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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2008**

John Battle,
Relator,

vs.

American Indian Community Development Corp.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 2, 2012
Affirmed
Wright, Judge**

Minnesota Department of Employment and Economic Development
File No. 28406419-3

John Battle, Richfield, Minnesota (pro se relator)

American Indian Community Development Corp., Minneapolis, Minnesota (respondent)

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

Considered and decided by Ross, Presiding Judge; Wright, Judge; and Muehlberg,
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UNPUBLISHED OPINION

WRIGHT, Judge

In this certiorari appeal from the denial of unemployment benefits, relator argues that the unemployment law judge (ULJ) erred by concluding that relator was discharged for employment misconduct and is, therefore, ineligible to receive unemployment benefits. Relator also contends that the ULJ erred by not permitting him to present surveillance-video evidence or a closing argument, by admitting hearsay evidence, and by reaching an unfair decision. We affirm.

FACTS

Relator John Battle worked full-time as a health care assistant for American Indian Community Development Corporation (AICD), a medical detox facility, from February 15, 2005 until he was discharged on August 11, 2011. Battle's job duties included admitting clients, providing them meals, and monitoring and reporting their vital signs. On February 24, 2011, Battle left work 15 minutes before the end of his scheduled shift without notifying his supervisors. Based on this incident, Battle's supervisor gave Battle a written warning advising him that his early departure constituted a "class III" violation of AICD's policy and procedures and that a future violation would result in his discharge.

On August 3, 2011, Battle asked a coworker to assist him with a work-related task. The coworker told Battle to "get the f**k out" of his face and walked into the employee break room. Battle followed the coworker and asked him again for assistance. This time the coworker pushed Battle and again shouted "get the f**k out of my face." This

conduct prompted Battle to shout that the coworker was “in trouble now.” Other employees overheard this altercation and entered the break room. One of the other employees held back the coworker, who appeared to be preparing to hit Battle. Both Battle and the coworker continued to shout at each other, and Battle moved into a defensive stance with his hands in front of his face. The entire altercation lasted between one and two minutes, after which Battle and the coworker returned to work in their respective workspaces. Later that day Battle’s supervisor questioned Battle, the coworker, and other employees regarding the altercation and subsequently sent Battle and the coworker home. On August 11, 2011, AICD discharged Battle for accruing two “class III” offenses.

Battle applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development determined that Battle is ineligible to receive unemployment benefits because he was discharged for employment misconduct. Battle appealed. Near the end of the telephonic hearing that followed, Battle’s telephone became disconnected from the call and the ULJ was unable to contact him after two attempts. The ULJ ended the hearing without permitting closing arguments from either Battle or the employer. After the hearing, the ULJ concluded that Battle is ineligible to receive unemployment benefits because he was discharged for committing employment misconduct. Following Battle’s request for reconsideration, the ULJ affirmed the decision. This certiorari appeal followed.

DECISION

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the conclusion, decision, findings, or inferences are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2010).

I.

Battle argues that the ULJ erred by concluding that 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) (2010). Employment misconduct is “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) (2010). 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). A ULJ’s factual findings are reviewed in the light most favorable to the decision and will not be disturbed on appeal if there is evidence that reasonably tends to sustain those findings. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

An employee commits employment misconduct when the employee engages in conduct that evinces the employee's intent to ignore or pay no attention to the standards of behavior the employer has a right to expect. *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004) (citing *Houston v. Int'l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002)), *review denied* (Minn. Mar. 30, 2004). A knowing violation of an employer's directives, policies, or procedures constitutes employment misconduct because it demonstrates a willful disregard of the employer's interests. *Schmidgall*, 644 N.W.2d at 804, 806-07.

Battle challenges the validity of the warning he received from AICD regarding his early departure from work in February 2011. An employer may establish and enforce reasonable rules governing employee absences. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). An employer also "has a right to expect an employee to work when scheduled." *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984), *superseded by statute on other grounds*, Minn. Stat. § 268.095, subd. 6(e) (Supp. 2007). The record reflects, and Battle does not dispute, that on February 24, 2011, Battle left work before the end of his scheduled shift without notifying his supervisor, which left no staff in AICD's triage area. Battle's early departure constituted a violation of AICD's policy and jeopardized AICD's detox-facility licensure, which requires a particular ratio of staff to clients. Although Battle contends that AICD issued the warning to "cover up" the termination of another employee for leaving early, the manner in which another employee is disciplined for violating the same policy or procedure is not dispositive of whether Battle's conduct constitutes employment

misconduct. *See Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986). Therefore, Battle's argument on this ground is unavailing.

Battle also challenges the ULJ's conclusion that his actions on August 3, 2011, constitute employment misconduct. The ULJ found that Battle argued loudly and assumed a fighting stance, which violates AICD's policy against "harassing and threatening behavior." The record sustains the ULJ's findings. AICD's policy prohibits "work-place violence," including verbal threats or harassing, threatening, or intimidating behavior. This prohibition is intended to protect AICD's vulnerable-adult clients and its staff in a setting where detox clients may become violent. The record establishes that Battle received and signed a written warning for violating this policy in October 2007. This warning describes the policy and the consequences for multiple violations of the policy. Battle testified that he shouted at a coworker during the August 2011 altercation, and his supervisors testified that Battle loudly argued with the coworker, which attracted the attention of several other employees. The uncontroverted evidence also establishes that Battle braced his legs and moved his hands in front of his face, which Battle explained is a normal defensive stance from his experience as a boxer.

Battle asserts that he was not the aggressor and that he did not use foul language or engage in physical or violent conduct. And the ULJ's findings do not address these facts. But accepting these assertions as true, Battle did not withdraw from the hostile situation despite ample opportunity. Rather, Battle's conduct escalated and prolonged the altercation until other employees physically intervened. Because an employer has the

right to expect an employee to act professionally and refrain from inappropriate threatening or intimidating behavior, Battle's conduct constitutes a serious violation of the standards of behavior that AICD has the right to expect of its employees. *See* Minn. Stat. § 268.095, subd. 6(a)(1). In light of previous warnings from Battle's supervisor that an additional "class III" violation would result in his discharge, Battle's conduct also displayed a substantial lack of concern for the employment. *See id.*, subd. 6(a)(2).

Accordingly, the ULJ correctly concluded that Battle is ineligible to receive unemployment benefits because he was discharged for employment misconduct.

II.

Battle also argues that the ULJ erred by not permitting him to present surveillance-video evidence or a closing argument, by admitting hearsay evidence, and by reaching an unfair decision. We address each of these arguments in turn.

A.

Battle contends that the ULJ should have permitted him to obtain and present surveillance-video evidence of the August 3, 2011 altercation. A ULJ

must give full consideration to a request for a subpoena and must not unreasonably deny a request for a subpoena. If a subpoena request is initially denied, the [ULJ] must, on the [ULJ's] own motion, reconsider that request during the evidentiary hearing and rule on whether the request was properly denied.

Minn. Stat. § 268.105, subd. 4 (2010). Battle did not formally request a subpoena for AICD's internal surveillance video. However, Battle submitted a letter to the ULJ before the hearing explaining that AICD had refused his request for a copy of the surveillance

video. Although Battle's supervisor was permitted to testify as to the contents of the surveillance video, which she had viewed and Battle had not, the ULJ did not address Battle's letter or the surveillance video either before or during the hearing.

Assuming, without deciding, that the ULJ erred by not considering and ruling on Battle's implicit request, we conclude that such error was not prejudicial. "[E]rror without prejudice is not [a] ground for reversal." *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (quotation omitted). We reach this conclusion because the surveillance video would have been cumulative of Battle's testimony, which the ULJ adopted and which supports the ULJ's conclusion that Battle committed employment misconduct. Battle does not contend that the surveillance video would differ from or expand on his first-hand account. Therefore, he is not entitled to relief on this ground.

B.

Battle also asserts that the ULJ erred by not permitting him the opportunity to present a closing argument at the hearing after his telephone became disconnected. A ULJ must ensure that all relevant facts are fully developed, but has "discretion regarding the method by which the evidentiary hearing is conducted." Minn. Stat. § 268.105, subd. 1(b) (2010). In exercising its discretion, the ULJ "must exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2011). The record reflects that Battle's telephone became disconnected at the conclusion of the evidentiary portion of the hearing but before either party presented a closing argument. After two unsuccessful attempts to contact Battle, the ULJ ended the

hearing without any further evidence or argument. The record does not demonstrate that these circumstances afforded the employer an unfair advantage, and Battle does not identify any additional information he would have presented had his telephone not become disconnected. Moreover, Battle's inability to present a closing argument did not prejudice him. Indeed, the ULJ's findings are consistent with Battle's testimony and amply support the ULJ's decision. In addition, Battle exercised his right to challenge the ULJ's decision in his motion to reconsider. Accordingly, Battle is not entitled to relief on this ground.

C.

Battle challenges his supervisor's testimony regarding other employees' statements following the August 2011 altercation. He specifically questions the absence of direct testimony from these witnesses. This argument is grounded in the rules of evidence that limit the admission and use of hearsay testimony. But the rules of evidence are not applicable in unemployment-insurance hearings before a ULJ. Minn. Stat. § 268.105, subd. 1(b) (providing that unemployment-insurance hearings need not conform to common law or statutory rules of evidence); Minn. R. 3310.2922 (2011) (providing that ULJ "may receive any evidence that possesses probative value, including hearsay"). Moreover, the ULJ's findings are amply supported by testimony from Battle and other non-hearsay evidence. Therefore, Battle's challenge on this ground fails.

Affirmed.