

No. A07-1704

---

State of Minnesota  
In Court of Appeals

GREGORY S. PETERSON,

*Relator,*

vs.

NORTHWEST AIRLINES INC.,

*Respondent,*

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

*Respondent.*

---

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

---

MARSHALL H. TANICK (#108303)  
STEPHEN H. PARSONS (#84219)  
220 SOUTH SIXTH STREET  
1700 U.S. BANK PLAZA SOUTH  
MINNEAPOLIS, MINNESOTA 55402-4511  
(612) 339-4295  
*Attorneys for Relator*

MAX HEERMAN (#268227)  
BRIGGS & MORGAN  
80 SOUTH EIGHTH STREET, SUITE 2200  
MINNEAPOLIS, MINNESOTA 55402  
(612) 977-8490  
*Attorney for Respondent*

Lee B. Nelson (#77999)  
Elizabeth H. Esser (#388287)  
MINNESOTA DEPARTMENT OF EMPLOYMENT  
AND ECONOMIC DEVELOPMENT  
1<sup>ST</sup> NATIONAL BANK BUILDING  
332 MINNESOTA STREET, SUITE E200  
ST. PAUL, MINNESOTA 55101-1351  
(651) 296-6110  
*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).

**TABLE OF CONTENTS**

**I. LEGAL ISSUE..... 1**

**II. STATEMENT OF THE CASE ..... 1**

**III. DEPARTMENT’S INTEREST IN THIS CASE ..... 2**

**IV. STATEMENT OF FACTS ..... 3**

**V. STANDARD OF REVIEW..... 8**

**VI. PETERSON SHOULD BE DISQUALIFIED FROM ALL BENEFITS  
BECAUSE HE WAS DISCHARGED FOR EMPLOYMENT MISCONDUCT  
..... 9**

**VII. THE CHEMICAL DEPENDENCY EXCEPTION TO  
EMPLOYMENT MISCONDUCT DOES NOT APPLY BECAUSE  
PETERSON IS NOT CHEMICALLY DEPENDENT ..... 12**

**VIII. NORTHWEST DID NOT VIOLATE ITS POLICIES IN  
DISCHARGING PETERSON ..... 15**

**IX. THE “SINGLE INCIDENT” EXCEPTION TO EMPLOYMENT  
MISCONDUCT DOES NOT APPLY ..... 17**

**X. CONCLUSION ..... 19**

**APPENDIX..... 20**

## TABLE OF AUTHORITIES

### CASES

<i>Auger v. Gillette Company</i> 303 N.W. 2d 255 (Minn. 1981) -----	15, 16
<i>Brown v. National American University</i> , 686 N.W. 2d 329, 332 (Minn. App. 2004) -----	16
<i>Lolling v. Midwest Patrol</i> , 545 N.W.2d 372, 377 (Minn. 1996)-----	9
<i>Montgomery v. F&amp;M Marquette National Bank</i> , 384 N.W.2d, 602 (Minn. App. 1986) -----	11
<i>Pedersen v. Omni Air International, Inc.</i> , A06-2146, unpublished, filed November 6, 2007 -----	11, 12, 18
<i>Risk v. Eastside Beverage</i> , 664 N.W.2d, 16, 21 (Minn. App. 2003)-----	14
<i>Sandstrom v. Douglas Machine Corporation</i> , 372 N.W.2d 89 (Minn. App. 1985) -----	11
<i>Scheunemann v. Radisson S. Hotel</i> , 562 N.W.2d 32 (Minn. App. 1997)-----	8, 9
<i>Sivertson v. Sims Security, Inc.</i> 390 N.W. 2d 868 (Minn. App. 1986)-----	18
<i>Skarhus v. Davannis</i> , 721 N.W.2d 340 (Minn. App. 2006) -----	8, 9, 17
<i>Vargas v. Northwest Area Foundation</i> , 673 N.W. 2d 200 (Minn. App. 2004) ----	10

### STATUTES

Minn. Stat. §116J.401, subd. 1(18) (2004) -----	2
Minn. Stat. §268.069, subd. 2 (2006) -----	2, 3, 10
Minn. Stat. §268.095, subd. 4 (2006) -----	9
Minn. Stat. §268.095, subd. 6 (2006) -----	9, 10
Minn. Stat. §268.105, subd. 7 (2006) -----	2, 3, 8, 9

### RULES

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

## **I. LEGAL ISSUE**

Under the law, an individual discharged for a serious violation of the standards of behavior the employer has a right to expect of the individual as an employee, is disqualified from the payment of unemployment benefits. Gregory Peterson, a pilot for Northwest Airlines, Inc., willfully violated Northwest Airlines' rule against drinking alcohol during the 12 hour period prior to being on call for flight status, a rule in place to protect the traveling public. Did Peterson violate the standards of behavior Northwest had right to expect of Peterson thus disqualifying him from the payment of unemployment benefits?

The Unemployment Law Judge (ULJ) held that Peterson was disqualified from the payment of unemployment benefits on the basis that he was discharged for employment misconduct, that is, a serious violation of the standards of behavior Northwest Airlines had a right to expect of Peterson as a pilot.

## **II. STATEMENT OF THE CASE**

Following his separation from employment with Northwest Airlines, Gregory Peterson filed an application for unemployment benefits and established a benefit account. The department initially determined that Peterson was discharged from Northwest Airlines, Inc. for reasons other than employment misconduct and

not disqualified from benefits.<sup>1</sup> Northwest filed an appeal and a de novo evidentiary hearing was conducted by a ULJ. The ULJ reversed the initial determination and held Peterson disqualified from the payment of unemployment benefits on the basis that he was discharged for reasons amounting to employment misconduct.<sup>2</sup>

Peterson requested reconsideration and the ULJ issued an order affirming his decision.<sup>3</sup> This matter now comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Peterson under Minn. Stat. §268.105, subd. 7 and Minn. R. Civ. App. P. 115.

### **III. DEPARTMENT'S INTEREST IN THIS CASE**

The Department is charged with the responsibility of administering and supervising the unemployment insurance program.<sup>4</sup> Unemployment benefits paid are paid from state funds, the Minnesota Unemployment Insurance Trust Fund, not from the employer or employer funds.<sup>5</sup> The Department's interest therefore carries over to the Court of Appeals' interpretation and application of the Minnesota Unemployment Insurance Law. Accordingly, the Department is

---

<sup>1</sup> D1. Transcript references will be indicated as "T." Exhibits in the record will be "D" for the department, "E" for the employer, "App" for the Applicant, with the number following.

<sup>2</sup> Appendix to Department's Brief, A3-A8

<sup>3</sup> Appendix, A1-A2

<sup>4</sup> Minn. Stat. § 116J.401, subd. 1(18)

<sup>5</sup> Minn. Stat. § 268.069, subd. 2

considered the primary responding party to any judicial action involving an ULJ's decision.<sup>6</sup>

The Department does not represent the employer in this proceeding and this brief should not be considered advocacy for Northwest Airlines, Inc. Northwest filed with the Court notification that it now takes no position in this matter. That is irrelevant to the disposition by the Court. Under the law, Peterson's entitlement to unemployment benefits must be determined based upon a preponderance of the available evidence, regardless of the participation or interest of an employer.<sup>7</sup>

#### **IV. STATEMENT OF FACTS**

Greg Peterson started working for Northwest Airlines as a pilot in August 1995, and was discharged on February 23, 2007.<sup>8</sup> Peterson was on paid administrative leave between December 28, 2006 and February 23, 2007 while Northwest investigated allegations that Peterson was flying planes with several citations for Driving Under the Influence ("DUI").<sup>9</sup>

On March 17, 2006, 11 months before his discharge, Peterson was cited for DUI.<sup>10</sup> As a result, Peterson received a court ordered evaluation where he was diagnosed as being not chemically dependent.<sup>11</sup> Peterson's license was suspended for 30 days and he was ordered to complete an alcohol awareness program, which

---

<sup>6</sup> Minn. Stat. § 268.105, subd. 7(e)

<sup>7</sup> Minn. Stat. §268.069, subd. 2

<sup>8</sup> T 10-11

<sup>9</sup> T 11-12

<sup>10</sup> T 52

he completed.<sup>12</sup> Following this incident, Peterson testified that his drinking habits “absolutely” improved and that his drinking and driving while using alcohol went down to next to nothing.<sup>13</sup> Peterson did not report this incident to Northwest.<sup>14</sup> However, Peterson did discuss the incidents with his union representative regarding the impact his offense would have on his ability to fly planes.<sup>15</sup>

Pilots for Northwest are prohibited from consuming alcohol during the 12 hour period immediately prior to assignment to reserve status.<sup>16</sup> At 11:11 a.m. on July 5, 2006, Peterson was assigned to short call reserve status beginning at 4:00 a.m. in the morning of July 6, which required him to be able to report to the airport and be on the airplane within two and a half to three hours and be able to fly.<sup>17</sup> Peterson was notified and acknowledged at 11:13 a.m. on July 5 that he would be on short call reserve.<sup>18</sup> Accordingly, Peterson was prohibited from drinking from 4 p.m. on July 5 until 4 a.m. on July 6 under the 12-hour rule.

On July 5, Peterson went on a boating trip with 12 of his friends.<sup>19</sup> Before leaving for the trip, Peterson checked the flight schedule and calculated the probability of his being called into work.<sup>20</sup> Peterson concluded that it was unlikely

---

<sup>11</sup> T 52, T 64

<sup>12</sup> T 52

<sup>13</sup> T 64

<sup>14</sup> T 48

<sup>15</sup> T 55

<sup>16</sup> T 33

<sup>17</sup> T 29

<sup>18</sup> T 30

<sup>19</sup> T 53

<sup>20</sup> T 54

that he would be called in and he proceeded with his plans to party with his friends.<sup>21</sup> Peterson appointed a designated driver for the boat and his vehicle, presumably because he planned on drinking heavily.<sup>22</sup> Peterson also purchased a large amount of beer before going to the lake. At the lake, Peterson admitted to having at least six beers and acknowledges that he drank “most of the day and into the evening.”<sup>23</sup> At 11:06 p.m. on July 5, 2006, while on reserve duty, Peterson was arrested for Boating Under the Influence (“BUI”), his blood alcohol content being 0.17, and for Carrying a Pistol with an Alcohol Concentration of .08 or more.<sup>24</sup> Fortunately, Peterson was not called into work that day.<sup>25</sup> Peterson did not report this incident to Northwest.<sup>26</sup>

Nearly five months later, in December 2006, Max Heerman, an attorney for Northwest<sup>27</sup>, was contacted by Rick Toscano, Director of Flying and Chief Pilot for Northwest,<sup>28</sup> regarding allegations that Peterson was flying planes with several citations for DUI and he was not in recovery.<sup>29</sup> Following his conversation with Toscano, Heerman contacted Arvin Johnson, Chairman of the Northwest Airlines Pilot Assistance Program (“NAPAP”) Committee,<sup>30</sup> an employee assistance

---

<sup>21</sup> T 54

<sup>22</sup> T 53

<sup>23</sup> T 53, Peterson Sworn Statement, Volume II at 6.

<sup>24</sup> Police Report, E-3

<sup>25</sup> T 54

<sup>26</sup> T 48

<sup>27</sup> T 5

<sup>28</sup> T 5

<sup>29</sup> T 12

<sup>30</sup> T 14

program related to alcohol and drug recovery, to inquire about Mr. Peterson.<sup>31</sup> Johnson confirmed that they were working with Peterson about voluntarily going to Hazelden for an alcohol assessment.<sup>32</sup>

Heerman later arranged a conference call with Peterson and Chris Brown, an attorney for ALPA.<sup>33</sup> During this conversation, Peterson said he received a DUI on March 17, 2006 and a BUI in June of 2006.<sup>34</sup> In a later conversation, Heerman asked Peterson about the details regarding the BUI, and Peterson again stated that it occurred in June 2006, but refused to provide any further details.<sup>35</sup>

Because Heerman found Peterson's response to be evasive, Heerman obtained the police report for the BUI and discovered that Peterson was arrested at 11:06 p.m. on July 5, 2006 – a date different than that reported by Peterson on two prior occasions.<sup>36</sup> After further investigation, Heerman discovered that the date of the BUI was a day that Peterson was on reserve status, which meant his drinking was in violation of Northwest's 12-hour rule.<sup>37</sup> Heerman arranged for Peterson to go to Hazelden for an alcohol assessment.<sup>38</sup> Peterson did not seek assistance prior to or following his receiving the DUI and BUI.<sup>39</sup> Peterson only sought an

---

<sup>31</sup> T 13

<sup>32</sup> T 13-14

<sup>33</sup> T 13-14

<sup>34</sup> T 14

<sup>35</sup> T 15

<sup>36</sup> T 15-16

<sup>37</sup> T 24

<sup>38</sup> T 22

<sup>39</sup> T 67

assessment and treatment after it was discovered by Northwest that he had violated the 12-hour rule placing him in jeopardy of losing his employment.<sup>40</sup>

On January 1<sup>st</sup> through January 5th, Peterson completed the five day assessment at Hazelden where he was diagnosed as not chemically dependent, but as an “alcohol abuser.”<sup>41</sup> Peterson testified that even though the FAA was in possession of his Hazelden records, it never issued a letter revoking his medical certificate, because “I was not diagnosed as being chemically dependent or with alcoholism – those are the two disqualifying factors that would have required me to not exercise my airman medical certificate.”<sup>42</sup>

After his diagnosis as an “alcohol abuser,” Hazelden recommended that Peterson complete an inpatient program, which he ultimately did complete on February 18, 2007.<sup>43</sup>

Peterson was discharged by Northwest on February 23, 2007.<sup>44</sup> The primary reason that Peterson was discharged was his violation of the 12-hour rule by consuming alcohol within 12 hours of being on reserve status.<sup>45</sup> Peterson’s dishonesty about the date of the BUI and refusing to provide details when

---

<sup>40</sup> T 68

<sup>41</sup> T 45, T 57, T 64. *See also* App.1– Hazelden Client Notes (Final chemical dependency diagnosis – “alcohol abuse.”) (Appendix, A14)

<sup>42</sup> T 57

<sup>43</sup> T 46

<sup>44</sup> T 11

<sup>45</sup> T 42

requested, both violations of rules of conduct for pilots, contributed to his discharge.<sup>46</sup>

## V. STANDARD OF REVIEW

The standard of review for unemployment insurance matters is set out in the statute 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.<sup>47</sup>

The Court of Appeals recently held in *Skarhus v. Davannis*, that the issue of whether an employee committed employment misconduct is a mixed question of fact and law.<sup>48</sup> Whether the employee committed a particular act is a fact question.<sup>49</sup> And whether the employee's acts constitute employment misconduct is a question of law.<sup>50</sup>

---

<sup>46</sup> T 42

<sup>47</sup> Minn. Stat. § 268.105, subd. 7(d) (2006)

<sup>48</sup> 721 N.W.2d 340, 344 (Minn. App. 2006)

<sup>49</sup> *Id.* (citing *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997)).

<sup>50</sup> *Id.*

The *Skarhus* Court reiterated the long-held standard that it views the ULJ's factual findings "in the light most favorable to the decision,"<sup>51</sup> and will not disturb the ULJ's factual findings when the evidence substantially sustains them.<sup>52</sup> The Court, however, reviews de novo the legal question of whether the employee's acts constitute employment misconduct.<sup>53</sup>

## **VI. PETERSON SHOULD BE DISQUALIFIED FROM ALL BENEFITS BECAUSE HE WAS DISCHARGED FOR EMPLOYMENT MISCONDUCT**

Under the law, if Peterson was discharged for employment misconduct he is disqualified from all unemployment benefits.<sup>54</sup> Employment misconduct is exclusively defined in the statute as:

### **"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.

(b) Conduct that was a direct result of the applicant's chemical dependency is not employment misconduct unless the applicant was previously diagnosed chemically dependent or had treatment for chemical dependency, and since that diagnosis or

---

<sup>51</sup> *Id.* (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996))

<sup>52</sup> *Id.* (citing Minn. Stat. §268.105, subd. 7(d))

<sup>53</sup> *Id.* (citing *Scheunemann*, 562 N.W.2d at 34)

<sup>54</sup> Minn. Stat. §268.095, subd. 4

treatment has failed to make consistent efforts to control the chemical dependency

\* \* \*

(e) The definition of employment misconduct provided by this subdivision shall be exclusive and no other definition shall apply.<sup>55</sup>

In *Vargas v. Northwest Area Foundation*, the Court of Appeals, acknowledging the statute, held that employment misconduct is determined by a preponderance of the evidence without regard to any burden of proof.<sup>56</sup> Additionally, there is no presumption of entitlement or non-entitlement to unemployment benefits.<sup>57</sup>

Peterson committed employment misconduct when he willfully drank alcohol within 12 hours of being on reserve status in violation of employer's 12-hour rule. Federal airline regulations prohibit pilots from operating an aircraft while under the influence. Northwest further prohibits pilots from drinking alcoholic beverages during the 12 hour period immediately prior to assignment to reserve or standby status.<sup>58</sup> These requirements are based on safety concerns for passengers and the need to ensure public confidence that pilots are in full control of their facilities while flying.<sup>59</sup>

---

<sup>55</sup> Minn. Stat. §268.095, subd. 6

<sup>56</sup> 673 N.W. 2d 200 (Minn. App. 2004)

<sup>57</sup> Minn. Stat. §268.069, subd. 2

<sup>58</sup> T 33, See Northwest Flight Operations Manual Rule 3.1.3 ("You [pilots] are prohibited from drinking alcoholic beverages...during the 12 hour period immediately prior to...assignment to reserve or standby status.")

<sup>59</sup> T 25

Northwest has a right to reasonably expect that its pilots will not drink while on reserve status subject to being called in to fly an airplane. That is a perfectly reasonable rule that does not place an unreasonable burden on the worker.<sup>60</sup> In *Montgomery v. F&M Marquette National Bank*, the Court of Appeals stated that it has held upon several occasions that a knowing violation of an employer's reasonable policies and rules is misconduct.<sup>61</sup> Peterson concedes as much on page 23 of his brief when he recognizes the rules "propriety" and "validity." Therefore, Peterson's conscious decision to drink within 12 hours of being on reserve status is a serious violation of those standards reasonably expected by Northwest.

The evidence shows that Peterson checked the pilot register in order to calculate the odds of his actually being called to fly. When he calculated that he was not likely to be called, he got someone to act as a designated driver for the party he was planning. Peterson proceeded to buy a significant amount of beer. Peterson planned on drinking, knowing he would be in violation of the 12-hour rule. Peterson just didn't care if he violated the rule because he didn't think he'd get caught. But he ultimately did get caught.

Recently, in the unpublished case of *Pedersen v. Omni Air International, Inc.*, the Court of Appeals held that violation of a no drinking rule by a flight crew

---

<sup>60</sup> *Sandstrom v. Douglas Machine Corporation*, 372 N.W. 2d 89 (Minn. App. 1985) (Violation of a reasonable request is misconduct.)

<sup>61</sup> 384 N.W.2d, 602 (Minn. App. 1986)

on standby was employment misconduct.<sup>62</sup> The Court should be consistent and conclude that Peterson's violation of the 12-hour rule is employment misconduct.

**VII. THE CHEMICAL DEPENDENCY EXCEPTION TO EMPLOYMENT MISCONDUCT DOES NOT APPLY BECAUSE PETERSON IS NOT CHEMICALLY DEPENDENT**

Because Peterson has never been diagnosed as chemically dependent, the chemical dependency exception to employment misconduct does not apply and Peterson is ineligible for unemployment benefits. Peterson's testimony is that he is not chemically dependent, but an "alcohol abuser." On page 64 of the transcript, Peterson explained that an alcohol abuser is someone whose use of alcohol has had a negative impact on their life as opposed to someone who is chemically dependent, an individual who has a physical need for alcohol. This is consistent with the distinction Hazelden makes on their website where they say, "To cut through the confusion, it helps to understand the difference between alcohol abuse and alcohol dependence."<sup>63</sup>

Following his DUI in March 2006, Peterson underwent a court ordered evaluation, and there he was found not to be chemically dependent. So three and a half months before he violated the 12-hour rule, Peterson was determined as not being chemically dependent.

In January 2007, six months after breaking the 12-hour rule, Hazelden

---

<sup>62</sup> A06-2146, unpublished, filed November 6, 2007. (Appendix, A9-A12)

<sup>63</sup> Appendix, A13.

diagnosed Peterson as not being chemically dependent but as an alcohol abuser. That Peterson's counsel can argue the "chemical dependency" exception applies even though two thorough chemical dependency evaluations, one three months before the incident and one six months after the incident, resulted in a diagnosis that Peterson was not chemically dependent and that Peterson does not consider himself to be chemically dependent is baffling. If chemical dependency equates to any binge drinking or occasional abuse of alcohol, conduct engaged in by Peterson, then it is probable that a majority of college students could be classified as chemically dependent. This is not what the legislature had in mind when it enacted the chemical dependency exception to employment misconduct. Peterson's brief appears to contend that because Hazelden recommended and provided treatment he must be considered chemically dependent. But there is no evidence in the record under what conditions Hazelden will provide treatment. Their website advocates treatment whenever alcohol disrupts a person's life, which can and does occur for an alcohol abuser.<sup>64</sup> Hazelden evaluated Peterson and concluded he was not chemically dependent. And while Peterson went through treatment for alcohol abuse, he does not consider himself chemically dependent.

Even if the tortured leap to chemical dependency were to be used to apply to Peterson, his violation of the 12-hour rule was not a "direct result" of chemical

---

<sup>64</sup> Appendix, A13.

dependency and thus the exception also cannot apply for this reason. Peterson went to extraordinary lengths to plan his drinking on July 5, 2006. He checked the flight schedule, estimated the probability that he would be called in based on his previous experience, and he went through the effort of assigning a designated driver for his boat and vehicle. Peterson's preparatory efforts indicate that he knowingly and intentionally violated the rule, thus his violation of the 12-hour rule was not an uncontrollable result of his drinking, but a premeditated violation of Northwest's policy.

Peterson asserted that this was his only violation of the 12-hour rule, therefore it can be concluded that Peterson was able to conform his conduct to Northwest policy for literally hundreds, if not thousands, of flights that he has piloted or served on reserve status over the 13 years both before and after the July 5 incident. To argue that he was unable to conform his conduct to the employer's policy on only the one day, July 5, and that such was a "direct result" of chemical dependency is contrary to the evidence. Peterson was able to conform except when he planned on not conforming.

The Court in *Risk v. Eastside Beverage*, held that the chemical dependency exception does not apply where an applicant obtained treatment after the incident but made no claim of any chemical dependency prior to the incident.<sup>65</sup> Again, Peterson went through a court ordered evaluation three and a half months before

---

<sup>65</sup> 664 N.W.2d, 16, 21 (Minn. App. 2003)

his violation of the 12-hour rule and was determined not chemically dependent. There is no evidence in the record to suggest that Peterson's condition changed between March and July of 2006. The fact that he went to treatment six months after the incident, ostensibly to save his job, while laudable on a personal level, does not affect whether unemployment benefits are payable.

#### **VIII. NORTHWEST DID NOT VIOLATE ITS POLICIES IN DISCHARGING PETERSON**

Relator argues that Northwest violated its own policies when it discharged Peterson. Northwest policies provide that for pilots who seek treatment for chemical dependency essentially the slate is wiped clean of prior incidents. But Northwest policy makes it clear that the rules related to predetection of impaired pilots does not diminish the company's right and authority to discharge a pilot for "conduct that would warrant discipline or discharge of a pilot who is not chemically dependent."<sup>66</sup> As indicated above, Peterson is not chemically dependent. To this day he does not contend that he is chemically dependent. He has not been diagnosed as an alcoholic either following his DUI in March 2006, or when evaluated in January of 2007 by Hazelden.

Additionally, the Supreme Court in *Auger v. Gillette Company* made it clear that the issue in an unemployment insurance proceeding is not whether the worker should have been discharged but only now that the worker has been

---

<sup>66</sup> Northwest Flight Operations Manual, Rule 3.3.3.

discharged, whether he is entitled to unemployment benefits.<sup>67</sup> This is not a contract action. Peterson may have remedies available to him under the contract, but the only question here is whether he committed employment misconduct. While employer policies can set out what standards of behavior an employer has a right to expect and thus what is misconduct for an individual employer, that has no applicability here. Peterson's brief on page 23 states in part:

“Peterson does not, to be sure, contest the propriety of the 12-hour no drinking policy. He recognizes its validity, and its significance to the safety and confidence of the flying public...”

He violated the rule, and thus committed misconduct in July of 2006. Northwest did not become aware of his violation until a number of months later and then Peterson sought treatment. Northwest's policies on treatment do not abrogate the 12-hour rule. The policy on treatment does not set the standard of behavior Northwest has a right to expect of a pilot. Further, whether Northwest violated its own policies some six and a half months after Peterson willfully committed the act constituting employment misconduct is of no consequence to this proceeding.

---

<sup>67</sup> 303 N.W. 2d 255 (Minn. 1981) *See also Brown v. National American University*, 686 N.W. 2d 329, 332 (Minn. App. 2004)

## IX. THE “SINGLE INCIDENT” EXCEPTION TO EMPLOYMENT MISCONDUCT DOES NOT APPLY

Peterson contends that his willful violation of the 12-hour rule “did not cause any harm” and therefore there can be no adverse impact on Northwest.<sup>68</sup> But Peterson does concede that his drinking alcohol while on reserve status “could” have had an adverse impact.<sup>69</sup> Peterson’s argument that actual resulting harm is necessary is simply ridiculous. The safety of the flying public is at issue. Northwest has the right to expect scrupulous adherence to the 12-hour rule. The fact that Peterson was not called to fly is simply fortuitous. What would have happened had he been called to fly? Do we judge the adverse impact on the employer only in hindsight? The Court indicated in *Skarhus v. Davannis*, a case involving a single incident of taking a small amount of food, that it is the loss of “trust” necessary which causes the adverse impact on the employer. When the safety of the flying public is at issue, the trust Northwest places on a pilot is sacred and the loss of that trust with Peterson is an adverse impact on Northwest.<sup>70</sup>

To accept Peterson’s argument would mean that if he had been called to fly and was able to successfully complete the flight without crashing the plane it could be said that there was no substantial adverse impact on Northwest. Therefore, under Peterson’s argument, drinking prior to flying can only amount to misconduct if the plane crashes (or a flight cancelled).

---

<sup>68</sup> Relator’s brief, p. 23

<sup>69</sup> Relator’s brief, p. 24

<sup>70</sup> 721 N.W.2d 340, 344 (Minn. App. 2006)

While decided before the statutory enactment, the Court of Appeals in *Sivertson v. Sims Security, Inc.* held that a security guard leaving his post was misconduct, that no actual harm to the employer was necessary for such a conclusion.<sup>71</sup> Accepting Peterson's argument could cause untold mischief. Security guards leaving their post, as long as nothing is stolen, nurses not administering medicine, so long as there are no increased medical problems are but two of the endless examples that could be given.

Seasoned counsel for Peterson cites to two unpublished cases, neither of which have any factual analogy, but did address the single incident provision.<sup>72</sup> But counsel curiously (but not surprisingly) did not include the Court of Appeals decision in *Pedersen v. Omni Air International*, a case decided three weeks before Peterson's brief was filed that involved a member of a flight crew who violated the no-drinking-while-on-call rule.<sup>73</sup> As the Court indicates, one of the arguments made by Pedersen was that the event constituted a single incident without an adverse impact on the employer. The Court rejected without specific comment that contention. If the exclusion did not apply in *Pedersen v. Omni Air International*, it does not apply here where the facts are much more egregious regarding Peterson's premeditated violation of the no drinking rule.

---

<sup>71</sup> 390 N.W. 2d 868 (Minn. App. 1986)

<sup>72</sup> Relator's brief, p. 23

<sup>73</sup> A06-2146, unpublished, filed November 6, 2007. (Appendix, A9-A12)

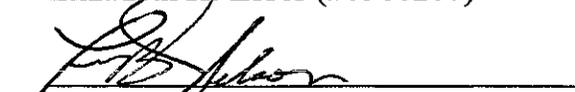
**X. CONCLUSION**

The Unemployment Law Judge correctly concluded that Peterson was discharged for employment misconduct.

The Department respectfully requests that the Court affirm the Unemployment Law Judge's decision.

Dated this 20<sup>th</sup> day of December, 2007.

  
Elizabeth H. Esser (#0388287)

  
Lee B. Nelson (#77999)

Department of Employment and  
Economic Development  
1<sup>st</sup> National Bank Building  
332 Minnesota Street, Suite E200  
Saint Paul, Minnesota 55101-1351  
(651) 296-6110

Attorneys for Respondent Department