STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1042

Charles Pahlen,
Relator,

vs.

Marvin Lumber & Cedar Co.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed January 18, 2011
Affirmed
Larkin, Judge

Department of Employment and Economic Development
File No. 24408506-3

Charles Pahlen, Warroad, Minnesota (pro se relator)

Marvin Lumber & Cedar Co., Warroad, Minnesota (respondent)

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

Considered and decided by Stauber, Presiding Judge; Wright, Judge; and Larkin, Judge.

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

LARKIN, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that he is ineligible to receive unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Relator Charles Pahlen began work as a tank operator for respondent Marvin Lumber & Cedar Company in 1996. In February 2009, Pahlen got into an argument with a coworker, D., after Pahlen informed D. that he was tired of cleaning up his messes. Following this argument, a supervisor informed Pahlen that he was required to interact with his coworkers in a civilized manner and to refrain from using abusive language.

On December 28, J., a Laotian coworker, dropped a load of lumber near Pahlen. J. then drove away in his electric cart. J. began talking with R., another coworker, and they were laughing. Pahlen approached them and told J., "Laugh you stupid m----r f-----g gook. We should've got you guys 40 years ago you slant eyed b-----d." R. tried to stop Pahlen, but Pahlen repeated the abusive language. Pahlen was discharged for violating Marvin's harassment policy, which provides that "Marvin Windows & Doors absolutely prohibits harassment and offensive behavior. This company has a zero tolerance policy towards such conduct."

Pahlen established a benefits account with the Department of Employment and Economic Development (DEED). A department adjudicator found that Pahlen was ineligible to receive unemployment benefits. Pahlen appealed this decision, and an

evidentiary hearing was held before a ULJ. The ULJ concluded that Pahlen was discharged for employment misconduct and therefore ineligible to receive unemployment benefits. Pahlen requested reconsideration of this decision, and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

Our review of a ULJ's eligibility determination is governed by Minn. Stat. § 268.105, subd. 7(d) (2008), which provides, in relevant part:

> The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:
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> . . .
>
> (4) affected by [an] error of law; [or]
>
> (5) unsupported by substantial evidence in view of the entire record as submitted[.]

Minnesota courts have defined substantial evidence as: "(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 Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct means "any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer

has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment." *Id.*, subd. 6(a) (Supp. 2009). The misconduct definitions set out in the act are exclusive and "no other definition applies." *Id.*, subd. 6(e) (Supp. 2009). "If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct . . . ." *Id.*, subd. 6(d) (Supp. 2009).

Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* This court reviews the ULJ's factual findings "in the light most favorable to the decision" and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Marvin has a policy that "absolutely prohibits harassment and offensive behaviors." The company "has a zero tolerance policy towards such conduct." An employer has a right to expect an employee to abide by reasonable policies and requests. *See Schmidgall*, 644 N.W.2d at 804 (stating that refusing to abide by reasonable policies and requests is, as a general rule, employee misconduct). The ULJ found that Pahlen made a "racially defamatory" statement to J. The ULJ concluded that this statement violated Marvin's policy against harassment and offensive behavior and displayed clearly

a serious violation of the standard of behavior that Marvin had a right to reasonably expect. We agree.

At the evidentiary hearing, R. testified that he witnessed Pahlen tell J., "[L]augh you stupid m----r f-----g gook[.] [W]e should have got you 40 years ago you slant eyed b-----d." Pahlen testified that he did not make any racially derogatory comments to J. J. did not testify at the hearing.

The crux of Pahlen's argument on appeal is that R. is not credible. Pahlen contends that the ULJ should have believed his version of the events. But the ULJ explicitly found that Pahlen's testimony was not credible. "When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2008). The ULJ's decision explains that he considered Pahlen's assertions that R. was not credible due to an incident in the past and because R. had been terminated from another job for stealing lottery tickets. But the ULJ nonetheless determined that R.'s testimony was more credible than Pahlen's. In support of this determination, the ULJ noted that R. witnessed the incident between Pahlen and J. and that R.'s testimony was consistent with his written statement. The ULJ also noted that "Pahlen admits that he referred to [J.] as a 'gook' when talking to a lead person." The ULJ adequately explained his reasons for discrediting Pahlen's testimony, and we defer to this credibility determination. *See Skarhus*, 721 N.W.2d at 344.

Pahlen further asserts that the employee handbook required J., rather than R., to file a harassment complaint. This assertion may relate to whether Pahlen was properly discharged, but it does not affect the determination regarding his eligibility for unemployment benefits. *See Brown v. Nat'l Am. Univ.*, 686 N.W.2d 329, 332 (Minn. App. 2004) ("We are not concerned with whether or not the employee should have been discharged but only with the employee's eligibility for benefits after termination of employment."), *review denied* (Minn. Nov. 16, 2004). Pahlen committed employment misconduct and is therefore ineligible to receive unemployment benefits, regardless of whether proper discharge procedures were followed.

Pahlen also contends that the harassment policy is very vague, such that "anyone can make up anything about someone and that someone would have to prove their innocence which is almost impossible without a witness to back you." Pahlen suggests that because J. did not testify, he was improperly denied the opportunity to confront his accuser. But these arguments are based on criminal-law doctrine that is inapplicable in a proceeding to determine eligibility for unemployment benefits. Further, the ULJ can consider hearsay "if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2009); *see also* Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009) (providing that the evidentiary standard in an unemployment hearing need not conform to the rules of evidence).

Lastly, a significant portion of Pahlen's brief discusses his earlier altercation with D. But the ULJ's conclusion that Pahlen engaged in employment misconduct is based on Pahlen's racially-derogatory statement to J. and not on the earlier incident between

Pahlen and D. Therefore, Pahlen's arguments regarding whether the earlier incident constituted misconduct does not affect our analysis or provide a basis for reversal. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal, an appellant must show both error and prejudice resulting from the error); *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993) (stating that the appellant bears the burden of demonstrating that error is prejudicial), *review denied* (Minn. June 28, 1993).

We find no error in the ULJ's eligibility determination and therefore affirm.

Affirmed.

Dated:

Judge Michelle A. Larkin