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State of Minnesota
In Court of Appeals

Gregory Peterson,

Relator,

v.

Northwest Airlines, Inc.,

Respondent,

Department of Employment
and Economic Development (DEED),

Respondent.

RELATOR'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

MANSFIELD, TANICK &
COHEN, P.A.
Marshall H. Tanick (#108303)
Stephen H. Parsons (#84219)
220 South Sixth Street
1700 U.S. Bank Plaza South
Minneapolis, MN 55402-4511
(612) 339-4295

Attorneys for Relator Gregory Peterson

Lee B. Nelson, Esq. (#77999)
Elizabeth H. Esser (#388287)
First National Bank Building
332 Minnesota Street, Suite E200
St. Paul, MN 55101-1351

Attorneys for Respondent Department of Employment and Economic Development

BRIGGS & MORGAN
Max Heerman (#268227)
80 South Eighth Street, Suite 2200
Minneapolis, MN 55402

Attorneys for Respondent Northwest Airlines, Inc.

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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).

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I. INTRODUCTION

The unemployment compensation laws must be construed liberally in favor of employees. *Jenkins v. American Express Financial Corp.*, 721 N.W.2d 286 (Minn. 2006). Under this tenet, Relator Peterson is entitled to unemployment compensation benefits because:

a) He complied with his employer's alcohol and chemical dependency policy for first-time offenders;

b) His termination was due to "chemical dependency" under Minn. Stat. § 268.095, subd. 6(b); and

c) He is eligible for unemployment compensation benefits under the "single incident" provision of Minn. Stat. § 268.095, subd. 6(a).

While Peterson's employer, Northwest Airlines, Inc. ("NWA"), takes "no position" in this matter, the Department of Employment and Economic Development ("DEED") does, and the arguments it makes are quite at odds with the rationale of the Unemployment Law Judge ("ULJ"). Apparently recognizing the defects in the ruling below, DEED comes up with its own new arguments to try to bolster the disqualification decision. But these new positions, like the old ones taken by the ULJ, lack merit and should not bar Relator from receiving unemployment compensation benefits.

II. PETERSON DID NOT VIOLATE ANY COMPANY POLICY, BUT NWA DID

It is well established in unemployment compensation proceedings that a discharge by the employer that violates its own policies or procedures vitiates a determination of disqualifying "misconduct." *Eyler v. Minneapolis Star & Tribune,* 427 N.W.2d 758, 761 (Minn. Ct. App. 1988); *Hoemberg v. Watco Publishers, Inc.,* 343 N.W.2d 676, 678-79 (Minn. Ct. App. 1984); *Neubert v. St. Mary's Hosp. and Nursing Center of Detroit Lakes,* 365 N.W.2d 780 (Minn. Ct. App. 1985). The reasoning of these cases is that a discharged employee should not be treated as failing to follow reasonably-expected standards when the employer does not adhere to its own rules. This is particularly so when an employer deviates from terms of an employment manual, which is supposed to govern workplace-related conduct. *Eyler,* at 761; *Hoemberg,* at 679.

NWA did not comply with the terms of its own policy that first-time alcohol offenders are not subject to discipline if they participate in, and successfully complete a chemical rehabilitation program, as Peterson did. Re. 1, App. 17-18, 23-24. Peterson had a chemical dependency problem, however phrased, and enrolled in, participated in, and successfully completed a 28-day inpatient program at Hazelden. Thus, under NWA's policy, he could not be fired or otherwise disciplined. Yet, only five days

after he completed the program, NWA chose to terminate him, in clear contradiction of its own policy.

While the employer certainly has a right to expect employees to abide by its 12-hour "no alcohol" rule, which Peterson admittedly violated, the employee has an equal expectation that the employer will comply with its policy for first-time alcohol offenders. NWA's policy "encourages" violators to participate in this type of program, for their own rehabilitation and in the interests of public safety. See App. 23. Peterson and other pilots have a reasonable expectation that the company will reciprocate for their participation by abiding by the policy's terms, which protect the jobs of complying pilots. NWA's deviation from its policy, despite Peterson's compliance, negates a determination of "misconduct" as a matter of law.[1]

The ULJ apparently felt that NWA's alcohol treatment policy was not applicable because he found Peterson to be a two-time offender, having had a prior DUI while off-duty and not on "reserve" status on St.

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[1] That NWA takes "no position" in this unemployment proceeding is indicative that it no longer seeks to further punish Peterson by depriving him of unemployment benefits. While DEED may challenge this appeal on its own initiative, NWA's lack of opposition is suggestive that the it does not feel that Peterson should be deprived of unemployment benefits. Peterson, incidentally, has entered into an agreement with NWA whereby he has regained his employment. Supp. App. 001-005.

Patrick's Day, about four months earlier than the July 5th incident. App. 9. But DEED does not embrace this view, and, rather takes the position that Peterson should be disqualified from unemployment benefits because of an "intentional" violation of the 12-hour rule and, more significantly, that the first-offender policy does not apply to him because he is not "chemically dependent." DEED's Brief, pp. 15-16.

Whether Peterson's drinking on July 5th was "intentional" is not pertinent. The NWA policy for first-offenders applies whether they drink intentionally or accidentally. More significantly, NWA's policy is not dependent upon whether Peterson was clinically diagnosed as "chemically dependent." The policy has a number of definitions, but does not define "chemically dependent." While Peterson denied that he was chemically dependent, he was doing so as a layperson, possibly in a sense of denial or misperception, which is typical of many with alcoholic

problems.[2] Hazelden determined him to be an "alcohol abuser," and allowed him to enroll in a 28-day inpatient program, which certainly reflects that Hazelden thought he had an alcohol problem, whether technically phrased as "dependency" or not.

The gist of this case is that Peterson had a drinking problem which underlied the incident of July 5th. He enrolled in, participated in, and successfully completed a 28-day inpatient program at Hazelden for people with drinking problems. The employer's policy prohibits terminating a first-time offender who completes such a program, as Peterson did. Quibbling with the semantics of whether Peterson was "dependent" and/or an "abuser" is not germane to the goal of the policy

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[2] Hazelden's website discusses "denial" as follows:

> "Denial is the tendency of alcoholics or addicts to either disavow or distort variables associated with their drinking or drug use in spite of evidence to the contrary," said Patricia Owen, PhD, a licensed psychologist for Hazelden in Center City, Minn.
>
> It's a common misconception that all alcoholics and addicts are in denial. In fact, people have various levels of awareness of their substance use problems and readiness to change behavior. "People may recognize certain facts concerning their use, such as number of arrests or how often they drink," Owen said. "At the same time, they may woefully misperceive the impact their use has had on the people around them, their relationships, how they feel about themselves, or the implications of their drinking history." Supp. App. 006-007.

that pilots with drinking problems seek, obtain, and complete rehabilitation, as Peterson dutifully did.

DEED's reliance (for "consistency") on the unpublished decision of this Court in *Pedersen v. Omni Air International, Inc.*, 2007 WL 3261598, Minn. Ct. App. (November 6, 2007, No. A06-2146, unpublished), DEED's App. 11-12, is misplaced.[3] *Pedersen,* similar to this case, involved a violation of a 8-hour no-alcohol rule. The claimant in *Pedersen,* however, was a flight attendant, not a pilot. There is no indication that the flight attendant's employer had a policy like Northwest's that protected first-time offenders. Peterson, through his union, was a beneficiary of that policy, and NWA was obligated to follow it for him. Not doing so negates a determination of disqualifying "misconduct." *Eyler, supra; Hoemberg, supra, Neubert, supra.*

III. "CHEMICAL DEPENDENCY" PROVISION APPLIES UNDER MINN. STAT. § 268.095, SUBD. 6(b)

The Unemployment Law Judge below concluded that the "chemical dependency" exception to employment misconduct, Minn. Stat. § 268.095, subd. 6(b) does not apply because of another provision, subd. 6(d), provides that a "driving offense" trumps the "chemical dependency" exception. DEED does not challenge Peterson's argument that the

[3] As an unpublished opinion, the *Pedersen* case is not precedential. Minn. Stat. § 480A.08, subd. 3.

legislative history of the misconduct provisions demonstrates that the "chemical dependency" exception applies to *all* conduct, across-the-board, *see* Relator's Brief, pp. 17-22, and even if it were not applicable to driving while impaired, that was not the reason for which Peterson was discharged. Therefore, the "chemical dependency" exception is applicable in this case.

DEED, deviating from the view of the Unemployment Law Judge, apparently recognizes that the "chemical dependency" exception is pertinent here, but argues that it is inapplicable because Peterson "has never been diagnosed as "chemically dependent." DEED's brief, p. 12. But this second deviation from the reasoning below does not support the disqualification decision. The statute does not define "chemical dependency," and rather uses it in a generic sense. Peterson did, to be sure, deny that he was chemically dependent, but did so from a layperson's standpoint. His diagnosis as an "alcohol abuser" by Hazelden certainly is indicative of a drinking problem, and that drinking problem underlied the July 5th incident, which formed the basis for his discharge.

But the statute precludes the disqualifying for a drinking-related problem by a first-time offender who participates in and successfully completes, a rehabilitation program. Peterson did so and, therefore, is

eligible for unemployment compensation benefits under this provision, notwithstanding the Unemployment Law Judge's view that the chemical dependency exception does not apply because Peterson was fired for a "driving offense," *which he was not*, and DEED's argument that Peterson denied being "chemically dependent," even though he clearly had a drinking problem and successfully completed a chemical rehabilitation program for it.

IV. THE "SINGLE INCIDENT" PROVISION APPLIES HERE

The Unemployment Law Judge found that the "single incident" provision, Minn. Stat. § 268.095, subd. 6(a) did not apply because there was a prior drinking incident, although not work-related which occurred on St. Patrick's Day. App. 9. Once again, DEED abandons rather than defends that rationale. It now argues that Peterson is disqualified because his conduct squandered his employer's "trust" in him, DEED's Brief, p. 17, citing two recent cases in support of this new argument.

DEED's reliance on *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340 (Minn. Ct. App. 2006) is, however, inappropriate because that case, unlike this one, involved an employee stealing, which is not the basis for

termination here.[4] The recent *Pedersen* decision is similarly inapposite. That court rejected that employee's "single incident" argument without explanation. As indicated above, *Pedersen* involved violation by a flight attendant of a 8-hour no-alcohol rule at a different airline where there was no indication that the airline had a chemical dependency policy. Pilot Peterson, unlike flight attendant Pederson, was subject to a policy allowing first-time offenders to keep their job if they enroll in and successfully complete a chemical dependency rehabilitation program, as Peterson did at Hazelden, which he did.

DEED's argument that Peterson's assertion that there was no "subject adverse effect" upon the employer is based on the hindsight that he was not called for flight duty misconstrues Peterson's position. He recognizes the legitimacy of the 12-hour no alcohol rule, but simply points out that, in this case, there was very little likelihood that he would be called to fly, and he was not, which prevented any harm to the public. Obviously, Peterson does not claim that the "single incident" provision is eviscerated only if he had been called to fly, flown drunk, or crashed an airplane. But, in the particular circumstances of this case, when the

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[4] The amount of food stolen in the *Skarhus* case was incredibly small, worth probably less than $5.00, but the court's decision turned on the act of dishonesty, which was not the basis for the ULJ's denial of unemployment compensation benefits in this case.

employer has a specific policy that "encourages" pilots to participate in chemical dependency programs, the pilot has caused no harm, and the employer suffers no adverse effect, let alone *significant* adverse impact, as required by the statute.

Peterson should not have violated the 12-hour no alcohol rule. But NWA should not have fired him after he participated in, and successfully completed, a chemical rehabilitation program that the airline's policy "encourages," and which specifically bars firing a first-time offender.

Under these circumstances, the law and the equity, favors granting unemployment compensation benefits to Peterson.

V. CONCLUSION

The determination of the Unemployment Law Judge denying unemployment compensation benefits to Relator Peterson should be reversed.

MANSFIELD, TANICK & COHEN, P.A.

Dated: December 28, 2007.

By: _____

Marshall H. Tanick (108303)
Stephen H. Parsons (84219)
1700 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402-4511
(612) 339-4295
ATTORNEYS FOR
RELATOR GREGORY PETERSON

468334