

No. A10-351

State of Minnesota
In Court of Appeals

BLAYNE BRISSON,

Relator,

vs.

CITY OF HEWITT,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

BLAYNE BRISSON

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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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Legal Issue

Under the law, an individual who is discharged from his employment for violating the standards of behavior the employer has a right to expect of him, or for conduct demonstrating a lack of concern for the job, commits employment misconduct, and is ineligible for unemployment benefits. The City of Hewitt terminated Blayne Brisson after he viewed pornographic images and visited pornographic websites on his work computer. Did Brisson commit acts constituting employment misconduct under Minnesota law?

Unemployment Law Judge (“ULJ”) Sasha Mackin found Brisson was terminated for employment misconduct, and was ineligible for unemployment benefits.

Statement of the Case

The question before this court is whether Blayne Brisson is entitled to unemployment benefits. A Department adjudicator determined that Brisson was ineligible for benefits between October 4, 2009, and October 8, 2009, because he was on a paid leave of absence.¹

Brisson appealed that determination, and ULJ Sasha Mackin held a de novo hearing. At the hearing, Brisson conceded that he was ineligible for benefits between October 4 and October 8 because he was on a paid leave of absence.²

¹ E-1. Transcript references will be indicated “T.” Exhibits in the record will be “E-” with the number following.

² T. 8.

Brisson and the City of Hewitt agreed to have the ULJ hold a de novo hearing on the issue of Brisson's eligibility based on his separation from employment, the ULJ having statutory authority to do so.³ The ULJ found that Brisson was discharged for employment misconduct, and was therefore ineligible for benefits.⁴ Brisson filed a request for reconsideration with the ULJ, who affirmed.⁵

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Brisson under Minn. Stat. § 268.105, subd. 7(a) (2009) and Minn. R. Civ. App. P. 115.

The Department is charged with the responsibility of administering and supervising the unemployment insurance program, and is the primary responding party in this case.⁶ The Department does not represent the co-respondent in this proceeding, and this brief should not be considered advocacy for the City of Hewitt.

Statement of Facts

Blayne Brisson worked as a utility maintenance supervisor for the City of Hewitt from June 1, 2002, to October 7, 2009.⁷ Brisson worked full-time and his

³ Minn. Stat. § 268.101, subd. 3(a).

⁴ Appendix to Department's Brief, A9-A13.

⁵ Appendix A1-A4 and A5-A8.

⁶ Minn. Stat. § 116J.401, subd. 1(18); Minn. Stat. § 268.105, subd. 7(e).

⁷ T. 26, 27.

ending wage was \$17 per hour.⁸ Between July 30, 2009, and October 7, 2009, Brisson was placed on paid administrative leave three times.⁹

On June 16, 2009, Brisson was involved in an incident with city clerk Miriam Collom-Winters.¹⁰ Brisson had purchased stainless steel bolts for speed limit signs.¹¹ Winters discovered that the city could use a less expensive version of the bolts and asked a city council member to return the bolts.¹² One box of bolts could not be returned to the store because it had been a special order.¹³ When Winters explained to Brisson what had happened, Brisson became angry and threw the box of bolts against a wall.¹⁴ This frightened Winters.¹⁵

On July 28, 2009, Winters received several emails related to pornographic websites.¹⁶ The emails thanked her for visiting a pornographic website and directed her to click on a link to view pornography.¹⁷ Winters had never received emails of this nature before and had not visited any websites that would have prompted the emails.¹⁸ Winters was upset by this and reported the emails to the mayor.¹⁹

⁸ T. 27.

⁹ T. 30, 43, 96; E-8, p. 5.

¹⁰ T. 3, 75.

¹¹ T. 71, 72.

¹² T. 72.

¹³ T. 72.

¹⁴ T. 72, 73.

¹⁵ T. 74.

¹⁶ T. 69-70.

¹⁷ T. 70, E-22.

¹⁸ T. 70, E-22.

¹⁹ T. 70, E-22.

Winters was told in August 2009 that she would be moving to a new building so that she and Brisson would be separated.²⁰ The reason for this was because Winters felt that Brisson was creating a hostile work environment.²¹ Brisson was told not to go to the new building.²² Brisson did go to the new building several times when he knew that Winters was not going to be there.²³ Brisson went to the new building once when he knew Winters was there, but he did so on a direct order from the mayor.²⁴

Based on Winters' concerns and a report from a citizen, Corey Buckner, that Brisson had viewed pornography on his work computer, the City of Hewitt hired an attorney to investigate.²⁵ The attorney interviewed Buckner on August 19, 2009, who stated that he went to the city offices and saw Brisson viewing pornographic websites on his computer.²⁶ Buckner told the investigator that there was "no doubt" as to the type of content Brisson was viewing and that he was "positive about what [he] saw."²⁷ The investigator also took Brisson's work computer to Mike Stromberg of Stromberg Technologies on August 17, 2009.²⁸ Stromberg found over 150 pornographic images on Brisson's computer.²⁹

²⁰ T. 76.

²¹ T. 38, 87, 88.

²² T. 87.

²³ T. 88.

²⁴ T. 88.

²⁵ T. 30, E-7.

²⁶ E-14.

²⁷ E-14.

²⁸ T. 29, 30; E-9.

²⁹ T. 29, E-9.

Stromberg told the investigator that it was highly unlikely that these images were accidentally accessed, due to the nature and number of them.³⁰ Brisson admits that he opened emails containing pornography and visited pornographic websites from his work computer.³¹

Brisson was terminated on October 7, 2009 for viewing pornography on the city-owned computer, exhibiting anger in the workplace, failing to fulfill job requirements, insubordination, and violation of policies.³²

Standard of Review

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceeding, reverse, or modify the decision if Brisson's substantial rights were prejudiced because the decision of the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.³³

The Court of Appeals held in *Skarhus v. Davannis* that the issue of whether an employee committed employment misconduct is a mixed question of fact and law.³⁴ Whether the employee committed a particular act is a fact question.³⁵

³⁰ E-9.

³¹ T. 79.

³² T. 26, 29.

³³ Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (2009).

³⁴ 721 N.W.2d 340, 344 (Minn. App. 2006).

³⁵ *Id.* (citing *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997)).

Whether the employee's acts constitute employment misconduct is a question of law.³⁶ The Court of Appeals also held in *Skarhus* that it views the ULJ's factual findings "in the light most favorable to the decision,"³⁷ and gives deference to the ULJ's credibility determinations.³⁸ The Court also stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.³⁹ The Supreme Court in *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency* defined substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion."⁴⁰ In *Ywswf v. Teleplan Wireless Services, Inc.*, the Court of Appeals reiterated the standard that the Court reviews de novo the legal question of whether the employee's acts constitute employment misconduct.⁴¹

Argument for Ineligibility

Blayne Brisson viewed pornographic images and visited pornographic websites on his work computer. This constitutes misconduct. The statute provides:

Subd. 4 . **Discharge.** An applicant who was discharged from employment by an employer is ineligible for all unemployment benefits according to subdivision 10 only if:

³⁶ *Id.*

³⁷ 721 N.W.2d 340, 344 (Minn. App. 2006) (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)).

³⁸ *Id.* (citing *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000)).

³⁹ *Id.* (citing Minn. Stat. § 268.105, subd. 7(d)).

⁴⁰ 644 N.W.2d 457, 466 (Minn. 2002).

⁴¹ 726 N.W.2d 525 (Minn. App. 2007).

- (1) the applicant was discharged because of employment misconduct as defined in subdivision 6...

The definition of “employment misconduct” was amended in 2009, under Laws 2009, ch. 15, § 9, and is effective for determinations⁴² issued on or after August 2, 2009, including Brisson’s. The definition of “employment misconduct” now reads:

Subd. 6. Employment misconduct defined.

(a) Employment misconduct means 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.

* * *

(e) The definition of employment misconduct provided by this subdivision is exclusive and no other definition applies.⁴³

1. Brisson committed employment misconduct by violating the standards of behavior that the City of Hewitt had the right to expect of him.

An employer has the right to reasonably expect that an employee will not use his work computer to view pornography. The reasons for this are obvious: it consumes time the employee should spend working and it could be viewed by other employees who find it offensive or threatening. Pornographic websites and email attachments also often contain viruses, malware, and other harmful programs that could harm an employer’s computer system. Brisson violated the

⁴² “Determination” is defined in Minn. Stat. § 268.035, subd. 12(c).

⁴³ Minn. Stat. § 268.095, subd. 6 (2009).

standards of behavior his employer had the right to expect of him and thus, committed employment misconduct.

In his brief, Brisson cites Minn. Stat. § 609.43, subd. 2, which refers to the crime of misconduct of a public officer or employee.⁴⁴ This is a criminal statute and has nothing to do with unemployment insurance. Brisson argues that he is not guilty of this crime because looking at pornography is not prohibited by law.⁴⁵ A city employee's conduct need not violate a criminal statute to be considered employment misconduct.

Brisson also argues that he could not have committed misconduct because the City of Hewitt does not have an official policy stating which types of websites employees are allowed to view at work.⁴⁶ Internet use policies vary greatly among employers but it is unlikely that there are employers, particularly government entities, who do not expect their employees to refrain from viewing pornography on their work computers when they are supposed to be working. An employer need not anticipate and expressly forbid every type of behavior that would be unacceptable in the workplace in order for misconduct to be found. This is especially true when common sense should dictate that the behavior would be unacceptable to the average employer, as is the case with viewing pornography during work hours. No reasonable employee would think that viewing pornography at work would be acceptable, especially a public employee. This

⁴⁴ Relator's brief, p. 3.

⁴⁵ Relator's brief, p. 3.

⁴⁶ Realtor's brief, p. 3.

Court has held that violation of an existing policy is not necessary for a finding of misconduct, stating, “[w]e are aware of no law that requires that an employer have an express “policy” regarding prohibited behavior for employees. The focus of the definition of misconduct is on ‘standards of behavior the employer has the right to reasonably expect of the employee.’”⁴⁷

In *Moench v. Red River Basin Board*, this Court affirmed the ULJ’s legal conclusion that “an employer clearly has the right to expect employees to refrain from storing large amounts of pornographic material under protected files in work computers’ even in the absence of a computer policy prohibiting such conduct.”⁴⁸ The Court reversed the ULJ’s decision, however, because there was not sufficient evidence to sustain a finding that the applicant in *Moench* had downloaded pornography onto his computer.⁴⁹ Here, Brisson admits that he visited pornographic websites on his work computer. In *Pidd v. Bergquist Company*, this Court held that sending a sexually explicit email violated the standards of behavior the employer had the right to expect, even though it did not directly violate the employer’s internet use policy.⁵⁰

The City of Hewitt’s employees’ salaries are paid with taxpayer funds. It is important for the citizens of Hewitt to know that their tax dollars are being spent

⁴⁷ *Brown v. National American University*, 686 N.W.2d 329, 333 (Minn. App. 2004) (citing Minn. Stat. § 268.095, subd. 6(a)).

⁴⁸ 2002 WL 31109803, at *4 (Minn. App. September 24, 2002), Appendix, A14-A17.

⁴⁹ *Id.*

⁵⁰ 2002 WL 1837996, at *2 (Minn. App. August 5, 2002), Appendix, A18-A20.

on activities that further the citizens' interest. Corey Buckner, a Hewitt resident, observed Brisson sitting at his desk, perusing pornography, when he should have been working. Buckner stated, "[t]hat made me mad. He was doing that on city time that we are paying for, and there was work to be done that he hadn't completed."⁵¹ Brisson's conduct could have seriously damaged the city's reputation. Viewing pornography on a work computer, during work hours, in full view of Hewitt's citizens shows a substantial disregard of the city of Hewitt's interest. There is sufficient evidence in the record to sustain a finding of misconduct.

2. There is no burden of proof in unemployment insurance proceedings.

Burden of proof in unemployment insurance is a common law notion that is no longer applicable. The statute is clear that there is no presumption of eligibility or ineligibility for unemployment benefits,⁵² and eligibility for benefits is decided using a preponderance of the evidence standard.⁵³ The unemployment insurance program is a creature of statute. There is no common law entitlement to benefits, and thus no common law burdens of proof can be assigned in unemployment insurance proceedings.⁵⁴

⁵¹ E-14.

⁵² Minn. Stat. § 268.069, subd. 2.

⁵³ Minn. Stat. § 268.101, subd. 2(e); Minn. Stat. § 268.031, subd. 1.

⁵⁴ Minn. Stat. § 268.069, subd. 3.

Unemployment benefits are paid from state funds, not employer funds.⁵⁵ The public interest prevails over any private interest,⁵⁶ and the public has a strong interest in the proper payment of benefits. As the Supreme Court indicated in *Lolling v. Midwest Patrol*, the expenditure of state funds to an applicant should not be triggered by an employer's inaction.⁵⁷

There is also no equitable entitlement to unemployment benefits.⁵⁸ The only entitlements are those laid out in statute, and the proceedings to determine entitlement are described in detail in the statute. In fact, an applicant can self-disqualify for misconduct without the employer providing any information at all. When an applicant applies for benefits, he must give the reason he is unemployed; if it is other than lack of work it raises an issue of ineligibility, and the Department must issue a written determination on the issue.⁵⁹ The applicant, who has indicated he was discharged, is then further required to give all the facts he knows about the discharge.⁶⁰ Based upon that information and information from any other source – whether anything is obtained from the employer or not – the Department is required to issue the written determination.⁶¹ Thus, an applicant can be held ineligible for benefits because he was discharged for employment

⁵⁵ Minn. Stat. § 268.069, subd. 2. *See also Jackson v. Honeywell*, 47 N.W.2d 449, 451 (Minn. 1951).

⁵⁶ Minn. Stat. § 645.17(5).

⁵⁷ 545 N.W.2d 372, 376 (Minn. 1996).

⁵⁸ *Id.*

⁵⁹ Minn. Stat. § 268.101, subd. 1(a).

⁶⁰ Minn. Stat. § 268.101, subd. 1(d).

⁶¹ Minn. Stat. § 268.101, subd. 2(a) and (c).

misconduct based upon his statement alone, the employer providing nothing. Saying there is a burden of proof on the employer is nonsensical under the current statutory scheme.

Further, no burden of proof exists if a hearing takes place, as the ULJ must ensure that all relevant facts are clearly and fully developed; the hearing is an evidence gathering inquiry.⁶² Again, an applicant's information (testimony and prior statements) alone can result in ineligibility because of employment misconduct. The preponderance of the evidence, from any source, determines the outcome of a hearing. This type of proceeding is incompatible with a burden-of-proof scheme found in adversarial proceedings.

In *Vargas v. Northwest Area Foundation*, the Court of Appeals, citing a number of statutory provisions, held that an individual's eligibility for unemployment benefits is determined based upon the available evidence without regard to any burden of proof.⁶³ While the statute has been amended since *Vargas*, the legislature did not adopt any sort of common law burden of proof standard, refusing to insert any burden of proof into the statute. Taking out references to no burden of proof is not a sign that one now exists. If the legislature wanted or intended a burden of proof it could have simply inserted one, as it has done in other parts of the statute. Minn. Stat. § 268.057, for example, places the burden on the employer in showing that a tax computation is incorrect.

⁶² Minn. Stat. § 268.105, subd. 1(a) and (b).

⁶³ 673 N.W. 2d 200 (Minn. App. 2004).

Conspicuously absent from the statute is any burden of proof, on the applicant, the employer, or the Department, in showing an applicant is ineligible or eligible for benefits.

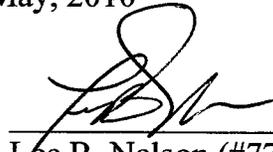
The Court of Appeals has decided at least a thousand unemployment insurance cases without applying any burden of proof.⁶⁴ The preponderance of evidence standard has remained constant, and accounts for the continuity of these decisions. No change in that process is called for.

Conclusion

Unemployment Law Judge Sasha Mackin correctly concluded that Brisson was terminated for employment misconduct. The Department requests that the Court affirm the decision of the Unemployment Law Judge.

⁶⁴ Over that same time, ULJs have heard and decided over 200,000 appeals, and the Department has issued over one million written determinations on eligibility.

Dated this 20th day of May, 2010



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