for crediting the testimony of LeVesseur and Howington. The evidence supports the ULJ’s credibility findings. Thus, the ULJ did not err in its factual finding that Frnicola entered the shower before his shift ended at 7:00 a.m.

Second, Frnicola contends that he did not commit misconduct because showering while on duty is not explicitly prohibited by the Securitas employee handbook. This

court previously has rejected such an argument on the ground that there is “no law that requires that an employer have an express ‘policy’ regarding prohibited behavior for employees.” *Brown v. National Am. Univ.*, 686 N.W.2d 329, 333 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004). Rather, “The focus of the definition of misconduct is on standards of behavior the employer has the right to reasonably expect of the employee.” *Id.* (quotation omitted). In this case, the ULJ found that “Securitas has the right to reasonably expect that its security guards will not be showering while on duty.” The ULJ found this expectation to be reasonable because “Frnicola’s job duties included maintaining a physical presence on the property to deter crime, and responding quickly to emergencies.” This finding is supported by LeVesseur’s testimony that Frnicola was required to patrol the operations center to ensure that there were no access violations, to provide a visible security presence, and to be available in case of an emergency. Thus, the ULJ did not err by concluding that Frnicola engaged in misconduct even though his conduct was not explicitly forbidden.

Third and finally, Frnicola contends that the ULJ’s findings are lacking in evidentiary support because Securitas did not introduce the surveillance videotape into evidence during the hearing, which was conducted by telephone. Frnicola is correct that Securitas did not offer the videotape. Instead, Securitas relied on Howington’s and LeVesseur’s testimony concerning their review of the videotape.

Frnicola’s argument is based on the proposition that only the videotape itself may be admitted into evidence. *Cf. State v. Carney*, 649 N.W.2d 455, 463 (Minn. 2002) (applying “best evidence” rule to exclude criminal defendant’s testimony concerning

contents of videotape). Franicola does not cite any binding precedent supporting that proposition in an unemployment hearing, and we are unaware of any such precedent. In fact, the administrative rules applicable to hearings conducted by ULJs states, “All competent, relevant, and material evidence” may be admitted into the agency record. Minn. R. 3310.2922 (2009); *see also* Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009) (containing similar language). The ULJ may use the rules of evidence “as a guide in a determination of the quality and priority of the evidence offered.” Minn. R. 3310.2922. A ULJ’s evidentiary standards “need not conform to common law or statutory rules of evidence and other technical rules of procedure.” Minn. Stat. § 268.105, subd. 1(b); *see* Minn. R. 3310.2922 (containing similar language). In addition, a ULJ “must ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b); Minn. R. 3310.2921 (2009). To comply with this statutory requirement, a ULJ must give “both parties ample opportunity to offer testimony.” *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 824 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010). In this case, the ULJ gave both Securitas and Franicola ample opportunity to present evidence at two evidentiary hearings. More specifically, the ULJ questioned Franicola about when he was in the locker room, and Franicola agreed to the timeline recited by Howington. Thus, the ULJ did not err by allowing Securitas to introduce testimony about the videotape without introducing the videotape.

In sum, the ULJ did not err by determining that Franicola is ineligible for unemployment benefits because he engaged in employment misconduct.

Affirmed.