STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1592

Henry Helgerson,
Relator,

vs.

Walgreen Co.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed June 13, 2011
Affirmed
Muehlberg, Judge[*]

Department of Employment and Economic Development
File No. 25063435-3

Henry Helgerson, Albert Lea, Minnesota (pro se relator)

Walgreen Co., St. Louis, Missouri (respondent)

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

Considered and decided by Ross, Presiding Judge; Stauber, Judge; and Muehlberg, Judge.

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

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

MUEHLBERG, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that he is ineligible for unemployment-compensation benefits for being discharged. Because the ULJ correctly determined that relator committed employment misconduct, we affirm.

FACTS

Relator Henry Helgerson worked as a part-time service clerk for Walgreen Co. (Walgreens) for two-and-a-half years and was reprimanded three times for misconduct. He was first reprimanded in December 2009, when a customer complained about him. He was next reprimanded when he failed to come to work on March 27, 2010, without calling his supervisor. He received a final written warning that he could be discharged if he engaged in any further misconduct. He was reprimanded a third time on April 7, 2010, and was discharged from employment.

The previous day, Helgerson's supervisor, Lydia Atkinson, noticed Helgerson reading a magazine at a register. Employees were not allowed to read magazines while on duty, but it was common for them to do so when business was slow. Two hours later, Atkinson again noticed Helgerson reading a magazine at the register. She started to instruct Helgerson what he should be doing instead, but he interrupted her, saying "let me finish this paragraph." Atkinson told Helgerson he was not to read magazines at the register and said she thought he was "smarter than that." Helgerson responded, telling Atkinson "you're the dumbest manager I know."

An hour later, another employee saw Helgerson reading a magazine at the register. Two hours after that, when employees were completing closing duties, Atkinson observed Helgerson on a personal call on the store phone. When Helgerson confirmed to Atkinson that the call was personal, she told him to end the call. Helgerson ignored her, and Atkinson told him again, at which point he loudly said into the phone, "Walgreens doesn't let me talk to my family" and ended the call.

Walgreens' employment policy states that employment termination is usually warranted when an employee's work performance does not improve after a final written warning (which Helgerson received in March 2010), so Walgreens discharged Helgerson.

Helgerson applied for unemployment-compensation benefits through the Minnesota Department of Employment and Economic Development (DEED). DEED initially determined that Helgerson was eligible for benefits, concluding he was not discharged for employment misconduct. Walgreens appealed, and an evidentiary hearing was held. The ULJ concluded that Helgerson was discharged for employment misconduct, making him ineligible for benefits. The ULJ affirmed on reconsideration. This appeal followed.

D E C I S I O N

Standard of Review

This court may affirm, remand, reverse, or modify the ULJ's decision if the relator's substantial rights 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) (2010). Whether the employee committed a particular act is a question of fact, but whether the employee's acts constituted employment misconduct is a question of law. *Skarhus v. Davanni's*, 721 N.W.2d 340, 344 (Minn. App. 2006).

We review a ULJ's findings in the light most favorable to the decision and defer 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). "[W]e will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Skarhus*, 721 N.W.2d at 344. "'Substantial evidence' is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moore Assocs., LLC v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996). However, we exercise our "own independent judgment in analyzing whether an applicant is entitled to unemployment benefits as a matter of law." *Irvine v. St. John's Lutheran Church of Mound*, 779 N.W.2d 101, 103 (Minn. App. 2010).

Employment Misconduct

The ULJ determined that Helgerson committed employment misconduct on three occasions. Employees discharged because of misconduct are ineligible for unemployment-compensation benefits. Minn. Stat. § 268.095, subd. 4(1) (2010).

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." *Id.* at subd. 6 (2010).

To be disqualified because of employment misconduct, the record must show that "the employee intended to engage in, or actually engaged in, conduct that evinced an intent to ignore or pay no attention to the employee's duties and obligations or the standards of behavior the employer had a right to expect." *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Mar. 30, 2004). "A single deliberate act that adversely affects the employer may constitute misconduct." *Id.*

Helgerson testified that he received three reprimands for misconduct. He did not deny committing any of the conduct for which he received reprimands. He acknowledged first receiving a verbal warning, then a final written warning that required him to sign a statement acknowledging "I understand that further misconduct will result in more severe discipline, up to and including termination." He acknowledged at the hearing that he knew his job was in jeopardy after that point. According to Walgreens' employee handbook, which Helgerson testified he read, if an employee's work performance did not improve after a final written warning, termination of employment is generally warranted. When Helgerson read a magazine at a register at work, interrupted Atkinson when she tried to give him tasks to perform, ignored her first request to end a

personal phone call, and told her she was the dumbest manager he had ever known, all conduct he admitted to, he was discharged.

Refusing to abide by an employer's reasonable policies generally constitutes disqualifying employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). It was reasonable for Walgreens to expect Helgerson to work while on duty instead of read a magazine, speak disrespectfully to his supervisor, and take a personal phone call. His behavior "evinced an intent to ignore" his duties and the standards of behavior Walgreens had a right to expect. *Vargas*, 673 N.W.2d at 206. The ULJ correctly concluded Helgerson committed employment misconduct.

Fair Evidentiary Hearing

Helgerson contends he did not receive a fair hearing because he did not understand his obligation to secure the presence of his witnesses at the hearing. Helgerson's first witness was to be his father, who was to testify that Helgerson is a hard worker who enjoyed his job at Walgreens. Helgerson's second witness was to be Jon Murray, a former Walgreens' assistant manager familiar with Walgreens' policy who was to testify that Helgerson was a good worker and that one of Walgreens' witnesses, Andy Walker, who discharged Helgerson, had been "disciplined for his treatment of employees."

At the beginning of the hearing, Helgerson explained that Murray could not participate, but that his father would "most likely answer." The ULJ responded that she could wait to contact the witnesses later in the hearing so that they would be available. She then informed Helgerson of his "right to request that the hearing be rescheduled so that documents or witnesses can be subpoenaed." Helgerson did not request that the

hearing be rescheduled. When the ULJ called Murray, he did not answer, so she asked if there was anything Murray's testimony would have added. Helgerson responded "I believe not, no."[1] The ULJ then asked Walker several questions about what Helgerson contended Murray was to testify to, namely, the policies Helgerson allegedly violated.

In a fair hearing, the ULJ fully develops the record, assists unrepresented relators in presenting a case, and explains the procedure of and the terms used throughout the hearing. Minn. Stat. § 268.105, subd. 1(b) (2010); Minn. R. 3310.2921 (2009). The ULJ informed Helgerson of his "right to request that the hearing be rescheduled so that documents or witnesses can be subpoenaed." The ULJ also led Helgerson through his testimony and asked him numerous questions to fully develop his position. When the ULJ could not reach Murray, she asked Walker the same questions she likely would have asked Murray. Helgerson did not state on the record that he was dissatisfied with the hearing. He did not request that the hearing be rescheduled or that the ULJ attempt to contact his witnesses again.

A hearing is generally considered fair if both parties are afforded the opportunity to give statements, cross-examine witnesses, and offer and object to exhibits. *Ywswf v. Teleplan Wireless Servs.*, 726 N.W.2d 525, 529-30 (Minn. App. 2007). The ULJ afforded the parties all such opportunities. The ULJ fully explained the procedure of the hearing to Helgerson, and Helgerson did not ask questions or attempt to clarify the finality of the hearing or the ULJ's decision. The ULJ holds an evidentiary hearing and

[1] Helgerson had earlier answered in the affirmative; but when the ULJ could not reach Murray, Helgerson conceded that Murray's testimony would not add to the hearing.

issues an initial decision; and if a request for reconsideration is filed, the ULJ reviews her decision and issues a final decision or orders an additional evidentiary hearing. Minn. Stat. § 268.105, subds. 1 and 2 (2010). Helgerson received a fair hearing.

Additional Evidentiary Hearing

Helgerson contends that his witnesses' absence from the hearing warrants an additional evidentiary hearing. The ULJ must order an additional evidentiary hearing if a relator shows that evidence 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) (2010). "This court will defer to the ULJ's decision not to hold an additional hearing." *Ywswf*, 726 N.W.2d at 533 (referring to request for additional evidentiary hearing based on claims of new evidence).

The ULJ stated in her order that:

> Helgerson had advance notice of the evidentiary hearing and should have arranged for his witnesses to be available at the scheduled time . . . . There is no showing that the testimony from the proposed witnesses would likely change the outcome of the decision or show the evidence submitted at the hearing was likely false.

The ULJ "may limit repetitious testimony and arguments," Minn. R. 3310.2921, and "may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly repetitious," Minn. R. 3310.2922 (2009). Neither witness was

present when Helgerson committed misconduct. Helgerson's father's testimony would have been probative of nothing more than that he thinks his son is a good worker, not whether he committed the acts of misconduct. Murray's testimony would have gone toward the credibility of Walker, whom Helgerson believed had been "disciplined" for his treatment of employees, but not toward whether Helgerson committed misconduct. The ULJ's conclusion that Helgerson's and Murray's testimony would not have changed the outcome of the proceeding was proper.

Helgerson also contends his father called DEED to testify after the hearing had begun but was told not to worry about testifying, that Helgerson could simply appeal. But, Helgerson's father's testimony would not have been relevant to a determination of whether Helgerson committed employment misconduct. Thus, there is substantial evidence to support the ULJ's denial of an additional evidentiary hearing.

Witnesses' Credibility

Helgerson contends the ULJ improperly found credible Walgreens' witnesses, Walker and Atkinson, alleging Atkinson lied at the hearing by saying she had never read a magazine at work and Walker lied by saying Walgreens "bring[s] in a truck once a week." The ULJ concluded that "[Walgreens'] testimony and contemporaneous documentation were persuasive and offered a more probable sequence of events than Helgerson's testimony."

"Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus*, 721 N.W.2d at 345. This court will affirm if "[t]he ULJ's

findings are supported by substantial evidence and provide the statutorily required reason for her credibility determination." *Ywswf*, 726 N.W.2d at 533.

Walker and Atkinson gave similar testimony, describing Helgerson's instances of misconduct in detail; indeed, Helgerson's testimony corroborated their testimony. Helgerson conceded that he signed a receipt of discipline after his second reprimand acknowledging that he had received a final written warning and that he understood that he could be discharged for any further misconduct; he acknowledged reading the employee handbook, which outlined the company's termination policies; and he testified that he realized his job was in jeopardy after his second reprimand. Helgerson conceded that he read a magazine at work, called Atkinson "the dumbest manager ever," and took a personal call at work. The ULJ found Walgreens' witnesses more credible, and substantial evidence supports the ULJ's credibility determinations. *See Skarhus*, 721 N.W.2d at 345.

Affirmed.