STATE OF MINNESOTA
IN COURT OF APPEALS
A10-800

Abdulaziz Abdi,
Relator,

vs.

Minneapolis & Suburban Bus Co., Inc.,
Respondent,
Department of Employment and Economic Development,
Respondent.

Filed January 11, 2011
Reversed
Stoneburner, Judge

Department of Employment and Economic Development
File No. 239673084

William L. Libby, St. Louis Park, Minnesota (for relator)

Minneapolis & Suburban Bus Co., Inc., Hastings, Minnesota (respondent employer)

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

Considered and decided by Toussaint, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

STONEBURNER, Judge

Relator Abdulaziz Abdi challenges an unemployment-law judge's (ULJ's) determination that he was discharged from employment for misconduct, and therefore, ineligible for unemployment benefits. Because the ULJ's determination is not supported by substantial evidence in the record as submitted, we reverse.

FACTS

Relator worked as a school bus driver for the Minneapolis & Suburban Bus Co., Inc., (the company) for more than 20 months. Relator worked five days per week transporting schoolchildren from school in the afternoon. His usual shift began at 1:45 p.m. and he was expected back at the bus terminal at 4:45 p.m. Upon returning to the terminal, drivers were allowed a few minutes to clean and refuel the bus. Relator also drove a bus that transported children to Community-Service Program (CSP) activities. The record does not clearly define the CSP schedule, but it appears that CSP transportation started at 4:45 p.m. and extended the driver's shift beyond the length of a regular shift.

The company allowed its bus drivers to stop the bus and pray, so long as the drivers deducted prayer time from their working hours for payroll purposes. It appears that drivers could pray only when there were no students on the bus. GPS records from November 19, 2009, indicate that the bus was stopped at the last location on relator's route at 4:45 p.m. and was turned off for 25 minutes at that location before the bus was returned to the terminal. Relator's timecard indicates that he checked out at 5:43 p.m..

Relator's timecard does not explain the 25-minute stop. The company terminated relator's employment for suspected payroll fraud.

Relator applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development (DEED) determined that relator was ineligible for benefits and relator appealed. Relator participated in a telephone hearing through an interpreter. Daniel Berg, the company's contract manager, appeared on behalf of the company.

Berg testified that the company had had several meetings with its "Somali drivers" to explain that drivers could stop the bus to pray, but could not be compensated for prayer time. Berg acknowledged that the drivers were not given any instructions about how to report prayer time. The ULJ asked if a driver should report prayer time by indicating on the timecard that the driver "checked out" at the beginning of prayer and "checked in" at the end of prayer. Berg stated that such a method of reporting would have been appropriate but also stated that when a driver arrived at the terminal later than expected, the driver was required to have a supervisor initial the timecard and the supervisor would ask the driver why he or she was checking out late before initialing the timecard. Berg referenced the "Explanation of Additional Time" column to the left of the column for a supervisor's initials, but did not indicate whether the driver or supervisor was responsible for providing information in this column.

Berg testified that relator should have checked out at 4:45 p.m. on November 19, but instead checked out at 5:43 p.m. But Berg, in response to questions from the ULJ, conceded that the GPS record showed that relator's last stop occurred at 4:45 p.m., that it

would take relator 25-30 minutes to return to the terminal after the last stop, and that drivers are compensated for "a few minutes" for cleaning and refueling the bus after they return to the terminal. Berg testified that company policy requires that drivers clean the busses at the terminal, but did not provide testimony about policies or consequences for cleaning the bus at another site. Berg "did not believe" that relator was required to drive the bus for a CPS activity on November 19.

Relator primarily testified through an interpreter. Relator asserted that CPS was scheduled on November 19, therefore, he did not arrive at the terminal late on that date. Relator testified that on November 19, he shut off the bus after the last stop and cleaned it, then prayed for ten minutes before returning to the terminal. Relator testified that he knew that he was not to be compensated for prayer time. Relator testified that, before returning to the terminal, he called the dispatcher and told her that he cleaned the bus and that he prayed. The dispatcher later signed his timecard. When the ULJ asked relator if he had deducted the prayer time on his timecard, relator stated, "I told the dispatcher, I say is okay and he authorized that in signing out." When the ULJ asked relator the same question again, relator answered, "I think so, I'm not sure. . . . I told [the dispatcher] that I was praying and I also deduct the time I pray from my timecard."

When pressed about where he made a deduction on the timecard, relator was nonresponsive, possibly because this colloquy appears to have occurred without the use of the translator. In another direct exchange between the ULJ and relator, the ULJ asked, "Did you tell someone that you had stopped to pray?" Relator responded, "No I didn't tell anybody." The ULJ failed to inquire into the discrepancy between this statement and

relator's earlier testimony through the interpreter stating that relator had told the dispatcher about the stop. We are unable to determine from the record whether relator's testimony was inconsistent or resulted from failure to use the interpreter.

The ULJ found that relator did not deduct prayer time from his claimed hours worked on November 19 and thereby violated the employer's reasonably-expected standard of behavior. The ULJ found that relator "confirmed that the time spent in prayer was supposed to be deducted from his timesheet," and concluded that relator's conduct constituted employment misconduct, making him ineligible for unemployment benefits.

Relator requested reconsideration and the opportunity to present additional witnesses. The ULJ declined to allow relator to present additional witnesses and affirmed the determination. The ULJ noted that relator's new evidence was inconsistent with relator's own testimony and was, therefore, unlikely to change the result. In this certiorari appeal, relator argues that there is not substantial evidence in the record to support the ULJ's findings that his conduct amounted to misconduct.

D E C I S I O N

Employment misconduct is "any intentional, negligent, or indifferent conduct that displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." Minn. Stat. § 268.095, subd. 6(a) (Supp. 2009). But conduct that an average reasonable employee would have engaged in under the circumstances is not misconduct. *Id*., subd. 6(b) (Supp. 2009). On appeal from a DEED decision, this court may affirm a ULJ's determination, 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 . . . unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d) (2008). Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether a particular act constitutes employment misconduct is a question of law, which a reviewing court examines de novo. *Schmidgall*, 644 N.W.2d at 804.

Relator argues that the record does not contain substantial evidence to support the ULJ's finding of misconduct because there is no evidence in the record showing specific expectations of the employer regarding how prayer time was to be reported. Relator also asserts that the ULJ did not address relator's undisputed testimony that he had informed the dispatcher that he had prayed for ten minutes and that the dispatcher approved relator's timecard.

The company acknowledges that no specific instructions were ever given to the drivers about recording or reporting prayer time. The timecard itself does not provide any guidance regarding deduction of prayer time from hours worked. The evidence does not support the ULJ's finding that prayer time was to be "deducted from [relator's timecard]" or the finding that relator confirmed that he was responsible for deducting prayer time on the timecard.

The only timecard in the record is relator's timecard for the week of November 16–22, 2009. Supervisor's initials appear on all but one of relator's daily time

entries. Nothing is written in the "Explanation of Additional Time" column for any day, negating Berg's implicit assertion that something should be written in that column if a supervisor's initials appear. There is no evidence in the record of how other drivers documented prayer time, and there is no evidence in the record to indicate that relator ever documented prayer time on his timecard during his 20-month employment.

On this record, we cannot conclude that substantial evidence supports the ULJ's implicit finding that a written notation by a driver on the timecard was the only acceptable method of reporting prayer time. The ULJ did not make credibility findings regarding Berg or relator. It is unclear whether the ULJ found relator's testimony stating that he reported prayer time to the dispatcher not credible or irrelevant or what evidence would support either finding. We are concerned about the quality of the interpreting and reliance on statements that appear to have been elicited from relator without the benefit of the interpreter. Because there is not substantial evidence in the record to support a determination that relator committed employment misconduct, we reverse.

Reversed.