

NO. A07-1704

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 BRIEF AND 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)
 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.

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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STATEMENT OF ISSUES

- I. IS AN EMPLOYEE DISQUALIFIED FROM RECEIVING UNEMPLOYMENT BENEFITS ON GROUNDS OF "MISCONDUCT" BECAUSE HE WAS TERMINATED FOR A FIRST-TIME ALCOHOL OFFENSE WHEN HE COMPLIED WITH THE EMPLOYER'S POLICY THAT DISCHARGE FOR A FIRST-TIME OFFENDER WHO SUCCESSFULLY COMPLETES A CHEMICAL DEPENDENCY TREATMENT PROGRAM?

The Unemployment Law Judge held that the employee is disqualified from receiving unemployment compensation benefits on grounds of "misconduct."

Apposite Authorities:

Eyler v. Minneapolis Star & Tribune Co., 427 N.W.2d 758
(Minn. Ct. App. 1988);
Hoernberg v. Watco Publishers, Inc., 343 N.W.2d 676
(Minn. Ct. App. 1984).
Minn. Stat. § 268.095, Subds. 4 and 6.

- II. IS THE EMPLOYEE ELIGIBLE FOR UNEMPLOYMENT COMPENSATION BENEFITS UNDER THE "CHEMICAL DEPENDENCY" PROVISION OF THE UNEMPLOYMENT COMPENSATION LAW, MINN. STAT. § 268.095, SUBD. 6(b).

The Unemployment Law Judge ruled that the "chemical dependency" provision was inapplicable because the termination was for a driving offense "that adversely affected the claimant's employment."

Apposite Authorities:

Minn. Stat. § 268.095, Subd. 6(b)

III. IS THE EMPLOYEE ELIGIBLE FOR UNEMPLOYMENT COMPENSATION BENEFITS UNDER THE "SINGLE INCIDENT" PROVISION OF MINN. STAT. § 268.095, SUBD. 6(b) WHEN HE WAS TERMINATED FOR A FIRST-TIME ALCOHOL RELATED INCIDENT THAT DID NOT HAVE A SIGNIFICANT ADVERSE IMPACT ON THE EMPLOYER'S BUSINESS?

The Unemployment Law Judge rejected the "single" incident claim.

Apposite Authorities:

Hendren v. Allina Medical Group, 2007 WL 900450

(Minn. Ct. App. 2007) (unpublished);

Williams v. Brooklyn Center Motors, LLC, 2007 WL 1747125

(Minn. Ct. App. 2007) (unpublished);

Minn. Stat. § 286.095, Subd. 6(a).

STATEMENT OF THE CASE

Relator Gregory Peterson, a veteran pilot with Northwest Airlines, Inc., ("Northwest"), was terminated from his employment on February 23, 2007. Northwest cited three reasons for discharging him, including violation of the airline's policy of restricting consumption of alcohol when a pilot is on a reserve or "on-call" status, within 12 hours of a potential flight.

Peterson filed for unemployment compensation benefits, and an adjudicator found him eligible. Northwest appealed and, following a hearing, an Unemployment Law Judge (ULJ) ruled that Peterson was disqualified on grounds of "misconduct" under Minn. Stat. § 268.095, subds. 4 and 6.

After Peterson's request for reconsideration was denied, he timely brought a Writ of Certiorari challenging the determination on grounds that he did not commit "misconduct," that his termination falls within the "chemical dependency" exception under Minn. Stat. § 268.095, subd. 6(b), or that he is eligible for unemployment benefits under the "single incident" provision of Minn. Stat. § 268.095, subd. 6(a).

STATEMENT OF THE FACTS

A. Northwest's Alcohol Policy

Relator Peterson was employed as a pilot by Northwest beginning in August, 1995, until he was terminated on February 23, 2007. During his career, he had an exemplary record, prior to the incidents leading up to his discharge.

Northwest has a policy that prohibits pilots from consuming alcohol within 12 hours of a scheduled flight, or 12 hours before they are on "reserve" status, which is a designated time period during which they are "on call" and *might* be summoned to fly. Re. 1, App. 19.¹

B. Peterson Is On Reserve Status

On July 5, 2006, within 12 hours of going on "reserve" status, Peterson consumed beer prior to, and while, boating on Lake Minnetonka. Er. 7, App. 27-28. Based on his experience, Peterson did not believe that he would not be called to fly while on reserve status on this occasion. Tr. 54. While boating, he was stopped by law enforcement authorities and charged with scoring a .17 on a breathalyzer test and

¹ "Tr. ___" refers to the transcript of the Unemployment Compensation proceeding and exhibits. "App. ____" refers to the Appendix herein. "Er. ___" refers to Employer's Exhibits at the proceeding. "Re. ____" refers to the Relator/Applicant's Exhibits at the hearing. Relator will, however, supply relevant Employer and Employee Exhibits as part of the Appendix. "Dept. ___" refers to the Department of Employment and Economic Development's exhibits at the proceeding.

with boating under the influence (BUI). Er. 1, App. 29-32.² Peterson was not called to duty during that reserve status period. Tr. 54, 74.

Peterson continued to fly his regular schedule with Northwest without incident. In December 2006, Northwest learned about the July incident from the Northwest Airlines Pilot Assistance Program (NAPAP), Tr. 12-13, a program to assist pilots with chemical dependency or other lifestyle problems. Northwest made inquiry about what occurred, and questioned Peterson about the incident. Tr. 13-14. Initially, Northwest questioned Peterson while he was on duty out of town, but without access to any documents, he responded that he thought Lake Minnetonka incident occurred in late June, without specifying the particular date. Tr. 53.

Peterson also voluntarily told Northwest about a prior DUI arrest which occurred on St. Patrick's Day, March 17, 2006, and resulted in a guilty plea and loss of his driver's license for 90 days. Tr. 13-14. Peterson was not on duty, or on reserve (or "on call") status at the time of the St. Patrick's Day incident, and the offense did not violate any Northwest policy. Tr. 25.

² Peterson also was charged with carrying a firearm while under the influence, which involved a pistol that he was *licensed* to possess. Peterson pled guilty to the charge, Tr. 70, but it is not relevant to this proceeding since Northwest did not cite it as a reason for discharging him, it may not be a basis for disqualification for unemployment benefits. *Hansen v. C. W. Mears, Inc.*, 486 N.W.2d 776, 780 (Minn. Ct. App. 1992).

C. Peterson Follows Northwest's Chemical Dependency Policy.

After learning of these incidents, Northwest suspended him with pay, while deciding what to do. Tr. 11. Peterson then participated in a five-day chemical dependency assessment program at Hazelden Treatment Center that resulted in his diagnosis as an "alcohol abuser." Tr. 45. Under Northwest's policy, this diagnosis required him to complete a 28-day inpatient treatment program.

A participant who is classified as chemically dependent or an abuser typically would immediately commence a 28-day in-patient treatment program. But Peterson had notified Northwest that he would have to leave Hazelden after five days to care for his ailing mother, regardless the results of the assessment, and Northwest agreed, with the understanding that he would return and complete any treatment program. Tr. 58-59, Er. 6, App. 34. This arrangement was confirmed by witness Rob Plunkett, an attorney for the Air Line Pilots Association who works on disciplinary issues as well as the NAPAP program. Tr. 70-72.

Peterson, thus, temporarily left Hazelden to care for his sick mother, who was stricken by cancer and was undergoing heavy chemotherapy treatments. Peterson was the only available relative who could assist her in taking her to and from the treatments and providing in-home care for her. She unfortunately passed away a few weeks later.

Peterson returned to Hazelden within two weeks and successfully completed the in-patient program in early February. Tr. 59-60.

D. Northwest Fires Peterson.

A couple of weeks after Peterson successfully completed the Hazelden program, Northwest fired him. *Id.*, Dept. 5, App. 11-12. Northwest based its discharge on three grounds. The main one was violation of the "12 hour" alcohol rule, because he consumed beer during the proscribed "12 hour" period before he was on reserve.

Northwest also cited him for violation of its policy requiring the exercise of "good" judgment and avoiding conflicts of interest because the license plate of the vehicle he was driving at the time of the July incident had a personalized license plate of "NWAV8R," which Northwest claims could identify him as a Northwest pilot and besmirch the company's reputation. Northwest also accused him of being dishonest and failing to cooperate in its investigation by providing misleading information about the date of the incident in July. *Id.*

E. The Unemployment Proceedings.

Peterson applied for unemployment compensation benefits, and an adjudicator initially determined that he was eligible.³ Dept. 1, App. 13-15. Northwest appealed and, following a hearing, the Unemployment Law Judge ("ULJ") deemed him disqualified from benefits on grounds of "misconduct" under Minn. Stat. § 268.495, subds. 4 and 6. App. 1-7.

The ULJ rejected two of Northwest's three stated reasons for Peterson's termination: the personalized/vanity license plates and the alleged misrepresentation and the alleged failure to cooperate with the employer in its investigation. App. 5. The ULJ reasoned that the personalized license plate was too "tenuous" to constitute a violation of company policy, *Id.*, and also that Peterson had not "knowingly misrepresented the date [of the offense] for the purpose of interfering with an investigation." *Id.* But the ULJ determined that Peterson's violation of the 12-hour rule was an "intentional policy violation" and constituted statutory "misconduct," disqualifying him from benefits. App. 5-6.

The ULJ rejected Peterson's contention that his conduct fell within the exception to the definition of employment misconduct of Minn. Stat.

³ Peterson, a member of the Airline Pilot's Association (ALPA), filed a grievance under its collective bargaining agreement with Northwest challenging his termination.

§ 268.095, subd. 6(b), which bars disqualification if the employee's misconduct was attributable to chemical dependency unless the applicant was previously diagnosed chemically dependent or had treatment for chemical dependency and since the diagnosis or treatment had failed to make consistent efforts to control the chemical dependency. The ULJ reasoned that the chemical dependency exception to "misconduct" was inapplicable because a subsequent provision, Minn. Stat. § 268.095, subd. 6(d), states that a "driving offense...that interferes with or adversely affects the employment" constitutes disqualifying "misconduct." The ULJ ruled that driving offense provision trumped the chemical dependency exception, that Peterson's BUI incident fell within the driving offense classification, and that he was, therefore, disqualified. *Id.*

Peterson timely requested reconsideration, also reasserting that he should be eligible for unemployment benefits under the "single incident provision" of Minn. Stat. § 268.095, subd. 6, which permits benefits for an employee whose conduct constitutes a "single incident" that does not have a significant adverse impact on the employer." Minn. Stat. § 268.096, subd. 6(a). App. 36-38.

The ULJ rejected that contention and affirmed the prior ruling. App. 8-10. This appeal by Certiorari ensued. App. 44.

THE LEGAL STANDARD

The unemployment compensation law should be construed liberally in favor of employees. *Jenkins v. American Exp. Financial Corp.*, 721 N.W.2d 286 (Minn. 2006). Determining eligibility for benefits is a mixed question of law and fact, “[W]hether an employee committed a particular act is a question of fact. ... Whether an act constitutes employment misconduct is a legal question, which this court reviews de novo.” *Brown v. National American University*, 686 N.W.2d 329, 332 (Minn. Ct. App. 2004). Determination of the legal issues are subject to *de novo* review. *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996).

SUMMARY OF ARGUMENT

Relator Peterson is not disqualified from unemployment benefits. His employer, Northwest, had a policy prohibiting termination of pilots who enroll in and successfully complete a chemical dependency treatment program and do not re-offend. Peterson's BUI charge was a first time work-related offense, and after his BUI charge, he participated in and successfully completed a chemical dependency program at Hazelden. Because he followed his employer's policy, and management did not, he did not commit "misconduct" as a matter of law.

Even if misconduct occurred, ***which it did not***, Peterson's action was attributable to chemical dependency. Under Minn. Stat. § 286.095,

subd. 3(b), the chemical dependency exception precludes a determination of "misconduct." Peterson qualifies under this provision because he had not previously been diagnosed as chemically-dependent or participated in and failed to abide by a dependency treatment program.

Moreover, the "single exception" doctrine applies here under § 268.895, subd. 6(a). This was Peterson's first alcohol-related offense and did not have significant adverse impact on his employer.

ARGUMENT

I. PETERSON'S SUCCESSFUL COMPLETION OF NORTHWEST'S ALCOHOL TREATMENT PROGRAM NEGATES HIS VIOLATION OF ITS ALCOHOL POLICY.

Under Minn. Stat. § 268.095, subd. 4 and 6, an employee is disqualified from receiving unemployment compensation benefits, for "employment misconduct," which is defined as

...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 ... are not employment misconduct.

Minn. Stat. § 268.095., subd. 6(a)(1)

Because Peterson's conduct did not rise to this level, he is eligible for benefits.

A. NWA Should Have Followed Its Own Alcohol Treatment Program

Both the prohibition on pilots consuming alcohol, Re. 1, App. 19-20, and the NAPAP program are part of Northwest's Flight Operations Manual. App. 17-18, 21-25. Since Northwest cited Peterson's violation of the 12-hour rule in the Manual as the basis for termination, the other portions of the Manual should also bear on the issue. *Eyler v. Minneapolis Star & Tribune Co.*, 427 N.W.2d 758, 761 (Minn. Ct. App.

1988); *Hoemberg v. Watco Publishers, Inc.*, 343 N.W.2d 676, 678-679 (Minn. Ct. App. 1984).

B. The July 5, 2006 BUI Charge Was Peterson's Only Work-Related Alcohol Offense.

The only basis for Peterson's determination that the ULJ credited was the July 5, 2006 BUI while he was within 12 hours of reserve status. This was Peterson's first work-related alcohol offense. The DUI on St. Patrick's Day 2006 occurred while Peterson was off duty, not on reserve status, and was totally unrelated to his employment. Northwest admits that he was not required to report that offense to it. Tr. 25. Thus, for purposes of its affecting his employment, Peterson was a first-time alcohol offender.

The ULJ's determination that, because of a prior St. Patrick's Day incident, Peterson was a two-time offender was erroneous. That incident did not occur during any 12 hour period prior to a scheduled flight or within 12 hours of any "reserve" status for Peterson. Northwest has made no claim that it did or that he was in uniform at that time and did not cite it in its reasons for discharging him. It also admits that he was under no duty to report the incident to it. Tr. 25. The St. Patrick's Day incident may not, therefore, be a basis for finding disqualifying misconduct. *Hansen v. C.W. Mears, Inc.*, *supra* at fn. 2.

C. Peterson Voluntarily Entered the Alcohol Treatment Program As A Pre-Duty Violator.

Peterson had voluntarily contacted the NAPAP program prior to any investigation of him by Northwest. This is implicit in the testimony of Northwest's witness Tim Buetell:

And so I made a phone call over to the chairman of the NAPAP committee and inquired about whether he'd heard anything about a DUI, multiple DUI's on a pilot that is currently flying and not in recovery? ...And I let the NAPAP chairman tell me, yeah, they were working with somebody and he's asked me if I had a name. And I said, yeah, I do. And it was, let's compare the names and it was the same name, which was Greg Peterson.

Tr. 13.

Under the NAPAP, Peterson could not be terminated for a first-time offense if he voluntarily participated in, and successfully completed a chemical dependency program. Re. 1, App. 17-18, 23-24. Peterson did so, enrolling in the Hazelden program and, after a short respite to care for his ailing mother, successfully completing it in February 2007. Yet two weeks later, Northwest discharged him.

Northwest's failure to follow its own policy negates a determination of "misconduct" as a matter of law. *Eyler v. Minneapolis Star & Tribune Co.*, *supra* ("violation by the employer of its own procedures vitiates the "heedless" aspect of purported misconduct."); *Hoemberg v. Watco*

Publishers, Inc., supra (“employees had notice of the disciplinary procedures in the handbook and had every right to expect the company would follow those procedures.”). See also, *Neubert v. St. Mary’s Hosp. & Nursing Center of Detroit Lakes*, 365 N.W.2d 780 (Minn. Ct. App. 1985). In this case, Peterson, through his union, was the beneficiary of the program, was entitled to rely upon it and expect it to be followed, not disregarded by the airline.

The only incident that impacted Peterson’s employment was the BUI incident in July, which constituted a first time offense. The earlier St. Patrick’s Day incident should not be considered for purposes of the Northwest alcohol policy because the policy contemplates that a pilot who believes that he or she may be chemically dependent should be given an opportunity to participate in a chemical dependency program. There is no evidence that Peterson, after the St. Patrick’s Day incident, thought that he might be chemically dependent. Nor is there any evidence that the St. Patrick’s Day incident impacted on his employment in any way.

Northwest found out about the St. Patrick’s Day incident about the same time as it learned of the July 5th incident. When it did, it urged Peterson to participate in the program at Hazelden, which he did, successfully completing it in early February. He was not given an

opportunity to complete the Hazelden program after the St. Patrick's offense because that did not come to light until the end of the year when he enrolled and completed the Hazelden program.

Further, Northwest did not rely on the St. Patrick's Day incident as a basis for terminating him. Thus, it cannot retroactively invoke a new reason not previously cited as a ground for discharge. *Hansen v. C.W. Mears, Inc., supra.* Peterson was entitled to be treated as a first-time alcohol offender. The required discipline is treatment, not termination.

Northwest failed to follow its policy by dismissing Peterson even though he successfully completed the chemical dependency program, Due to Northwest's deviation from its own standard, Peterson cannot be disqualified on grounds of "misconduct." Therefore, the decision of the ULJ should be reversed.

II. THE "CHEMICAL DEPENDENCY" EXCEPTION TO "MISCONDUCT" APPLIES

Even if he engaged in "misconduct," *which he did not*, Peterson's conduct was the result of his previously undiagnosed and previously untreated chemical dependency. This entitles him to unemployment benefits under the "chemical dependency" exception in the law.

A. The Chemical Dependency Exception, By Its Terms, Is Not Limited to Non-Vehicular Misconduct.

Under Minn. Stat. § 268.095, Subd. 6(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 treatment has failed to make consistent efforts to control the chemical dependency.

Minn. Stat. § 268.095, subd. 6(b). (emphasis supplied).

There is no language in this provision that limits its application to particular types of employment misconduct.

Peterson was determined at Hazelden to be an "alcohol abuser," which certainly indicates that his behavior was related to chemical dependency. Northwest's policy specifically requires that those with alcohol problems obtain treatment. Tr. 45-46, App. 24. Moreover, FAA policies state that *either* a chemical dependency or abuse diagnosis invalidates a pilot's medical certification, which is required to be legally eligible to fly an airplane. Tr. 45. The only way the medical certification may be re-obtained is for the pilot to successfully complete a chemical dependency treatment program.

B. The ULJ Erroneously Limited The Application of the Chemical Dependency Exception to Misconduct.

In determining that the chemical dependency exception to employment misconduct did not apply, the ULJ erroneously reasoned that the statutory provision that specifically designates driving offenses

that interfere with or adversely affect the employment as employment misconduct was a “specific” provision that controlled the “general” provision concerning conduct that is a direct result of chemical dependency. Without citing the statute, the ULJ, presumably based his reasoning on the provisions of Minn. Stat. § 645.26, subd. 1:

When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be *irreconcilable*, the special provision shall prevail and shall be construed as an exception to the general provision,... (*emphasis added*).

That reasoning was incorrect for a number of reasons:

1. *Peterson Was Fired for Consuming Alcohol, Not For The BUI Charge.*

Northwest terminated Peterson for violating the 12-hour alcohol consumption rule, *not* because he was accused of BUI. Dept. 5, App. 11. The gravaman of his offense was that he drank alcohol while on reserve status, regardless of the amount he consumed or whether he did so in connection with swimming, water skiing, boating, or no nautical activities at all. Simply put, the BUI did not form the basis for his termination. It was predicated on his consumption of alcohol, irrespective of the BUI charge; therefore, the “driving offense” definition

of “misconduct” in Minn. Stat. 268.095, subd. 6(d) does not apply. *Hansen v. C.W. Mears, supra.*

The chemical dependency exception is as equally “special” as is the “DUI-affecting-employment-is-misconduct” provision. The provisions should, therefore, be construed as much as possible to give effect to both. Minn. Stat. § 645.26, subd. 1.

2. *The Legislative History of Minn. Stat. §268.095, subd. 6, Shows That The Legislature Intended That The Chemical Dependency Exception Apply To All Conduct That Meets The Definition of Misconduct*

Prior to the last legislative revision of the statute in 2003,⁴ Minn. Stat. §268.095, subd. 6 read as follows:

Subd. 6. Employment misconduct defined.

(a) Employment misconduct means:

- (1) any intentional conduct, on the job or off the job, that disregards the standards of behavior that an employer has the right to expect of the employee or disregards the employee's duties and obligations to the employer; or
- (2) negligent or indifferent conduct, on the job or off the job, that demonstrates a substantial lack of concern for the employment.

(b) Inefficiency, inadvertence, simple unsatisfactory conduct, poor performance because of inability or incapacity, or absence

⁴ Laws 2003, 1st Sp., c. 3, art. 2, §§ 11 to 14, subd. 1.

because of illness or injury with proper notice to the employer, are not employment misconduct.

- (c) **Any conduct in violation of paragraph (a), clause (1) or (2), that was a result of the applicant's chemical dependency is employment misconduct if the applicant has previously been diagnosed chemically dependent or had treatment for chemical dependency, and has failed to make consistent efforts to control the chemical dependency.**
- (d) A driving offense in violation of sections 169A.20, 169A.31, or 169A.50 to 169A.53 that interferes with or adversely affects the employment is employment misconduct.”

(emphasis supplied).

Under the pre-2003 version of the statute, the chemical dependency exception *did not apply* to paragraph (d) the specific designation of driving offenses interfering with, or adversely affecting, employment as “misconduct.” It applied *only* to the *general definition* of intentional, negligent, or indifferent conduct described in paragraph (1). Driving offenses under the old statute were, therefore, a type of “super” misconduct for which there was no possible chemical dependency exception.

The 2003 revision, however, *removed* the limitation of paragraph (c)’s application. It did not change the chemical dependency exception other than to remove the language that limited its application to the

general definition of misconduct. It now necessarily applies to any conduct that could be employment misconduct.

The Legislature had to have a reason for this significant change. In interpreting the Legislature's intent, if the words of the statute are not explicit, this court may consider the circumstances under which the statute was enacted *and the former law*. Minn. Stat. § 645.16. *Welscher v. Myhre*, 231 Minn. 33, 36, 42 N.W.2d 311, 313 (1950) ("If the language of the Revised Statutes be...of doubtful meaning or import, or susceptible of two constructions, the prior statutes, of which the new is the revision, may be resorted to for the purpose of rendering the new clear."). Given the Legislature's removal of the limiting language of subdivision (b), the only conclusion can be that it intended the chemical dependency exception to apply to all types of employment misconduct.

This case differs from those in which loss of a driver's license due to a DUI, has been regarded as "misconduct." *E.g.*, *Markel v. City of Circle Pines*, 465 N.W.2d 408 (Minn. Ct. App. 1991), *rev. granted*, *affirmed* 479 N.W.2d 382 (Minn. 1992); *Smith v. American Indian Chemical Dependency Diversion Project*, 343 N.W.2d 43 (Minn. Ct. App. 1984). In these cases, the employees needed to drive as part of their work, and the loss of a driver's license impaired their ability to do the

job. Peterson does not need a driver's license to pilot a plane, and his pilot's license was never jeopardized or even implicated.

The statutory provision that treats a DUI as "misconduct" only applies if the violation "interferes with or adversely affects the employment." Minn. Stat. § 268.095, subd. 6(d). Peterson's July 5th *BUI* did not do so because it had no effect on his employment. The prior provision, § 268.095, subd. 6(b) governs here. It states that conduct that was the "result of the applicant's chemical dependency is **not** employment misconduct" unless the employee was previously diagnosed as chemically dependent or had been treated for chemical dependency, and since the diagnosis or treatment has failed to make consistent efforts to control the dependency. Peterson qualifies under this provision. He had not previously been diagnosed as chemically dependent.

Peterson was terminated because of his alcohol offense. His drinking was indisputably due to his "chemical dependency." Therefore, the "chemical dependency" provision applies and eviscerates the determination of statutory "misconduct," as a matter of law.

III. THE 'SINGLE INCIDENT' PROVISION ALSO APPLIES

Peterson also is eligible for unemployment compensation under the "single incident" provision of Minn. Stat. § 268.095, subd. 6(a), which entitles an applicant to unemployment benefits if the offense was a

"single incident" and does not have a "significant adverse impact on the employer. Even if Peterson's violation of the 12-hour rule constituted "misconduct," **which it does not**, it falls within the "single incident" exception. It was the only alcohol-related offense that was employment-related. The prior St. Patrick's Day offense was, as indicated, not employment-related and, furthermore, was not cited by Northwest as a basis for Peterson's termination.

The only blemish on Peterson's record was therefore the July 5th drinking episode, which constitutes the "single incident" for his termination. The incident did not have any adverse impact upon Northwest, let alone a "substantial" one. Peterson was not called to fly while he was on reserve status. App. 3, Tr. 54. Therefore, Northwest did not suffer any negative impact from that incident.

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. However, in this particular case, while he may have violated the rule, he did not cause any harm, which is the essence of the "single incident" provision. *See Hendren v. Allina Medical Group*, 2007 WL 90450 (Minn. Ct. App. 2007) (unpublished); App 42. *Williams v. Brooklyn Center Motors*, 2007 WL 1747125 at *2 (Minn. Ct. App. 2007) (unpublished), App. 39.

Peterson's alcohol consumption while he was reserve status *could* have had an adverse impact, *but it did not do so*. Under these circumstances, the "single incident" exception applies, and Peterson should not be disqualified on misconduct grounds from receiving unemployment compensation benefits.

In sum; Northwest did not incur any impact at all, let alone any "adverse" effect, and certainly no "significant" one because of the July BUI incident. Peterson was not called to fly. There was no effect, adverse or not, upon Northwest. Since there was no effect at all, the impact cannot be considered "significant" for purposes of Minn. Stat. § 286.095, subd. 6.

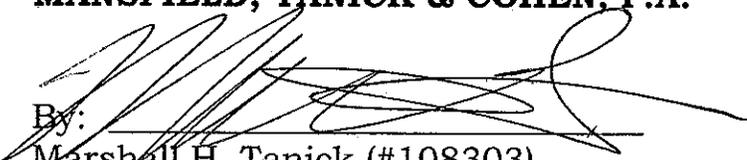
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IV. CONCLUSION

For the above reasons, the decision of the Unemployment Law Judge disqualifying Peterson from receiving unemployment compensation should be reversed.

MANSFIELD, TANICK & COHEN, P.A.

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By: 

Marshall H. Tanick (#108303)
Stephen H. Parsons (#84219)
220 South Sixth Street, #1700
Minneapolis, MN 55402-4511
(612) 339-4295

**ATTORNEYS FOR RELATOR
GREGORY PETERSON**

465760v3