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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1289**

Thomas Pinckney,
Relator,

vs.

Nutty Boyz Entertainment Group, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 19, 2011
Affirmed
Minge, Judge**

Department of Employment and Economic Development
File No. 24057362-3

Thomas Pinckney, West Lakeland, Minnesota (pro se relator)

Nutty Boyz Entertainment Group, Inc., Brooklyn Center, Minnesota (respondent)

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

Considered and decided by Minge, Presiding Judge; Larkin, Judge; and Crippen,
Judge.*

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

UNPUBLISHED OPINION

MINGE, Judge

Relator Thomas Pinckney challenges the findings of an unemployment law judge (ULJ) that he was fired for employee misconduct and therefore not eligible for unemployment benefits. Pinckney also argues that the ULJ should have held an additional evidentiary hearing to consider new evidence. Because there was substantial evidence to support the ULJ's determination and the ULJ did not abuse her discretion in denying an additional evidentiary hearing, we affirm.

FACTS

Pinckney worked for respondent Nutty Boyz Entertainment Group, Inc., a recording studio, as a staff engineer from 2005 until November 2009, when Nutty Boyz terminated his employment. Pinckney filed for unemployment benefits with respondent Minnesota Department of Employment and Economic Development (DEED). DEED staff determined that he was eligible for benefits. Nutty Boyz appealed Pinckney's eligibility and a ULJ conducted a de novo hearing. The ULJ found that Pinckney was discharged for employment misconduct and ineligible for benefits. Pinckney requested reconsideration, and the ULJ affirmed her decision. Pinckney then filed a certiorari appeal with this court.

DECISION

I.

The first issue is whether the ULJ's findings of fact are adequately supported by the record. This court may affirm, reverse and remand, or modify the decision of a ULJ

if “the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision” are affected by an error of law or unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d)(4)-(5) (2010).

Whether the employee committed a certain act is a question of fact. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We review a ULJ’s findings of fact in the light most favorable to the decision and give deference to the ULJ’s credibility determinations. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). This court will affirm the ULJ’s credibility determinations if “[t]he ULJ’s findings are supported by substantial evidence and provide the statutorily required reason for her credibility determination.” *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007); *see also* Minn. Stat. § 268.105, subd. 1(c) (2010).

Whether particular actions of an employee constitutes employment misconduct “is a question of law, which we review de novo.” *Skarhus*, 721 N.W.2d at 344. Employee misconduct is defined as “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) (2010).

The record of the hearing indicates that Pinckney was responsible for operating and maintaining the recording equipment, scheduling recording times with clients, and generally keeping the studio clean. He was a salaried employee and, except for vacation time, he was expected to be available as needed. Nutty Boyz asserted that Pinckney

defamed the recording studio and its owner, turned away potential customers, did not return customer phone calls, was absent from work without taking vacation and notifying management, used the equipment to record his own music, and damaged music files. Pinckney denied these claims and explained events differently.

The ULJ evaluated the conflicting evidence and found the testimony of Nutty Boyz's witnesses more credible. As a result, the ULJ found that Pinckney was discharged for (1) making negative remarks about Nutty Boyz and its owner; (2) threatening to damage the studio; and (3) requesting and receiving payment for days when he was absent from the studio, was not taking vacation, and was not working on Nutty Boyz business. The ULJ determined that these actions constituted employee misconduct.

Pinckney argues that the ULJ inappropriately asked leading questions throughout the proceedings. The ULJ is required to "ensure that relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009). Here the ULJ asked clarifying questions and rephrased some answers to make certain that she understood what was going on. In reviewing the record, we conclude that the ULJ did not inappropriately lead the witnesses to make statements outside their direct testimony.

Pinckney also claims that the witnesses lied and that their testimony was based on hearsay. A ULJ "may receive any evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2009). We note that much of Pinckney's testimony was repetitive and simply denied the accusations against

him. As a result, the ULJ had to make credibility determinations to which we defer. *See Peterson*, 753 N.W.2d at 774. We also note that Pinckney admitted being out of town and absent from the studio on three occasions, did not request time off for at least one of those trips, and admitted they were not business-related. We conclude that there is substantial evidence in the record to support the ULJ's findings.

We further conclude that the ULJ did not err in determining that Pinckney's actions constituted employment misconduct. Repeatedly making negative remarks about the studio and its owner, threatening to damage the studio if let go, and taking compensation when not working nor taking paid vacation are actions that clearly display a serious violation of the standards of behavior that the studio had the right to reasonably expect of Pinckney.

II.

The second issue is whether the ULJ abused her discretion in upholding her initial decision and declining to schedule an additional hearing to consider new evidence. In deciding a request for reconsideration, the ULJ cannot consider evidence not submitted at the prior hearing but must hold an additional evidentiary hearing to receive new evidence if it "would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence." Minn. Stat. § 268.105, subd. 2(c) (2010). We defer to the ULJ's decision not to hold an additional evidentiary hearing and will not disturb it absent an abuse of discretion. *Skarhus*, 721 N.W.2d at 345.

Pinckney provided no reason for failing to provide his new evidence at the initial hearing. He was informed of the claims being made by Nutty Boyz prior to the initial

hearing date. Because Pinckney was apparently unaware of the initial hearing and needed more time to prepare, the hearing was rescheduled. Given the considerable time available to Pinckney to prepare for that rescheduled initial hearing and Pinckney's failure to provide a good reason for not producing the new evidence at that hearing, we conclude that the ULJ did not abuse her discretion in denying the relief requested.

III.

Pinckney also makes several arguments not related to this appeal. He argues that the president and chief operating officer of Nutty Boyz engaged in the unauthorized practice of law and improper attorney conduct. As it is unrelated to the issue of termination, we decline to address the issue.

Pinckney also argues at length that he did not improperly remove equipment from the recording studio, did not use the studio to further his own music career, and did not damage files and the facility's capabilities with the intent to disrupt its business. None of these arguments were a basis for the ULJ's findings and do not affect the result of the proceeding.

Affirmed.

Dated: