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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1169**

Eugene Miller,
Relator,

vs.

SDH Education West LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 16, 2009
Affirmed
Shumaker, Judge**

Department of Employment and Economic Development
File No. 20723922-3

Eugene Miller, 41 Sycamore Street West, St. Paul, MN 55117-5449 (pro se relator)

SDH Education West LLC, 10400 Fernwood Road, Bethesda, MD 20817 (respondent-
employer)

Lee B. Nelson, Minnesota Department of Employment and Economic Development,
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respondent department)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and
Collins, 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.

UNPUBLISHED OPINION

SHUMAKER, Judge

Relator contends that an unemployment-law judge (ULJ) erred in ruling that relator's employer terminated him for employment misconduct when he was absent for 45 days because he was incarcerated. We affirm.

FACTS

Respondent SDH Education West LLC, a food-service supplier, hired relator Eugene Miller in August 2007 to work full time doing salad preparation. SDH terminated Miller's employment in February or March 2008 because of excessive unexcused absenteeism.

Miller applied for unemployment benefits. An adjudicator for the Minnesota Department of Employment and Economic Development (DEED) determined that SDH had terminated Miller for employment misconduct and, therefore, he was ineligible for unemployment benefits. Miller appealed, and a ULJ held a de novo hearing and came to the same conclusion. The ULJ also denied Miller's request for reconsideration. By writ of certiorari, Miller requests that this court review the ULJ's determination that he was discharged for employment misconduct and the ULJ's refusal to reconsider the case.

The only testimony in the hearing conducted by the ULJ came from Miller. The record shows that, during Miller's interview for the job with SDH, he told the interviewing supervisor that there were outstanding warrants for his arrest and that he might have to go to jail. Because Miller had several years of food-service experience and because SDH needed workers immediately, the supervisor hired him. As to Miller's

possibility of going to jail, the supervisor said, “[W]e’ll deal with that when we get here . . . ; [I]t ain’t set in stone. I want you to know anything can happen.”

Miller received notice to appear in court on February 5, 2008. About a week before that date, he told his supervisor that he would be going to court. He reminded his supervisor on February 4 that he would be going to court the next day.

On February 5, Miller was sentenced to jail for 45 days. He was released on March 16, 2008. Miller personally had no contact with SDH while he was in jail, but his mother and his lawyer had contacted SDH “on numerous occasions.” While he was still in jail, Miller learned from his lawyer that SDH had terminated his employment.

D E C I S I O N

The ULJ ruled that Miller was terminated from his job because of employment misconduct, specifically excessive unexcused absenteeism. Whether an employee has committed employment misconduct is a mixed question of fact and law. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). If a ULJ’s determination prejudiced the substantial rights of a relator because it was “unsupported by substantial evidence” or based on an “error of law,” considering the entire record, we may reverse that determination. Minn. Stat. § 268.105, subd. 7(d) (2008).

“Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job (1) 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 (Supp. 2007).

The material facts, as disclosed during the ULJ's hearing, are not in dispute. They reveal that Miller told his supervisor during the employment interview that he might eventually have to go to jail and that his supervisor stated that he would address that problem when it occurred and that "anything can happen." The supervisor made neither an oral nor written promise that Miller's job would be held for him if he went to jail, but Miller hoped it would be held.

By the time Miller was released, the supervisor who hired him was no longer with SDH, and a different supervisor indicated to Miller, his mother, and his lawyer that Miller had been terminated.

When an employee misses work because of incarceration, ordinarily his absenteeism is deemed to be his own fault and to constitute employment misconduct. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45-46 (Minn. App. 1984). Such absenteeism is a violation of behavioral standards an employer is entitled to expect of employees. *Id.* at 45.

In *Smith*, the relator was arrested for failure to pay a fine. *Id.* at 44. He notified his employer as soon as he was taken into custody and was absent for three days. *Id.* at 45. Unlike Miller, Smith had a record of unexcused tardiness and absences, but his incarceration and absence from work during the incarceration were held to be sufficient employment misconduct to render him ineligible for unemployment benefits.

Although Miller's employment record with SDH prior to his incarceration does not show absenteeism, his 45 days of absences without permission from his employer constitutes a serious violation of employment standards and is employment misconduct.

Under some circumstances, absenteeism because of incarceration will not constitute employment misconduct. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286 (Minn. 2006). In *Jenkins*, the employer gave assurances to the employee that, despite her prospective incarceration, she would continue to have a job and that the employer would verify her employment so that she could obtain work release. *Id.* at 288. The employer failed to verify the employee's employment and she was not granted work release. *Id.* The employer notified her that if she did not report to work, the employer would assume that she had voluntarily resigned. *Id.* But lacking verification of her employment, she could not come to work because she was incarcerated. *Id.* When she applied for unemployment benefits, DEED determined that her absenteeism was employment misconduct, making her ineligible for benefits. *Id.* at 288-89. The supreme court held that the unique facts of the case did not support a finding of employment misconduct because the employer had promised to verify employment so that the employee could come to work and the employer failed to keep that promise. *Id.* at 292-93.

The instant case does not reveal unique facts similar to those in *Jenkins*. The record clearly shows that SDH never promised that Miller's job would be held for him but rather indicted that "anything can happen." The record supports the ULJ's determination that Miller was discharged for employment misconduct.

Miller requested reconsideration. The ULJ declined to reconsider his decision because Miller failed to "show good cause" why additional evidence was not submitted at the ULJ's hearing. The new evidence appears to be Miller's speculation that he was terminated because SDH lost its food-service contract with the organization at which

Miller was working; a hearsay statement that a payroll clerk said that Miller was terminated on February 12, rather than on March 7, as found by the ULJ; and Miller's testimony that, at the time he was hired, his supervisor told him that, if he were incarcerated, he could use vacation time and other benefit time to prevent the incarceration period from counting as an absence.

To obtain a reconsideration of a ULJ's decision not to hold an additional hearing because of new evidence, the relator must show good cause as to why the evidence was not submitted during the ULJ's hearing and why the new evidence would likely have changed the outcome of the case. Minn. Stat. § 268.105, subd. 2(c) (Supp. 2007). Information that was available before the ULJ's evidentiary hearing but was not submitted cannot be the basis for reconsideration. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 534 (Minn. App. 2007). We defer to the ULJ's decision not to hold an additional hearing. *Id.* at 533.

Miller testified that he, his mother and his lawyer all had contacts at various times with SDH before the ULJ's hearing. Miller failed to show good cause as to why he did not present the allegedly new evidence during the hearing and failed to show that such evidence was unavailable. Thus, the ULJ did not err in declining to reconsider his decision.

Affirmed.