

No. A06-677

State of Minnesota
In Court of Appeals

DANIEL P WICHMANN,

Relator,

vs.

TRAVALIA & US DIRECTIVES INC,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

LISA HOLLINGSWORTH
SOUTHERN MINNESOTA REGIONAL
LEGAL SERVICES
15815 FRANKLIN TRAIL SE SUITE 309
PRIOR LAKE, MINNESOTA 55372
(952) 440-1040
Attorney for Relator

TRAVALIA & US DIRECTIVES INC
2920 220TH STREET EAST
PRIOR LAKE, MINNESOTA 55372-8879
(952) 447-2272
Respondent- Employer -Pro se

Lee B Nelson (#77999)
Linda A. Holmes (#027706X)
MINNESOTA DEPARTMENT OF EMPLOYMENT
AND ECONOMIC DEVELOPMENT
1ST NATIONAL BANK BUILDING
332 MINNESOTA STREET, SUITE E200
ST. PAUL, MINNESOTA 55101-1351
(651) 282-6216
Attorneys for Respondent-Department

TABLE OF CONTENTS

I.	LEGAL ISSUE.....	1
II.	STATEMENT OF THE CASE	1
III.	STATEMENT OF FACTS	2
IV.	ARGUMENT	5
	A. SUMMARY OF ARGUMENT	5
	B. STANDARD OF REVIEW	5
	C. EMPLOYMENT MISCONDUCT.....	7
V.	CONCLUSION	15
	APPENDIX.....	16

TABLE OF AUTHORITIES

CASES

<i>Colburn v. Pine Portage Madden Bros., Inc.</i> , 346 N.W. 2d (Minn. 1984)	6
<i>Houston v. International Data Transfer Corp.</i> , 645 N.W. 2d (Minn. 2002)	7
<i>Lolling v. Midwest Patrol</i> , 545 N.W. 2d (Minn. 1996)	6
<i>Scheunemann v. Radisson South Hotel</i> , 562 N.W. 2d (Minn. App. 1997)	6
<i>Schmidgall v. FilmTec Corp.</i> , 644 N.W. 2d (Minn. 2002)	6

STATUTES

Minn. Stat. § 268.095, subs. 4 and 6 (2004)	7
Minn. Stat. § 268.105, subd. 7(a) (2004)	2
Minn. Stat. § 268.105, subd. 7(d) (Supp. 2005)	6

OTHER AUTHORITIES

Laws 2003, 1 st Sp. Session, ch. 3, art. 2, sec. 13	7
Laws 2004, Ch. 183, sec. 64	7

RULES

Minn. R. Civ. App. P. 115	2
---------------------------	---

I. LEGAL ISSUE

Employees whose conduct shows a serious violation of the employer's reasonable expectations, or whose conduct shows a substantial lack of concern for their employment, are disqualified from receiving unemployment benefits. Daniel P. Wichmann was discharged after repeatedly failing to care for the horses he was expected to care for, or to provide notice of his absence so that arrangements could be made for the shift to be covered. Is Wichmann disqualified from receiving benefits?

II. STATEMENT OF THE CASE

This case involves whether Relator Daniel P. Wichmann is entitled to unemployment benefits. Wichmann established a benefit account with the Minnesota Department of Employment and Economic Development. A department adjudicator initially determined that Wichmann was discharged from employment with Travalia & US Directives Inc. for employment misconduct and so was disqualified from receiving benefits. (D1)¹ Wichmann appealed that determination, and a de novo hearing was held. A department unemployment law judge affirmed the initial determination. (Appendix to Department's Brief, A3-A6) Wichmann filed a request for reconsideration with the unemployment law

¹ Transcript references will be indicated as "T." Exhibits in the record will be "D" for the department, with the number following.

judge, and the unemployment law judge issued an order affirming the decision.
(Appendix, A1-A2)

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Wichmann under Minn. Stat. § 268.105, subd. 7(a) (2004 and Supp. 2005) and Minn. R. Civ. App. P. 115.

III. STATEMENT OF FACTS

Daniel P. Wichmann worked as stable manager at the Minnesota Horse & Hunt Club from May 10, 2003 until November 23, 2005. (T.13) In addition to receiving an hourly wage, Wichmann received lodging and lived on the premises of the club. (T.13) The owner, Kathy Urseth, managed day-to-day operations at the barn. (T.4) The general manager was Terry Correll. (T.7)

One of Wichmann's responsibilities was to feed, water, and turn out the horses in the morning. (T.15) It's very important for horses to be kept on a regular schedule. (T.15) In the winter, caring for them promptly in the morning is even more important, because they are brought indoors by dark each evening, so by the time morning arrives, they have been locked in stalls without food or extra water for a long period, and must be tended to promptly. (T.17) The horses were usually finished being fed and turned out by 7:30 at the latest. (D8, p.2) Because of the importance of caring for the horses as scheduled, Wichmann knew that it was important that if he could not do his work for any reason, he called to let someone know so that his shift could be covered. (T.17)

On the morning of November 7, 2005, Urseth drove by the stable at 8:00 AM and saw that the horses had not been fed, watered, or turned out, and that Wichmann was not there. (D8, p.1) She visited the trailer house on the premises where he lived, but he was not there, and she had no idea where he was. (D8, p.1) She made repeated attempts to find him, but could not, and had to leave herself. She later received word from others that he arrived at approximately 1:00 PM. (D8, p.1) Wichmann later claimed, by writing in by hand on his time card rather than using the time clock, that he had arrived at work at 5:00 AM and worked until 3:00 PM, for a total of ten hours.

On the morning of November 16, 2005, Urseth again drove by the stable at around 8:00 AM, and again, the horses had not been cared for and Wichmann was not there. (D8, p.2) This time, when she went to the trailer house, she saw his car, so she pounded on the door for about five minutes until he finally woke up and came to the door. (D8, p.2) To her shock, Wichmann had essentially demolished a portion of the interior of the trailer home, knocking out a support wall and making a large mess. (D8, p.2) He referred to the project as “remodeling” and told Urseth he had wanted to “surprise” her. (D8, p.2) She told him to go and take care of the horses immediately, and she told him that this could not happen again. (D8, p.2) Wichmann assured her it would not happen again. (D8, p.2)

The next day, November 17, 2005, Wichmann punched in and started work at 5:54 AM. (D8, p.2)

The next morning, November 18, 2005, Urseth again drove by the stable at about 8:15 and saw that the horses had not been cared for. (D8, p.3) This time, it took approximately ten minutes for Wichmann to answer the door. (D8, p.3) When he finally did, she told him to go and care for the horses immediately. (D8, p.3) He apologized again and told her that it would not happen again. (D8, p.3)

On November 21, 2005, Wichmann arrived in the morning and fed the horses, but then vanished without giving any notice to anyone and was not around for the rest of the day. (D8, p.3)

On November 22, 2005, yet again, Urseth found that the horses had not been cared for when she was leaving for work, so once again, she pounded on the door of the trailer house until Wichmann woke up and came to the door. (D8, p.4) He looked terrible, and she asked him to at least get up and feed the horses, which he said he would do. (D8, p.4) She also asked him to feed the horses the following morning, because another employee who had been expected to take care of them that day had walked off the job citing poor treatment by Wichmann, so he needed to take care of the horses. (D8, p.4) Wichmann promised to care for the horses the following morning. (D8, p.4)

The next morning, at approximately 8:00 AM, the horses had not been fed as Wichmann agreed he would do. (D8, p.4) She pounded on the door until he got up. (D8, p.4) He was angry at her for waking him up, and he protested that he was "supposed to be on vacation." (D8, p.4) She reminded him that he had agreed to feed the horses. (D8, p.4) As she was driving to work, Urseth received a voice

mail message from Wichmann on her cell phone that said, "So I'm just your puppet now? You put me where you want me? That shit isn't going to fly, Miss Kathy." (D8, p.4) Because of the ongoing problems with Wichmann's neglect of his job, as well as concerns about his behavior, Urseth and Correll discharged him, giving him two weeks to move out of the trailer house.

IV. ARGUMENT

A. SUMMARY OF ARGUMENT

Wichmann was discharged because on at least six occasions, he failed to show up and remain at work as scheduled without offering any notice. On three of those occasions, he claims to have been sick. On the other three, he does not. On the three occasions when he claims to have been sick, Urseth had to pound on the door to get him out of bed, which makes it perfectly clear that she had no notice that he was going to miss his scheduled work until it had already gone undone. His neglect of his duties and his failure to keep Urseth informed so that she could see to the care of the horses was misconduct.

The hearing in this case was entirely fair. The ULJ conducted the hearing properly, gave Wichmann ample opportunity to offer his side of the story, and asked appropriate questions. There is no need for the case to be remanded for a new hearing.

B. STANDARD OF REVIEW

Effective for unemployment law judge decisions issued on and after June 25, 2005 that are directly reviewed by the Court of Appeals, the legislature

restated the standard of review at Minn. Stat. § 268.105, subd. 7(d) (Supp. 2005)

as follows:

(d) 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:

- (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.

The issue of whether an employee committed misconduct, and the unemployment law judge's determination of that issue, is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W. 2d 801, 804 (Minn. 2002), citing *Colburn v. Pine Portage Madden Bros., Inc.*, 346 N.W.2d 159, 161 (Minn. 1984). Whether or not the employee committed an act alleged to be misconduct is a fact question, but whether that act is employment misconduct is a question of law. *Scheunemann v. Radisson South Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether or not an employee's acts constitute employment misconduct is a question of law on which a reviewing court remains "free to exercise its independent judgment." *Lolling v. Midwest Patrol*, 545 N.W. 2d 372, 377 (Minn. 1996).

C. EMPLOYMENT MISCONDUCT

An applicant who is discharged from employment is disqualified from benefits only if the conduct for which the applicant was discharged amounts to employment misconduct. Minn. Stat. § 268.095, subd. 4 (2004)² provides:

Subd. 4. **Discharge.** An applicant who was discharged from employment by an employer shall not be disqualified from any unemployment benefits except when:

- (1) the applicant was discharged because of employment misconduct as defined in subdivision 6, or
- (2) the applicant was discharged because of aggravated employment misconduct as defined under subdivision 6a.

The definition of "employment misconduct" reads:

"Subd. 6. **Employment misconduct defined.**

(a) 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, or (2) that displays clearly a substantial lack of concern for the employment.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

* * *

(e) The definition of employment misconduct provided by this subdivision shall be exclusive and no other definition shall apply."³

² Under Laws 2004, Ch. 183, sec. 64, the 2004 amendments apply.

³ The statutory amendments effective August 1, 2003 overturned the analysis set out in *Houston v. International Data Transfer Corp.*, 645 N.W. 2nd 144 (Minn. 2002), replacing that analysis with an objective standard. See Laws 2003, 1st Sp. Session, ch. 3, art. 2, sec. 13.

Wichmann claims first that the ULJ used the wrong standard in considering misconduct, because the ULJ somehow made it part of the legal standard that Wichmann arrange for someone else to cover his shifts. In a rather cursory argument, Wichmann claims that because “there is evidence” that Wichmann provided notice of his absences, “this matter should be reversed.” This argument is without merit for several reasons.

First, the standard of review does not call for the matter to be reversed simply because “there is evidence” that Wichmann believes could support a conclusion that he provided notice of his absences. It is true that Wichmann claims that as to *some* of the absences – three out of six – that he gave some notice to Urseth that he was ill, although he apparently cannot explain why, then, she came to the door. However, it is also true that Urseth testified repeatedly that this never happened. The fact that “there is evidence” in the form of an employee’s insistence that he called in does not require reversal of the ULJ where the employer testified consistently that he did not call in. This is not to even mention the fact that at least three absences in a month – November 7, November 16, and November 18 – do not, in Wichmann’s own explanation, have anything to do with illness.

Wichmann has seized on the following sentences in the reasoning of the ULJ: “Over the last few weeks of Wichmann’s employment, he was not reporting for work on time and not performing the duties that were required of him. Additionally, Wichmann was not arranging for anyone else to care for the horses

and it was his responsibility to do so.” The second sentence here, Wichmann claims, is improper, because provided that he was ill and provided proper notice, it is not misconduct for him not to arrange for other employees to cover his shift. Certainly, it is true that if he had provided proper notice, then those absences that were due to illness would not constitute misconduct.

All the ULJ is doing in this sentence is explaining “proper notice.” What Urseth testified was required for Wichmann to arrange for the care of the horses was simply to call her or someone else and explain that he was sick. He was not required to make the arrangements himself; here, “arranging for [someone] else to care for the horses” meant letting someone know he couldn’t care for them. Urseth testified that had Wichmann told her that he was sick, she could have had the shift covered. The ULJ is clearly referring to the notice requirement, because the first sentence of the section Wichmann highlights states that he did not do his work as scheduled; the second addresses the fact that he did not provide notice so that his shift could be covered.

It makes perfect sense that for someone who cares for horses, “proper notice” involves making sure that someone is aware that you’re not going to be present, for the precise purpose of making sure someone covers the responsibilities of caring for the animals. Wichmann might have a point if the ULJ had found that he called Urseth and told her he was sick, but that he needed to go further and get his shifts covered. That is not what the ULJ found. The ULJ found, as Urseth testified, that she had to go and get him out of bed on the 22nd and 23rd of

November, which obviously would not have happened if, as he claimed, she had known he was sick. Urseth testified unambiguously, and her contemporaneous notes that she kept on her computer reflect, that she had no idea Wichmann was supposedly sick on any of those days until after he had already neglected to care for the horses.

The mention of an employee's responsibility to see that a shift is covered is simply a reference to the requirement of proper notice. Proper notice in a case like this means notice adequate to ensure the safety of the animals by allowing for someone else to care for them. Wichmann provided no such notice, and the horses were not cared for as scheduled on at least five different mornings in the month of November.

Wichmann does not dispute in his brief that there was evidence adequate to find that he falsified his timecard, and does not address how a finding of misconduct based on six unexcused absences and falsification of time reporting would necessarily be reversed even if he prevailed on this issue and three of the six absences were not considered to be misconduct.

Wichmann also argues that the hearing was unfair, because the ULJ did not provide Wichmann with enough assistance. Wichmann opens with the broad and, in the context of this record, baffling accusation that "there is no evidence that the ULJ considered his responsibilities in conducting a fair hearing." (Rel. Br. 11) This is strong language, and one would expect to find, at the very least, some evidence that the ULJ at some point showed bias, cut off Wichmann's testimony,

or did something to justify the accusation that he did not even “consider his responsibilities” regarding fairness.

Nothing even approaching this kind of evidence appears in the record. The first accusation is this: “The ULJ noted the employer’s concerns about incidents from May and June of 2005 but failed to ask Mr. Wichmann his side of the story for either incident.” (Rel. Br. 11) The ULJ did not find misconduct related to any incidents from that long ago. In fact, the ULJ mentioned these incidents in passing, only in the course of stating that clearly, the incidents at issue were the ones in November. (T.16) There was no reason for the ULJ to ask Wichmann for his “side of the story” as to incidents that were clearly not the reasons for his discharge and that the ULJ did not cite as misconduct in his decision.

Wichmann’s brief further complains about the exchange that occurred after Urseth testified that she looked for Wichmann on the morning of November 7 and he was not there and the horses had not been cared for. Wichmann’s response was that his cell-phone bill showed calls to his girlfriend between 6:00 AM and 7:00 AM that day, and he believed that proved that he was at work, because he claimed to have remembered being at work when he made the calls. According to Wichmann’s brief, the ULJ should have “ask[ed]... additional questions to clarify how Mr. Wichmann knew that this occurred on November 7.” (Rel. Br. 11) Apparently, these questions the ULJ should have asked are something other than the repeated questions the ULJ asked Wichmann about this story, including the ultimate (and rather conspicuous) question of how proving that he was talking to

his girlfriend on the morning of November 7 proved that he was at work. Wichmann was not able to offer an answer other than to repeat that he was unhooking the trailer at the time he made the call. Other than asking how proving he was on the phone proves he was at work, it is unclear what the ULJ could have asked.

Wichmann's brief then complains that the ULJ, after eliciting testimony from Wichmann that he called in sick on the mornings of November 22nd and 23rd, did not ask for more details about how he notified the employer, whom he called, or when he called. Wichmann had, of course, just answered "yes" to the question, "Are you saying *you called her* on those mornings...?" (T.34, emphasis added) Answering "yes" to "are you saying *you called her*" would appear to cover the matters of how he notified the employer and whom he notified, so it is a little confusing that Wichmann apparently thinks the ULJ was obligated to ask these questions again. It is always possible that Wichmann misspoke when he affirmed that he called Urseth, but the ULJ did not fail in his basic responsibilities by not asking again for information Wichmann had already given.

The statement that the ULJ "failed to ask Mr. Wichmann to provide his testimony concerning November 18" is clearly false, as Wichmann was asked about what happened on "the other mornings" other than the ones already addressed. Moreover, he and the ULJ discussed the morning of November 18, and the ULJ *did* ask him about it specifically on page 33 of the transcript. The ULJ discussed November 16 with Wichmann and then said, "I notice the next morning,

you punched in at 5:54 AM, quite a bit earlier than 8:00, so apparently you were going to follow her desires about getting those horses fed and out by 7:30. But then on the next day [November 18], the same thing happened. It was 8:15 when she woke you up. What's, and then the week of..." (T.33) At this point, Wichmann interrupted the ULJ and changed the subject to complain (incorrectly) that he was being accused of being absent all day rather than late. (T.33) In fact, the ULJ did ask Wichmann about what happened on November 18, both when he asked about "other mornings" and when he raised the November 18 incident specifically. It is not clear how many times the ULJ is required to ask for the same information under the theory contained in Wichmann's brief.

Wichmann's brief does not, unsurprisingly, explain what information would have been or could have been uncovered by any of the questions it has come up with in hindsight to add to the ones that the ULJ asked. The standard Wichmann asks this court to apply, it appears, is that if there is any possibility that a question, repetition of a question, restating of a question, or a more specific version of a question, could have resulted in the applicant saying anything that might have helped him, then it is reversible error for the ULJ to fail to ask it. This is simply an impossible standard. The ULJ in this hearing conducted a fair, thorough hearing in which Wichmann explained what he claimed occurred, and Urseth explained what she claimed occurred.

The most substantive argument in Wichmann's brief is the claim that the ULJ failed to include in the decision a mention of the reasons why Urseth's

testimony was credited in some cases over Wichmann's conflicting testimony, particularly as to Wichmann's claim that he called in sick on days when Urseth explained he did not call in, and that this was why she wound up pounding on his door.

It does appear that the ULJ neglected to include a statement of reasons for the credibility determination in the decision as required by statute. Wichmann mischaracterizes the requirement by referring to these as "essential findings," as they are not "findings" but simply, by statute, a statement of "the reasons" the ULJ credited one piece of testimony over another. There is no requirement that the reasons meet a particular standard; only that they be set out. It is true that this standard is new, and that the ULJ, who has many years of experience conducting hearings as well as acting as a commissioner's representative and representing the department before the court, appears to have neglected to set out the reasons in the decision.

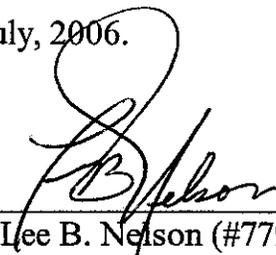
Notably, the reasons to credit Urseth's testimony over Wichmann's are legion. She kept contemporaneous notes, her testimony was consistent, and she has no apparent motive to lie. Wichmann, on the other hand, altered his timecard and changed his testimony, sometimes arguing that he was at work when Urseth wanted him there, and other times arguing that it wasn't necessary for him to be there as early as she wanted. (T.29, stating that, because of the number of horses present, "you don't have to get up that damn early in the morning"). But it is correct that the ULJ should have made those reasons explicit in the decision. There

is certainly no basis for a remand for an additional hearing, and the statute does not specify the remedy if the ULJ fails to mention the reasons for not crediting testimony, but the department does not object to remand for the very limited purpose of issuing a new decision in which the reasons will be set out by the ULJ.

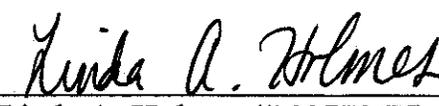
V. CONCLUSION

The unemployment law judge correctly concluded that Wichmann's disregard of the attendance policy constituted employment misconduct under the statute. The department respectfully requests that the Court affirm the agency decision. However, the department does not object if the court considers it necessary to remand the case to the ULJ for the issuance of a new decision laying out the reasons Wichmann's testimony was not credited.

Dated this 5th day of July, 2006.



Lee B. Nelson (#77999)



Linda A. Holmes (# 027706X)

Department of Employment and
Economic Development
1st National Bank Building
332 Minnesota Street, Suite E200
Saint Paul, Minnesota 55101-1351
(651) 282-6216

Attorneys for Respondent Department

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).