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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0827**

Brian L. Northbird,
Relator,

vs.

Leech Lake Tribal Council Gaming Division,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 19, 2009
Affirmed
Peterson, Judge**

Department of Employment and Economic Development
File No. 20502306-3

Brian L. Northbird, 19639 Williams Road Southeast, Cass Lake, MN 56633-2922 (pro se relator)

Leech Lake Tribal Council Gaming Division, 6280 Upper Cass Frontage Road Northwest, Cass Lake, MN 56633 (respondent employer)

Lee B. Nelson, Katrina I. Gulstad, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101-1351 (for respondent Department of Employment and Economic Development)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

Relator challenges the decision by an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for misconduct for violating the employer's policy prohibiting intimidating behavior in the workplace. Relator argues that (1) he did not receive a fair hearing because evidence presented at the hearing was false and/or hearsay, and (2) necessary witnesses were not subpoenaed. We affirm.

FACTS

Relator Brian L. Northbird was employed as a mechanical engineer by respondent Leech Lake Tribal Council Gaming Division. When relator arrived at work one night, he saw a drawing on his supervisor's desk that depicted relator sitting in a chair and a coworker standing over relator and punching him. Relator testified that the supervisor had been drawing offensive pictures of employees for years and that he thought that the coworker had asked the supervisor to draw the picture of the coworker punching him.

Relator confronted the coworker about the picture. The coworker responded by using profanity and telling relator to leave. Relator then used profanity and a racial epithet and also said that he intended to show the pictures to the director of investigations.

In the morning, upon learning about the incident, the mechanical-maintenance manager spoke to relator. During the discussion, relator used profanity, called the supervisor unflattering names, and said that he would "like to kick his a--."

The employer then discharged relator for violating its policy prohibiting intimidating behavior in the workplace.

Relator filed a claim for unemployment benefits with respondent Department of Employment and Economic Development. A department adjudicator determined that relator was discharged for reasons other than misconduct and, therefore, was eligible for unemployment benefits. Respondent-employer appealed to a ULJ. Following an evidentiary hearing, by findings of fact and decision issued March 13, 2008, the ULJ determined that relator was discharged for misconduct and, therefore, ineligible for unemployment benefits. Relator filed a request for reconsideration. The ULJ affirmed the March 13, 2008 decision. This certiorari appeal followed.

D E C I S I O N

I.

This court may affirm the ULJ's decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights "may have been prejudiced because the findings, inferences, conclusion or decision are . . . affected by . . . error of law," "unsupported by substantial evidence in view of the entire record as submitted," or "arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d) (2008).

Whether an employee committed misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee committed a particular act is a fact question, which we review in the light most favorable to the decision and will affirm if supported by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether an employee's act

constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

An employee who was discharged for misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). “Employment misconduct” is

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.

Minn. Stat. § 268.095, subd. 6(a) (Supp. 2007).

The ULJ explained its misconduct determination as follows:

While [relator] may have been provoked by what was an offensive drawing of him and a co-worker made by his supervisor, this does not excuse [relator] engaging in clearly inappropriate conduct himself. The comment [relator] made to his co-worker was of such a nature as to risk a more serious conflict. Additionally, although disputed by [relator], the mechanical maintenance manager credibly testified that in addition to calling his supervisor an inappropriate name, [relator] had also told him that he would like to “kick his a--.” [Relator] confirmed only that he called him a name. The [ULJ] finds the mechanical maintenance manager’s testimony to be more credible than [relator’s] self-serving testimony to the contrary. [Relator] was clearly upset about the supervisor’s conduct. This was reasonably perceived by [the employer] as threatening workplace behavior.

Relator disputes the credibility of the testimony of the coworker and the mechanical-maintenance manager. But the ULJ specifically found the testimony of the mechanical-maintenance engineer to be credible, and the ULJ's factual findings show that the ULJ also found the coworker's testimony credible. We defer to the ULJ's credibility determinations. *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006).

Relator argues that the mechanical-maintenance manager's testimony was hearsay because the manager was not at work when relator found the drawing and confronted the coworker about it. But relator's discharge was based on two incidents, the confrontation with the coworker and the discussion with the mechanical-maintenance manager. The coworker, not the mechanical-maintenance engineer, testified about the first incident.

Relator also argues that he was discharged because he is not a supporter of the tribal chairman. But nothing in the record indicates that relator was discharged for any reason other than his conduct on November 1, 2007.

We find no error in the ULJ's determination that relator was discharged for misconduct and, therefore, is ineligible for unemployment benefits.

II.

A ULJ is to conduct an evidentiary hearing "as an evidence gathering inquiry and not an adversarial proceeding." Minn. Stat. § 268.105, subd. 1(b) (Supp. 2007). The ULJ "must ensure that all relevant facts are clearly and fully developed." *Id.* The ULJ has the authority to "issue subpoenas to compel the attendance of witnesses and the production of documents and other personal property considered necessary as evidence in

connection with the subject matter of an evidentiary hearing.” Minn. Stat. § 268.105, subd. 4 (Supp. 2007).

Relator argues that he was prejudiced by the ULJ’s failure to subpoena the supervisor who drew the offensive picture because the coworker was biased in favor of the employer and the supervisor would not have been. The record does not show that relator requested that the supervisor be subpoenaed. Also, it is undisputed that the supervisor drew the picture, and the picture was admitted into evidence at the hearing before the ULJ. The record does not indicate that the supervisor was present during either of the incidents resulting in relator’s discharge, and relator has not made any showing as to how the supervisor’s testimony could have affected the misconduct determination.

Relator also argues that the director of investigations should have been subpoenaed. Again, the record does not show a subpoena request by relator, and relator has not shown how the director’s testimony could have affected the misconduct determination.

Absent any showing that the testimony of the supervisor and/or the director of investigations might have affected the misconduct determination, we cannot conclude that the ULJ erred by failing to subpoena them. *See* Minn. Stat. § 268.105, subd. 2(c) (Supp. 2007) (standard for obtaining additional evidentiary hearing).

Affirmed.