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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1261**

Brad Erickson,
Relator,

vs.

Red Lake Gaming Enterprises, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 9, 2011
Affirmed
Minge, Judge**

Department of Employment and Economic Development
File No. 25054484-3

Alan B. Fish, Alan B. Fish, P.A., Roseau, Minnesota (for relator)

Red Lake Gaming Enterprises, Inc., Red Lake, Minnesota (respondent employer)

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Considered and decided by Minge, Presiding Judge; Johnson, Chief Judge; and
Crippen, Judge.*

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

UNPUBLISHED OPINION

MINGE, Judge

In this certiorari appeal, relator Brad Erickson challenges the determination by an unemployment law judge that he is ineligible for unemployment benefits because he committed both employment misconduct and aggravated employment misconduct. Based on his duties as an employee of a gaming casino, Erickson was required to hold a gaming license. Due to pending criminal charges and failure to keep the licensing commission informed of the status of the criminal proceedings, the commission suspended Erickson's gaming license. Thereafter, Erickson's employer suspended him for failure to maintain his gaming license. We conclude that Erickson engaged in both employment misconduct and aggravated employment misconduct and affirm.

FACTS

Red Lake Gaming Enterprises (Enterprises) operates several casinos. Beginning in 2001, Enterprises employed Erickson as a "drop team" supervisor who oversaw the accounting of money gambled within one of its casinos. This position required that Erickson hold a gaming license issued by the Red Lake Gaming Commission (Commission), a regulatory entity independent of Enterprises and its casino operations.

In March 2010, the Commission learned that gross misdemeanor criminal charges had been brought against Erickson based on an incident in 2008. The Commission immediately suspended Erickson's license and notified Enterprises of this action. Because Erickson had been on vacation, he was initially unaware of the charges. Surprised by the criminal proceedings, he protested the license suspension. The

Commission restored his gaming license. However, on April 1, 2010, after further reviewing the charges and after Erickson failed to report the results of a plea hearing, the Commission again suspended Erickson's gaming license. This action was based on the seriousness of the charges and Erickson's failure to report the outcome of a court appearance within 72 hours. Subsequently, Enterprises suspended Erickson indefinitely for failure to maintain a gaming license required for employment within the casino.

Erickson applied for unemployment benefits. The Minnesota Department of Employment and Economic Development (DEED) denied his application. Erickson sought review of the denial by an unemployment law judge (ULJ). At the evidentiary hearing, the ULJ questioned Erickson regarding the facts surrounding his criminal charges. Erickson admitted to transmitting a video of himself masturbating to a person claiming to be a minor. Erickson denied that his actions were a criminal offense on the ground that the recipient of the video was not a minor, but an adult law enforcement officer posing as a minor.

The ULJ found that Erickson's suspension was due to the severity of the charges against him and his failure to keep the Commission informed as to the status of his pending charges. The ULJ also found that Erickson had a sexually explicit conversation over the Internet with a police officer posing as a minor and, via webcam, exposed himself masturbating. The ULJ determined that Erickson was ineligible for unemployment benefits because he committed both employment misconduct and aggravated employment misconduct by losing his gaming license, a requirement for

employment, when he committed acts giving rise to the gross-misdemeanor charge of attempted fifth-degree criminal sexual conduct. This certiorari appeal followed.

DECISION

I.

The first issue is whether the ULJ erred in determining that Erickson engaged in employment misconduct, rendering him ineligible for unemployment benefits. Employment misconduct is defined as any intentional, negligent, or indifferent conduct, on or off the job, that clearly displays either (1) a serious violation of the behavioral standards the employer has a right to reasonably expect; or (2) a substantial lack of concern for the employment. Minn. Stat. § 268.095, subd. 6(a) (2010). When an employee engages in intentional, negligent, or indifferent conduct that results in the loss of a license necessary for the performance of his job duties, his actions constitute employment misconduct. *Markel v. City of Circle Pines*, 479 N.W.2d 382, 385 (Minn. 1992) (concluding that misconduct occurred when a city utility worker lost his driver's license after conviction of DWI); *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 823 (Minn. App. 2010) (concluding employment misconduct occurred when an employee failed to pay child support, resulting in a suspension of his driver's license, rendering him unable to continue employment as a truck driver). An applicant discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2010).

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 the employee committed a particular act is a question of fact.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Factual findings are reviewed in the light most favorable to the decision and will not be disturbed when the evidence substantially sustains them. *Id.* The ULJ makes findings of fact based on a “preponderance of the evidence.” Minn. Stat. § 268.105, subd. 1(b) (2010). Whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Skarhus*, 721 N.W.2d at 344.

The ULJ found that Erickson had to have a gaming license to keep his job, was aware that any criminal act could endanger his licensure, and yet engaged in reckless and negligent conduct by transmitting lewd webcam images of himself. The record is adequate to support the ULJ’s findings. Enterprises’s employee handbook states that a gaming license is required for employment and all employees are subject to background checks. Further, Erickson admitted to the distribution of lewd material over the Internet, conduct that could jeopardize his gaming licensure and therefore his employment.

Citing *Jenkins v. Am. Express Fin. Co.*, Erickson argues that a criminal act cannot be employment misconduct as a matter of law. 721 N.W.2d 286 (Minn. 2006). In *Jenkins*, the employee was convicted of assault and sentenced to 30 days in jail with work-release privileges. *Id.* at 288. The employer had agreed to cooperate in qualifying the employee for work release. *Id.* However, the employer failed to cooperate and, when the employee was unable to report to work, discharged her. *Id.* In this context, the supreme court concluded that missing work due to being in jail was not employment misconduct as a matter of law. *Id.* at 290. Nothing in the record indicates that

Enterprises represented that Erickson would be able to work without a gaming license or failed to cooperate in steps that would enable Erickson to reclaim his gaming license and resume working. *Jenkins* is not applicable to Erickson’s situation.

The ULJ found, by a preponderance of the evidence, that Erickson lost his gaming license, a necessity for employment, due to negligent conduct. Because this finding is supported by substantial evidence, we affirm the ULJ’s decision that Erickson committed employment misconduct.

II.

The second issue is whether the ULJ erred in determining that Erickson engaged in aggravated employment misconduct, thereby cancelling his wage credits from employment at Enterprises. Aggravated employment misconduct is defined as the commission, on or off the job, of any act that would amount to a gross misdemeanor or felony, provided the act either (1) substantially interfered with the employment; or (2) had a significant adverse effect on the employment. Minn. Stat. § 268.095, subd. 6a(a) (2010).

The ULJ found that Erickson committed acts constituting the elements of attempted fifth-degree criminal sexual conduct, a gross misdemeanor.¹ Substantial evidence in the record supports this finding. Although Erickson admitted transmitting webcam images of himself masturbating to someone claiming to be a minor, Erickson

¹ See Minn. Stat. §§ 609.3451, subd. 1(2) (2010) (gross misdemeanor if a person “engages in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present”), .17, subd. 1 (2010) (attempt).

argues that, because the recipient of his video actually was not a minor, there was no crime and his conduct could not be employment misconduct. The ULJ did not err in rejecting this argument. The admitted conduct was a substantial step toward completion of the crime, and impossibility is not a defense unless it was clearly evident that the commission of the crime was not possible. *See* Minn. Stat. § 609.17, subd. 2 (2010).

Further, the ULJ found that Erickson's loss of his gaming licensure had a significant adverse effect on his employment. Substantial evidence also supports this finding. Enterprises's representatives testified that they had no choice but to suspend Erickson indefinitely after the loss of his gaming licensure. Erickson admits he cannot work without a gaming license. Because substantial evidence in the record supports the ULJ's determination that Erickson's conduct would amount to a gross misdemeanor and had a significant adverse effect on his employment, we affirm the ULJ's decision that Erickson committed aggravated misconduct.

III.

Erickson submitted four alternative arguments in his brief and during oral argument. We address each in turn.

First, Erickson argues that the facts surrounding his pending criminal charges should not be considered when determining whether his conduct constituted aggravated employment misconduct. He argues that he is "innocent until proven guilty" and that inquiry into the criminal charges exceeded the scope of the ULJ's authority. A ULJ is required to "ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b). A ULJ can receive "any evidence that possesses probative value,

including 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). The ULJ makes findings of fact based on a preponderance of the evidence. Minn. Stat. § 268.105, subd. 1(b). The ULJ inquired into the facts surrounding Erickson’s pending criminal charges apparently to determine whether Erickson’s intentional conduct led to bona fide criminal charges and whether Erickson had been mistakenly charged. When Erickson admitted to transmitting webcam images of himself masturbating to someone claiming to be a minor, he supplied reliable, material, and relevant evidence that was the basis for bona fide charges that created a situation constituting aggravated employment misconduct.

Second, at oral argument, Erickson argued that the ULJ did not have substantial evidence indicating the Commission and Enterprises were separate and independent entities. The record, however, indicates that the ULJ did inquire into the nature of the Commission and found that it was an independent entity. Two employees of Enterprises testified at the evidentiary hearing that the Commission was a separate organization and that Enterprises had to follow whatever determination the Commission made regarding licensure. Erickson supplied no evidence refuting this claim and did not address the issue in his brief. The ULJ had substantial evidence in the record to support the finding, and we do not disturb it.

Third, Erickson appears to argue that the Commission’s actions revoking his gaming licensure were arbitrary or unreasonable. The Commission is an independent entity entitled to make decisions regarding gaming licensure. It is not a party to this

proceeding, and we are not reviewing its decision. Further, the ULJ's inquiry revealed that the Commission did not make a mistake as to Erickson's identity when it chose to suspend his licensure. Erickson also failed to report the result of his plea hearing and he admitted to the facts surrounding his criminal charges. We note that when Erickson failed to meet the Commission's criteria for maintaining licensure, he provided the Commission with cause to suspend and/or revoke his gaming license.

Fourth, Erickson argues that, because Enterprises only suspended him and did not terminate him, his conduct was not serious enough to constitute employment misconduct. Erickson appears to claim that until terminated, there was not employment misconduct that would disqualify him for unemployment benefits. However, even a suspension without pay can signify that employment misconduct occurred. Here, temporary loss of his gaming license meant Erickson could no longer work in his position at the casino. Because Erickson was ineligible to be an employee, there was disqualifying misconduct. Again, on this record, we do not go behind the decision-making process of the Commission absent some showing of duplicity or bad faith.

Because substantial evidence confirms the ULJ's findings that Erickson committed employment misconduct and aggravated employment misconduct, we affirm.

Affirmed.

Dated: