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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2149**

Timothy N. Sourivong,
Relator,

vs.

North Metro Harness Initiative, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 12, 2013
Affirmed
Connolly, Judge**

Department of Employment and Economic Development
File No. 30069551-3

Anne M. Loring, Minneapolis, Minnesota (for relator)

North Metro Harness Initiative, LLC, Columbus, Minnesota (for respondent)

Lee B. Nelson, Christine Hinrichs, Minnesota Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Connolly, Presiding Judge; Cleary, Judge; and
Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CONNOLLY, Judge

In this certiorari appeal from an unemployment-law judge's (ULJ's) decision that relator is ineligible for unemployment benefits because he committed employment misconduct, relator argues that (1) his actions did not actually constitute employment misconduct and (2) the hearing was unfair because the ULJ failed in his duty to assist an unrepresented party and to clearly and fully develop the record. Because the ULJ did not err in determining that relator committed employment misconduct, and because the ULJ did not fail in his duty to assist an unrepresented party and to clearly and fully develop the record, we affirm.

FACTS

Relator Timothy Sourivong worked at Running Aces Harness Park, a division of respondent-employer North Metro Harness Initiative Inc. (North Metro), from June 2008 until his discharge on July 29, 2012. North Metro is a racino business; conducting live harness racing and operating a "Las Vegas style" card room featuring a variety of card games, including 4 Card Poker. Relator worked as a dual-rate pit-supervisor, sometimes acting as a dealer in card games. During his employment at North Metro, relator was issued a total of six Employee Corrective Action (ECA) documents from January 29, 2009 through July 9, 2012, not including his final termination notice. The "misconduct" box was only checked on two of these ECA documents: on January 29, 2009 and May 2, 2012. The "performance" box was checked on three of the ECA documents. The sixth

document did not have a check next to “misconduct” or “performance,” but was the basis for a suspension relator received in November 2010.

On the night of July 25, 2012, relator was dealing cards at a 4 Card Poker table when he forgot to deal himself in as a dealer in the game, violating the rules of play. Upon realizing his mistake, relator called the floor supervisor over to his table. The floor supervisor provided relator with instructions on correcting the error, which relator proceeded to question in front of patrons. North Metro policies and standard casino practices require dealers to always follow the direction of a floor supervisor to avoid confrontation at a table in front of players. Relator eventually complied with the floor supervisor’s instructions but only after continuing to question her in front of the card players, in violation of policy. Only later did the floor supervisor learn that her instructions had, in fact, been inaccurate according to guidelines established by the Minnesota Racing Commission (MRC). Due to relator’s violation of North Metro’s policy on July 25, as well as previous violations, relator was discharged on July 29, 2012. Relator subsequently applied for unemployment benefits.

Respondent-department, the Minnesota Department of Employment and Economic Development (DEED), issued a determination of ineligibility on August 17, 2012, finding that relator was discharged for misconduct and is ineligible to receive unemployment benefits. Relator appealed the determination, and a ULJ conducted a de novo hearing. The ULJ found that relator was discharged for misconduct, and is therefore ineligible for benefits. Relator requested reconsideration, and the ULJ affirmed his decision. Relator now challenges the determination of his ineligibility.

DECISION

1. Misconduct

When reviewing the decision of a ULJ, we may affirm the decision, remand it for further proceedings, or reverse or modify it if the substantial rights of the relator 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.” Minn. Stat. § 268.105, subd. 7(d) (2012).

Relator challenges the ULJ’s finding that he committed employment misconduct, arguing that his actions did not constitute misconduct because he was trying to comply with MRC guidelines. We review de novo a ULJ’s determination that an applicant is ineligible for unemployment benefits. *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 30 (Minn. App. 2012). We review the ULJ’s findings of fact in the light most favorable to the decision and will not disturb the findings where the record substantially supports them. *Id.* at 31.

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). “Whether an employee committed employment misconduct is a mixed question of fact and law. Whether the employee committed a particular act is a question of fact.” *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citation omitted), *review denied* (Minn. Oct. 1, 2008).

Relator first argues that the ULJ erroneously took into consideration incidents which were not technically misconduct. A determination of the ULJ's reasons for a termination "is a factual determination that is to be reviewed in the light most favorable to the decision and may not be disturbed if there is evidence reasonably tending to sustain the finding." *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 204 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004). The ULJ found that relator was terminated due to his conduct during the final incident, as well as the conduct that resulted in his previous warnings. This finding is supported by substantial evidence in the record, including relator's final notice of termination and the testimony of the manager involved in the decision to terminate relator. The fact that North Metro checked a box designated "performance" instead of "misconduct" on some violations does not indicate that the conduct was not considered in making the decision to terminate. Because the ULJ's finding that each of relator's policy violations factored into North Metro's decision to terminate relator is substantially supported by the record, we will not disturb the finding on appeal.

Relator also argues that his actions did not rise to the level of employment misconduct under the law. Employment misconduct is "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." Minn. Stat. § 268.095, subd. 6(a) (2012). In addition to dealing cards, relator sometimes worked as a supervisor. Despite this level of seniority, however, the record shows that relator

continued to violate North Metro's policies during the months leading to his termination. In May 2012, relator was suspended for telling a player that he could play over the table's maximum betting amount. Within a month of returning to work, relator engaged in the same conduct. The seriousness of these violations is magnified by relator's position as a supervisor for North Metro because his employer had the right to reasonably expect that he follow the policies that he was charged with enforcing among his subordinates. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002) (“[A]n employee’s decision to violate knowingly a reasonable policy of the employer is misconduct.”).

Additionally, relator admitted that he understood North Metro's policy prohibiting the questioning of floor supervisors in front of guests. But on the night of July 25, he intentionally disregarded this policy by questioning his supervisor in front of card players. These policy violations over the last several months of relator's employment are clearly a serious violation of North Metro's reasonable expectations. Therefore, the ULJ did not err by concluding that the relator committed employment misconduct.

Next, relator argues that, as a matter of policy, he did not commit misconduct because he was attempting to comply with the MRC guidelines by dealing the cards in the correct manner. As support for this argument, relator cites *Phipps v. Clark Oil & Refining Corp.*, 396 N.W.2d 588 (Minn. App. 1986), *aff'd*, 408 N.W.2d 569 (Minn. 1987). In *Phipps*, we recognized that “[a]n employer’s authority over its employee does not include the right to demand that the employee commit a criminal act.” *Id.* at 592. According to relator, because his employer did not have the authority to ask him to deal a game incorrectly, it had no authority to characterize his behavior as misconduct when

relator objected. But relator provided no substantive evidence at the hearing, other than his own opinion, that his employer's policies violated the law. He did not introduce into evidence the written policies of his employer or the MRC's rules. Therefore, we have no basis to apply *Phipps*. For purposes of determining benefit eligibility, the definition of misconduct contained in Minn. Stat. § 268.095, subd. 6 (2012) is exclusive. Minn. Stat. § 268.095, subd. 6(e). Because relator engaged in intentional conduct that clearly displayed a serious violation of the standards of behavior the employer has the right to reasonably expect, the ULJ did not err by concluding that relator was terminated for misconduct.

Finally, relator argues that his conduct falls within one of the statutory exceptions to misconduct. Exceptions to employment misconduct exist for "conduct an average reasonable employee would have engaged in under the circumstances" and "good faith errors in judgment if judgment was required." Minn. Stat. § 268.095, subd. 6(b)(4), (6). Relator implies that he had no other reasonable choice but to question the floor supervisor in front of patrons. But relator could have waited until he got off the table to ask the floor supervisor or requested to speak to her in private. Relator acknowledges that he was informed of North Metro's policy prohibiting the questioning of floor supervisors in front of patrons. Therefore, relator's conduct was unreasonable under the circumstances.

Relator also argues that if he did violate North Metro's policies by questioning a floor supervisor, it was a good faith error because he was trying to do what was right by following the MRC guidelines. Importantly, however, this exception applies only when judgment is required. Because North Metro's policies do not allow employees the

discretion of deciding whether to question floor supervisors in front of patrons, relator was not justified in his actions and his conduct does not fall under this exception.

2. Evidentiary Hearing

Relator also argues that the evidentiary hearing was unfair. Specifically, relator argues that (1) the ULJ did not adequately assist him in presenting his evidence because the ULJ cut him off and failed to offer relator a chance to cross-examine witnesses for the employer and (2) the ULJ's decision was arbitrary and capricious because he failed to develop a factual record on the impact of the MRC's guidelines on governing casinos.

Relator first argues that the ULJ failed in his duty to assist an unrepresented party. According to relator, the ULJ cut him off and exhibited "exasperation and impatience." The ULJ has a duty to ensure that all relevant facts are clearly developed and "must exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2011). A review of the transcript reveals that the ULJ properly exercised control over the hearing to ensure that relator was offering relevant testimony.

Relator also argues that the ULJ did not allow him a final opportunity to cross-examine two witnesses after each made an additional statement. One witness testified that some of the actions for which relator had been disciplined were caught on a security camera, and offered her opinion as to how relator could have handled a particular situation. The other witness informed the ULJ that, although relator had indicated otherwise, it was not compulsory for employees to sign written warnings. Relator maintains that these witnesses' testimony served to bolster other evidence and render it

more compelling when the ULJ made his findings. While it is true that the ULJ did not allow relator a final chance to cross-examine these witnesses, an appellant must show both error and prejudice resulting from the error in order to prevail on appeal. *See Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975). There is no evidence in the record before us that the ULJ's failure to allow relator an opportunity to cross-examine the witnesses resulted in any prejudice to relator. In fact, neither of the two witnesses' testimony is referenced in the ULJ's decision.

Finally, relator argues that the ULJ failed to develop a factual record by disregarding the relationship between North Metro and the MRC. As we have previously discussed, it was relator who failed to present the relevant evidence concerning North Metro's policies and MRC's guidelines.

Affirmed.