

No. A10-423

State of Minnesota
In Court of Appeals

SHAHRIAR VASSEEI,

Relator,

vs.

SCHMITTY & SONS SCHOOL BUSES INC,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

LEGAL ISSUE..... 4

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 5

STANDARD OF REVIEW..... 6

ARGUMENT FOR INELIGIBILITY 7

 1. VASSEEI’S CONDUCT VIOLATED THE STANDARDS OF BEHAVIOR THAT HIS
 EMPLOYER HAD THE RIGHT TO REASONABLY EXPECT, AND THUS CONSTITUTED
 EMPLOYMENT MISCONDUCT..... 9

 2. VASSEEI’S HEARINGS WERE PROCEDURALLY SOUND..... 10

CONCLUSION 16

APPENDIX..... 17

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 AUTHORITIES

CASES

<i>Drellack v. Inter-County Community Council, Inc.</i> , 366 N.W.2d 671 (Minn. App. 1985)-----	9
<i>Jackson v. Honeywell</i> , 234 Minn. 52, 55, 47 N.W.2d 449 (Minn. 1951)-----	11
<i>Jenson v. Dep't of Econ. Sec.</i> , 617 N.W.2d 627, 631 (Minn. App. 2000), <i>review denied</i> (Minn. Dec. 20, 2000) -----	7
<i>Krantz v. Larco Division</i> , 363 N.W.2d 833 (Minn. App. 1985)-----	9, 10
<i>Lolling v. Midwest Patrol</i> , 545 N.W.2d 372 (Minn. 1996)-----	7, 12
<i>Minn. Ctr. for Envtl Advocacy v. Minn. Pollution Control Agency</i> , 644 N.W.2d 457, 466 (Minn. 2002)-----	6
<i>Montgomery v. F & M Marquette National Bank</i> , 384 N.W. 2d 602 (Minn. App. 1986)-----	9
<i>Ntamere v. DecisionOne Corp.</i> , 673 NW 2d 179 (Minn. App. 2003) -----	11
<i>Scheunemann v. Radisson S. Hotel</i> , 562 N.W.2d 32 (Minn. App. 1997)-----	7
<i>Shell v. Host Int'l Corp.</i> 513 N.W.2d 15 (Minn. App. 1994) -----	9
<i>Skarhus v. Davannis</i> 721 N.W.2d 340 (Minn. App. 2006)-----	7
<i>Thiele v. Stich</i> , 425 NW 2d 580 (Minn. 1988) -----	14
<i>Thompson v. County of Hennepin</i> , 660 N.W.2d 157 (Minn. App. 2003) -----	11
<i>Ywswf v. Teleplan Wireless Services, Inc.</i> , 726 N.W.2d 525 (Minn. App. 2007) --	7, 11

STATUTES

Minn. Stat. § 268.031, subd. 1 -----	11
Minn. Stat. § 268.069, subd. 2 -----	11
Minn. Stat. § 268.069, subd. 3 -----	11

Minn. Stat. §268.095, subd. 4 (2009) -----	8
Minn. Stat. §268.095, subd. 6 (2009) -----	8
Minn. Stat. §268.101, subd. 1 (2009) -----	12
Minn. Stat. §268.101, subd. 2 (2009) -----	12
Minn. Stat. §268.105, subd. 2 (2009) -----	10, 14
Minn. Stat. §268.105, subd. 7 (2009) -----	5, 6
Minn. Stat. §645.17(5) (2009)-----	10

RULES

Minn. R. 3310.2921-----	11
Minn. R. Civ. App. P. 115 -----	5

Legal Issue

Under Minnesota law, an individual discharged from employment for violating the standards of behavior the employer has a right to expect from him commits employment misconduct and is ineligible for unemployment benefits. Schmitt & Sons School Buses, Inc. (“Schmitt & Sons”) discharged driver Shahriar Vassei after he hit and injured a bicyclist, and then continued driving his route without stopping. Vassei had previously amassed a number of warnings for safety violations. Is Vassei ineligible for benefits because he was discharged for employment misconduct?

Unemployment Law Judge (“ULJ”) Frank Villaume found that Vassei was discharged because of employment misconduct, and was ineligible for unemployment benefits.

Statement of the Case

The question before this court is whether Shahriar Vassei is entitled to unemployment benefits. A Minnesota Department of Employment and Economic Development (the “Department”) adjudicator determined that Vassei was ineligible for unemployment benefits because he had been discharged for employment misconduct.¹

Vassei appealed that determination, and ULJ Villaume held a de novo hearing in which Schmitt & Sons was unrepresented, and Vassei was represented by counsel. The ULJ found that Vassei was not discharged for employment misconduct, and was

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

therefore eligible for benefits.² Schmitt & Sons filed a request for reconsideration with the ULJ, who reversed, and ordered an additional evidentiary hearing to consider evidence and testimony not offered at the first hearing.³ The ULJ then issued a decision finding that Vassei was discharged for misconduct and was ineligible for benefits.⁴ This resulted in an overpayment of benefits previously paid. Vassei filed a request for reconsideration, and the ULJ affirmed.⁵

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Vassei under Minn. Stat. § 268.105, subd. 7(a) (2009) and Minn. R. Civ. App. P. 115. The Department is the primary responding party to any judicial action involving an Unemployment Law Judge's decision,⁶ and this brief should not be considered advocacy for Schmitt & Sons.

Statement of Facts

Shahriar Vassei worked at Schmitt & Sons as a full-time transit driver from January 10, 2008, through July 31, 2009, with a final wage of \$15.50 an hour.⁷ Vassei earned his commercial driver's license in February 2007, and received an additional 50 to 60 hours of training after Schmitt & Sons hired him.⁸ Vassei received four written warnings for violating his employer's policies during his year-and-a-half on the job, including for making a U-turn, for swerving suddenly and shouting at a passenger, for not

² Appendix to Department's Brief, A14-A19.

³ Appendix, A12-A13.

⁴ Return-3C (Appendix, A6-A11).

⁵ Return-6 (Appendix, A1-A5).

⁶ Minn. Stat. § 268.105, subd. 7(e).

⁷ T. 12.

⁸ T. 54, 75.

following route changes, and for leaving a bus unattended.⁹ Vasseei also hit a pole while backing up a bus, and though the accident was preventable, he received no written warning.¹⁰

On July 31, 2009, Vasseei was making a right turn when he hit a bicyclist in the crosswalk.¹¹ Vasseei was turning with only one hand, when he should have been using two.¹² He also failed to make the turn completely and backed the bus up without using a spotter, although policy required him to use a spotter or get off the bus.¹³ He then continued on his route, unaware that he had hit a bicyclist.¹⁴ The Schmitt & Sons safety committee discharged him because he had two preventable accidents within two years.¹⁵

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 Vasseei'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.¹⁶

⁹ E-4-7, T. 31-34.

¹⁰ T. 38.

¹¹ T. 62-63,

¹² T. 42, 44-45.

¹³ T. 30, 104.

¹⁴ T. 66, 69.

¹⁵ T. 14-15, 55.

¹⁶ Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (2009).

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.¹⁷ Whether the employee committed a particular act is a fact question.¹⁸ Whether the employee's acts constitute employment misconduct is a question of law.¹⁹ The Court of Appeals also held in *Skarhus* that it views the ULJ's factual findings "in the light most favorable to the decision,"²⁰ and gives deference to the ULJ's credibility determinations.²¹ The Court also stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.²² The Supreme Court in *Minn. Ctr. for Env'tl Advocacy v. Minn. Pollution Control Agency* defined substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion."²³ In *Yswsf 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.²⁴

Argument for Ineligibility

An applicant who is discharged from employment is ineligible for benefits if the conduct for which the applicant was discharged amounts to employment misconduct.

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

¹⁸ *Id.* (citing *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997)).

¹⁹ *Id.*

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

²¹ *Id.* (citing *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000)).

²² *Id.* (citing Minn. Stat § 268.105, subd. 7(d) (2009)).

²³ 644 N.W.2d 457, 466 (Minn. 2002).

²⁴ 726 N.W.2d 525 (Minn. App. 2007).

The definition of employment misconduct is clearly delineated in the statute, and Vassei's dangerous disregard for his employer's safety rules, which ultimately resulted in the injury of an innocent bicyclist, 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:

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

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 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.

(b) Regardless of paragraph (a), the following is not employment misconduct:

(1) conduct that was a consequence of the applicant's mental illness or impairment;

(2) inefficiency or inadvertence;

(3) simple unsatisfactory conduct;

(4) conduct an average reasonable employee would have engaged in under the circumstances;

(5) poor performance because of inability or incapacity;

(6) good faith errors in judgment if judgment was required;

* * *

(e) The definition of employment misconduct provided by this subdivision is exclusive and no other definition applies.²⁵

²⁵ Minn. Stat. § 268.095, subd. 6 (2009).

1. Vasseei's conduct violated the standards of behavior that his employer had the right to reasonably expect, and thus constituted employment misconduct.

Relator's brief makes no real argument that, on the record before the ULJ at the November 23, 2009, hearing, Vasseei did not commit misconduct. Nonetheless, the Department must briefly address the severity of Vasseei's conduct. There is no question that a serious violation of an employer's reasonable rules and policies is employment misconduct.²⁶ The Court emphasized in *Shell v. Host Int'l Corp.* that this is especially true when safety is involved.²⁷ Here, Vasseei was charged with delivering passengers in a large bus, a bus that could cause serious damage unless driven with great care and caution. He received training on how to safely operate the bus.

Yet in only a year-and-a-half on the job, Vasseei was given four written warnings and caused two preventable accidents, one resulting in injuries that sent a bicyclist to the hospital. It should be intuitive that a large bus, wielded incorrectly, can cause serious injury or death. This intuition should have been further reinforced by the extensive training Vasseei received. And yet, time after time, Vasseei engaged in conduct that endangered his passengers and innocent pedestrians and bystanders. The Court of Appeals held in *Drellack v. Inter-County Community Council, Inc.* that the applicant's conduct as a whole should be considered in determining whether the applicant was discharged for misconduct.²⁸ Similarly, in *Krantz v. Larco Division*, the Court of

²⁶ See *Montgomery v. F & M Marquette National Bank*, 384 N.W. 2d 602 (Minn. App. 1986).

²⁷ 513 N.W.2d 15, 18 (Minn. App. 1994).

²⁸ 366 N.W.2d 671 (Minn. App. 1985).

Appeals held that where, as in this case, the applicant was not terminated for one incident alone, the applicant's poor work history should be evaluated, and not just the final incident.²⁹ Vasseei proved time and time again that he did not take safety seriously, which ultimately resulted in serious injury. Had Vasseei followed safety regulations, including turning with both hands and not backing up without a spotter, this injury might have been prevented. Vasseei's violation of his employer's safety policies constitutes employment misconduct.

2. Vasseei's hearings were procedurally sound.

Relator's brief essentially argues only one point: that the ULJ erred in ordering an additional evidentiary hearing, and that this Court should instead order the Department to pretend that it never received the testimony or the police report detailing the accident and the bicyclist's injuries. But unemployment insurance proceedings are evidence-gathering inquiries, not adversarial proceedings, and the ULJ, on his own motion, properly ordered an additional hearing to provide the assistance he failed to offer to an unrepresented party during the first hearing. This is in keeping with the ULJ's obligations under Minn. Stat. § 268.105, subd. 2(b), which explains that:

The evidentiary hearing is conducted by an unemployment law judge as an evidence gathering inquiry...The unemployment law judge must ensure that all relevant facts are clearly and fully developed. The department may adopt rules on evidentiary hearings. The rules need not conform to common law or statutory rules of evidence and other technical rules of procedure. The department has discretion regarding the method by which the evidentiary hearing is conducted...

²⁹ 363 N.W.2d 833 (Minn. App. 1985).

Moreover, under Minn. R. 3310.2921, “[t]he judge should assist unrepresented parties in the presentation of evidence....The judge must exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing. The judge must ensure that relevant facts are clearly and fully developed.” The Court has made clear that ULJs must fulfill the obligations laid out for them in Minn. R. 3310.2921, and a ULJ’s obligation to assist an unrepresented party applies to both unrepresented applicants and unrepresented employers.³⁰

The ULJ’s obligations are central to the purpose of the unemployment insurance program. Unemployment benefits are paid from state funds, not employer funds.³¹ The public interest prevails over any private interest,³² and the public has a strong interest in the proper payment of benefits. The statute is clear that there is no presumption of eligibility or ineligibility for unemployment benefits,³³ and eligibility for benefits is decided using a preponderance of the evidence standard.³⁴ 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.³⁵ 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

³⁰ *Ywswf*, 726 N.W.2d at 529-30; *Thompson v. County of Hennepin*, 660 N.W.2d 157 (Minn. App. 2003); *Ntamere v. DecisionOne Corp.*, 673 NW 2d 179 (Minn. App. 2003).

³¹ Minn. Stat. §268.069, subd. 2. *See also Jackson v. Honeywell*, 234 Minn. 52, 55, 47 N.W.2d 449, 451 (Minn. 1951).

³² Minn. Stat. § 645.17(5).

³³ Minn. Stat. § 268.069, subd. 2.

³⁴ Minn. Stat. § 268.101, subd. 2(e); Minn. Stat. § 268.031, subd. 1.

³⁵ Minn. Stat. § 268.069, subd. 3.

inaction.³⁶ The ULJ is not interested in picking a winner from the two parties; he is interested in uncovering the relevant evidence from all available sources, and making a fully informed decision.

The only entitlements to benefits 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.³⁷ The applicant, who has indicated he was discharged, is then further required to give all the facts he knows about the discharge.³⁸ 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.³⁹ Thus, an applicant can be held ineligible for benefits because he was discharged for employment misconduct based upon his statement alone, the employer providing nothing.

In light of the ULJ's clear obligation to assist unrepresented parties in developing the record, ULJ Villaume recognized that he had erred. During the first hearing, Schmitt & Sons transit manager Connie Massengale indicated that she had not read the

³⁶ 545 N.W.2d 372, 376 (Minn. 1996).

³⁷ Minn. Stat. §268.101, subd. 1(a).

³⁸ Minn. Stat. §268.101, subd. 1(d).

³⁹ Minn. Stat. §268.101, subd. 2(a) and (c).

full police report, but that Karen Halstead had received it.⁴⁰ Once the employer raised this issue, it was the ULJ's obligation to inquire further. But the ULJ did not ask if Halstead was available to testify, nor did he ask if Schmitt & Sons had a copy of the police report that could be submitted to the ULJ.

ULJs conduct 5 hearings a day, and 25 hearings a week, and not infrequently this grinding schedule leads to errors that ULJs must correct when a request for reconsideration brings them to light. ULJs will also often use their inherent authority to reopen a hearing on their own motion when, after the close of the hearing, they realize that they have forgotten to inquire into a crucial area of the case. A ULJ will not infrequently hang up the telephone only to realize that they forgot to inquire into one of the elements of the statute, or failed to call a witness that a party mentioned at the beginning of the hearing. Should the ULJ then simply hope that one of the parties requests reconsideration, or perhaps call a party and urge them to make the request? If an applicant quits for a medical reason, and the ULJ forgets to inquire about whether the applicant requested accommodation, should the ULJ deny benefits because there is nothing in the record to show the request was made? These would be absurd results in which ULJs would be helpless to correct their own errors, and are not contemplated by the statute. ULJ Villaume correctly saw that he had failed to gather all relevant evidence, and had not assisted Schmitt & Sons in submitting all the evidence. He correctly ordered an additional evidentiary hearing to make up for his previous error.

⁴⁰ T. 25, 28.

As relator's brief repeatedly points out, it is true that Minn. Stat. § 268.105, subd.

2(c) explains that:

The unemployment law judge must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

But that does not somehow erase the ULJ's responsibility under subd. 2(b) to ensure that all relevant facts are developed. A ULJ may order an additional hearing under subd. 2(c), when faced with an entirely new document never before mentioned by either party. But subd. 2(c) is not the only statutory clause allowing for a new hearing; the ULJ may also order a new hearing because he failed to assist an unrepresented party, or failed to develop the record. Vassei's counsel seemed to recognize this, as during the second hearing, Vassei's counsel did not object to the ULJ's introduction of additional evidence, including the police report,⁴¹ although he did argue that the report was hearsay.⁴² As the Minnesota Supreme Court explained in *Thiele v. Stich*, arguments not made before the lower court are waived, and a party may not "obtain review by raising the same general issue litigated below but under a different theory."⁴³ Vassei has waived this argument by not raising it earlier.

⁴¹ T. 90-91.

⁴² T. 107.

⁴³ 425 NW 2d 580 (Minn. 1988).

More importantly, though, the second hearing showed the extent to which the ULJ failed to develop the record in the first hearing. At hearing, Vassei denied ever hitting the bicyclist, and concluded that someone else must have hit her.⁴⁴ Based on the testimony from the first hearing, the ULJ also concluded that “the rider was not injured.”⁴⁵ During the second hearing, though, the ULJ for the first time took testimony from Karen Halstead, the HR compliance manager, who received a faxed copy of the police report.⁴⁶ Halstead also viewed the videotape from the cameras on the vehicle.⁴⁷ Halstead spoke with the police officer who wrote the report, who told Halstead that he had spoken to the injured bicyclist.⁴⁸ The officer confirmed to Halstead that the injured bicyclist had been taken to the hospital.⁴⁹ After fully developing the record and assisting the unrepresented party, the ULJ had a complete record on which to base his decision. No law, rule, or case would require the ULJ or this Court to ignore this information, pretending that Halstead did not testify or that the police report had never been written. This testimony and these documents completed the record, giving a full account of the events of July 31. They enabled the ULJ to make an informed decision, in keeping with his obligations clearly laid out by statute. Vassei hit and injured a bicyclist, and committed employment misconduct.

⁴⁴ T. 65-66, 70, 100-01.

⁴⁵ Return-3A.

⁴⁶ T. 91-92; E-13.

⁴⁷ T. 93.

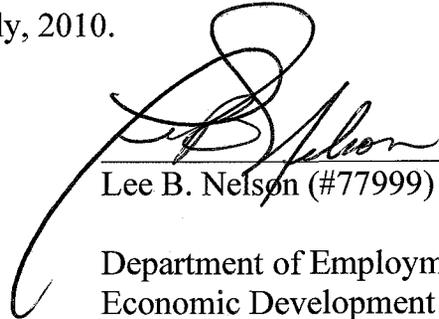
⁴⁸ T. 95.

⁴⁹ T. 96-97.

Conclusion

Unemployment Law Judge Frank Villaume correctly concluded that Vassei was terminated for employment misconduct. The Department requests that the Court affirm the decision of the Unemployment Law Judge.

Dated this 19th day of July, 2010.



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