STATE OF MINNESOTA
IN COURT OF APPEALS
A10-572

Julie Orinstien,
Relator,

vs.

Colonial Acres Home, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 28, 2010
Affirmed
Bjorkman, Judge

Department of Employment and Economic Development
File No. 24002534-3

Julie Orinstien, St. Louis Park, Minnesota (pro se relator)

David A. Turner, Bassford Remele, P.A., Minneapolis, Minnesota (for respondent Colonial Acres Home, Inc.)

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

Considered and decided by Toussaint, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that she is ineligible for unemployment benefits because she was discharged for employment misconduct. We affirm.

FACTS

On April 13, 2009, relator Julie Orinstien began working as a housekeeper for respondent Colonial Acres Home, Inc. When she began employment, Orinstien participated in training with Elaine Danforth, one of her direct supervisors, who instructed her how to properly store her cart and cleaning chemicals when not using them to ensure that the nursing-home residents would not accidentally be exposed to the chemicals.

During the course of her employment, Orinstien was periodically absent and tardy for various reasons. She also left her cart and cleaning supplies unattended on several occasions. On April 24, Danforth observed that Orinstien's cart was unattended for longer than one hour. After Danforth warned Orinstien to keep the chemicals in a locked area and not leave the cart unattended, the cart and supplies were again found unattended and unsecured on June 19.

Colonial Acres discharged Orinstien on June 23. Orinstien signed the termination letter, which indicated that the reasons for her discharge included attendance issues and leaving the housekeeping cart and chemicals unattended in violation of Colonial Acres' policies. Orinstien applied for unemployment benefits, and respondent Minnesota

Department of Employment and Economic Development (DEED) determined that she was ineligible.

Orinstien appealed DEED's decision and a ULJ conducted an evidentiary hearing. Orinstien testified on her own behalf, and Danforth and John Haugen, the director of facilities management, testified for Colonial Acres. Haugen testified about Orinstien's attendance issues and the "frequent" instances where Orinstien left her cart unattended. Danforth testified that Orinstien left her cart unattended "six or seven" times during her two-month employment, despite Danforth's warnings and instructions. Orinstien testified that she never received training related to storing her cart and that she was only instructed not to leave her cart unattended on June 19, when Danforth left her a note.

The ULJ found that Orinstien's act of leaving the cart and cleaning supplies unattended on multiple occasions constituted misconduct that made Orinstien ineligible for unemployment benefits. Orinstien requested reconsideration, arguing that she did not have adequate time to prepare for the hearing. The ULJ affirmed his decision without an additional evidentiary hearing. This certiorari appeal follows.

D E C I S I O N

When reviewing the decision of a ULJ, this court may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced. Minn. Stat. § 268.105, subd. 7(d) (2008). We review a ULJ's decision to determine whether 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." *Id.*

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). 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." *Id.*, subd. 6(a) (Supp. 2009). An employer has a right to expect an employee to abide by reasonable policies and procedures, and "an employee's decision to violate knowingly a reasonable policy of the employer is misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804, 806 (Minn. 2002).

Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Id.* at 804. Whether an employee committed a particular act is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We do not disturb a ULJ's factual findings if there is evidence that substantially sustains them. *Id.* But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

In challenging the ULJ's determination, Orinstien argues that (1) Colonial Acres did not timely challenge her eligibility for benefits, (2) she did not receive a fair hearing, (3) the ULJ made improper credibility determinations, and (4) the ULJ improperly denied her request for an additional evidentiary hearing on reconsideration. We address each argument in turn.

Timeliness

Orinstien cites Minn. Stat. § 268.101, subd. 2(b) (Supp. 2009), for the proposition that Colonial Acres did not timely contest her eligibility for benefits because "[s]ix months had passed before Colonial Acres challenged [her] benefits." This reliance is misplaced. The section cited refers to circumstances affecting the application of tax exceptions under section 268.047. The relevant statute provides that "[t]he commissioner may issue a determination on an issue of ineligibility at any time within 24 months from the establishment of a benefit account based upon information from any source, even if the issue of ineligibility was not raised by the applicant or an employer." Minn. Stat. § 268.101, subd. 2(e) (Supp. 2009).

Here, after Orinstien applied for benefits in December 2009, DEED requested information from Colonial Acres. DEED issued its determination of ineligibility on December 18—well within the 24 months required by the statute. Accordingly, we discern no error on this issue.

Fairness of the hearing

Orinstien next argues that she did not receive a fair hearing because she did not have adequate notice of the issues to be decided and did not receive Colonial Acres' exhibits until the day before the hearing. A hearing generally is considered fair if both parties are afforded an opportunity to give statements, cross-examine witnesses, and offer and object to exhibits. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

When an applicant appeals from an initial determination of ineligibility, DEED must provide all parties with a notice that

> set[s] out the parties' rights and responsibilities regarding the hearing. The notice must explain that the facts will be determined by the unemployment law judge based upon a preponderance of the evidence. The notice must explain in clear and simple language the meaning of the term "preponderance of the evidence." The department must set a time and place for a de novo due process evidentiary hearing and send notice to any involved applicant and any involved employer, by mail or electronic transmission, not less than ten calendar days before the date of the hearing.

Minn. Stat. § 268.105, subd. 1(a) (Supp. 2009). DEED regulations likewise provide, in pertinent part:

> If the issue to be considered at the hearing involves ineligibility for unemployment benefits because of a separation from employment, the notice must explain that the parties should be prepared to discuss all incidents that arose during the course of the employment that led to the separation.

Minn. R. 3310.2910 (2009).

The notice DEED provided here satisfies these requirements. It included the time and place of the hearing and was sent to Orinstien on January 4, 2010—more than ten days prior to the January 20 hearing date. The notice stated that the issues to be considered at the hearing included the "reason [Orinstien] separated from [Colonial Acres.]" It also provided that the assigned ULJ would make findings based on the preponderance-of-the-evidence standard and defined that standard in clear language.

Orinstien contends that notice was inadequate because she "had no knowledge" that any issue other than her absenteeism would be discussed. We disagree. The

language in the notice was broad and clearly stated that the reason for Orinstien's separation from employment would be discussed. Orinstien cannot reasonably argue that she was unaware that her handling of the cleaning cart contributed to her separation. The termination letter Orinstien signed identified leaving the "housekeeping cart and chemicals unattended" as one of the reasons for her discharge. The ULJ expressly rejected Orinstien's notice argument, finding that "[the termination letter] makes mention of the fact that you left your cart unattended." Because Orinstien knew that cart-related issues were a contributing factor to her termination, and the notice from DEED clearly informed her that the reason for separation from employment would be discussed, we conclude that Orinstien had adequate notice of the scope of the hearing.

Orinstien's argument that she did not receive a fair hearing because Colonial Acres did not provide her with copies of documents until the day before the hearing also fails. Parties may submit proposed exhibits to DEED and the other party "no later than five calendar days before the scheduled time of hearing." Minn. R. 3310.2912 (2009). The rule does not, by its terms, prohibit late submissions. And a ULJ is authorized to permit the introduction of new documents, even during the course of the hearing, so long as the ULJ "rules that the documents should be admitted into evidence" and the moving party sends copies of the documents to the ULJ and the opposing party. *Id.*

Neither party complied with the five-day rule. Orinstien did not provide her proposed exhibits to the ULJ and Colonial Acres until the day of the hearing. The ULJ admitted all of the proposed exhibits and repeatedly invited Orinstien to present any additional information she wanted to discuss. When asked, at the end of the hearing,

whether she felt she had been fully heard, Orinstien replied, "Yes, to the best of my knowledge, I've asked the questions that I wanted to ask," and indicated that she could not think of any other testimony. A ULJ conducts a hearing "as an evidence gathering inquiry" and is obligated to "ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009). On this record, we conclude that the ULJ did not err in permitting both Orinstien and Colonial Acres to present exhibits that were not timely submitted and that Orinstien received a fair hearing.

Credibility determinations

Orinstien also challenges the ULJ's credibility determinations. Specifically, she argues that the ULJ incorrectly credited Danforth's testimony regarding the training Orinstien received on how to store her cart, Orinstien's repeated failure to follow these procedures, and the verbal and written warnings she received. "When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (Supp. 2009). The ULJ did so here. Such "[c]redibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus*, 721 N.W.2d at 345.

The ULJ found that Danforth's testimony was "consistent, corroborated by contemporaneous documentation and . . . more reasonable [than] Orinstien's self-serving denials." The ULJ further found that Colonial Acres' policy of not leaving carts and cleaning chemicals unattended was reasonable considering the nature of the employer (a nursing home that served residents with dementia) and that Orinstien's repeated failures

to comply "were a serious violation of standards of behavior Colonial Acres had a right to reasonably expect of her." Because the ULJ made express credibility findings that are reasonably supported by the evidence, we decline to disturb the ULJ's credibility determinations.

Additional hearing

Finally, Orinstien asserts that the ULJ erred in refusing to grant an additional evidentiary hearing on her reconsideration request. A ULJ must order an additional evidentiary hearing if a 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.

Minn. Stat. § 268.105, subd. 2(c) (Supp. 2009). We defer to the ULJ's decision not to hold an additional evidentiary hearing, and will reverse only for an abuse of discretion. *Skarhus*, 721 N.W.2d at 345.

In her request for reconsideration, Orinstien asked that she "be allowed to submit new evidence." But Orinstien does not identify the specific evidence she seeks to offer, demonstrate that the evidence would likely change the outcome of the decision, or show that evidence submitted at the hearing was likely false. Instead, her argument for an additional hearing is premised on the claimed lack of notice and inadequacy of the ULJ's credibility determinations. Accordingly, we conclude that Orinstien has not shown that

she is entitled to an additional evidentiary hearing under Minn. Stat. § 268.105, subd. 2(c), and the ULJ did not abuse his discretion in denying an additional evidentiary hearing.

Affirmed.