STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0192

Gerald Leidner,
Relator,

vs.

SMSC Gaming Enterprises,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed September 10, 2012
Affirmed
Larkin, Judge

Department of Employment and Economic Development
File No. 28338946-3

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Considered and decided by Wright, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

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

LARKIN, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that he is ineligible to receive unemployment benefits because he was discharged from employment for misconduct, contending that the findings of fact are not supported by substantial evidence in the record and that his actions did not constitute employment misconduct. We affirm.

FACTS

Relator Gerald Leidner began working for respondent SMSC Gaming Enterprises, a casino, on September 15, 1998 as a full-time shuttle bus driver for employees and guests of the casino. Leidner was aware of SMSC's driving policies and procedures, under which an employee who has four preventable accidents or four other driving violations in a 24-month period will be terminated. SMSC discharged Leidner after he had a total of four preventable accidents and driving violations in a 24-month period.

The four incidents were as follows. First, on May 5, 2010, Leidner failed to use his turn signals while exiting two different parking lots, and SMSC issued him a written warning. Second, on July 5, 2010, Leidner hit a heavy stationary cement garbage container next to a passenger shelter, damaging his bus, and SMSC issued another written warning. Third, on May 17, 2011, Leidner hit a weighted stationary stop sign in the parking lot, damaging his bus, and he failed to timely report the accident to his supervisor, resulting in a three-day suspension. SMSC warned Leidner in each instance

that any further violations would result in further discipline up to and including termination.

The fourth incident occurred on July 13, 2011. It involved an accident in SMSC's parking lot and led to termination of Leidner's employment. The incident was captured on SMSC's surveillance video, which the ULJ watched. While making a left turn and after proceeding forward, Leidner was watching a pedestrian on his left, who had finished crossing by the time Leidner completed the left turn. As Leidner drove forward, a truck began backing out of a parking spot in front of him; Leidner stopped but the back of the truck collided with the right passenger side of his bus, causing significant damage. On July 14, 2011, SMSC discharged him for having a total of four accidents or driving violations within a 24-month period.

Leidner established an unemployment-benefits account with respondent Minnesota Department of Employment and Economic Development (DEED). DEED issued a determination of ineligibility for unemployment benefits. Leidner appealed, and a ULJ held a de novo hearing on whether Leidner had been discharged for employment misconduct and was ineligible for unemployment benefits. The ULJ ruled that he had been discharged for employment misconduct and was ineligible for benefits. Leidner requested reconsideration, and the ULJ affirmed. Leidner brought this certiorari appeal.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator may 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). Minnesota courts have defined substantial evidence as: "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Whether an employee committed employment misconduct "is a mixed question of fact and law." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). "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." *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 539 (Minn. App. 2011). But "[d]etermining whether a particular act constitutes disqualifying misconduct is a question of law that we review de novo." *Stagg*, 796 N.W.2d at 315. We defer to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

I.

The ULJ found that the July 13, 2011 accident was preventable, but Leidner argues that the ULJ's findings are not supported by substantial evidence in the record. Leidner first challenges the ULJ's finding that he "failed to . . . yield the right of way in

the parking lot" to the truck that was backing out of its parking space, contending that legally, Leidner had the right of way. The ULJ, however, was addressing whether the accident would have been preventable had Leidner yielded to the truck, not which driver had the right of way legally. Leidner also takes issue with the ULJ's finding that he had time to stop before the truck backed into his bus. The ULJ based this finding on her review of the video of the incident, as well as the testimony of the witnesses and the documents in the record, and our review of the record shows that the ULJ had substantial evidence to support this finding. Leidner's argument that the ULJ erroneously found that he swerved to avoid the truck, rather than that he angled slightly to the left, does not change our decision.

Leidner next challenges the ULJ's decision to credit the testimony of SMSC's witnesses over Leidner's testimony. "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) (2010). "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 a credibility determination if the 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).

Leidner complains that the ULJ did not explain what part of his testimony was not credible. The primary area of dispute was whether the accident was preventable, and it is

apparent that the ULJ did not credit Leidner's testimony that the accident was not preventable. Leidner also challenges the ULJ's finding that he changed or corrected his statements, claiming that the ULJ discredited his testimony simply because he was trying to "correct his statement" as to undisputed matters. This argument is not supported by the record. The ULJ's credibility findings are supported by substantial evidence in the record, and we defer to the ULJ's credibility determinations.

II.

Next, Leidner contends that he did not engage in misconduct in the July 13, 2011 accident. The ULJ ruled: "The evidence supports that the accidents were avoidable and that Leidner committed the driving violations, including failure to report an accident," which "were in serious violation of the standards of behavior that SMSC Gaming Enterprises had a right to reasonably expect of him." The ULJ concluded that Leidner was discharged for employment misconduct.

Leidner first contends that he was not negligent in the July 13, 2011 accident. "Employment misconduct [is] any intentional, negligent, or indifferent conduct" that clearly displays "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." Minn. Stat. § 268.095, subd. 6(a)(1) (2010). "Negligence is the failure to use the care that a reasonable person would use in the same or similar circumstances," but the law does not require perfect conduct. *Dourney*, 796 N.W.2d at 540. Leidner asserts that the ULJ erred by improperly equating "preventable" behavior with "negligent" behavior. We disagree. The ULJ first found that the fourth accident was preventable, making Leidner subject to disciplinary action for violating

SMSC's driving policies. The ULJ then concluded that his total of four accidents and driving violations met the standards for employment misconduct as a matter of law under subdivision 6(a)(1).

Next, Leidner argues that his conduct was not negligent because SMSC should not expect perfect conduct from him. *See Id.* (holding that perfect conduct not required). But SMSC's standards do not require "perfect" conduct, and its graduated plan of discipline acknowledges that drivers are not perfect. Instead, Leidner was discharged only after he had been involved in a total of four accidents and driving violations within a 24-month period.

Leidner also contends that his conduct did not display "a serious violation of the standards of behavior the employer *has the right to reasonably expect of the employee*." Minn. Stat. § 268.095, subd. 6(a)(1) (emphasis added). SMSC's driving standards require that a driver "must observe his or her surroundings for any potential safety issues." Leidner contends that he acted reasonably in regard to the July 13, 2011 accident because he was observing a pedestrian as a safety precaution, rather than focusing solely on parked vehicles. To the contrary, SMSC could reasonably expect that its employee would observe all of his surroundings for any potential safety issue and not limit his observations to his left, to the exclusion of the rest of the surroundings.

In his next assertion of error, Leidner argues that he did not engage in misconduct because, regardless of subdivision 6(a), inadvertent conduct, conduct that an average reasonable employee would have engaged in under the circumstances, or good faith errors in judgment, if judgment is required, are not considered misconduct. Minn. Stat.

§ 268.095, subd. 6(b)(2), (4), (6) (2010). Leidner first contends that his "driving mistakes" were a consequence of inadvertence. He cites the case of a discharged school bus driver who had been involved in two at-fault rear-end collisions, as well as a third not-at-fault accident, and whom the supreme court held had not engaged in employment misconduct and instead, at most, was involved in incidents of inadvertence or negligence. *Swanson v. Columbia Transit Corp.*, 311 Minn. 538, 538-40, 248 N.W.2d 732, 732-33 (1976) (addressing common law definition of misconduct, under which negligent acts may not have been considered misconduct); *cf.* Minn. Stat. § 268.095, subd. 6(a) (current statute providing that misconduct can include negligent acts). Asserting that his accidents and driving violations were less serious than those of the driver in *Swanson*, because he did not repeat his mistakes, he contends that his driving mistakes were simple inadvertencies that could have been made by even good drivers.

Inadvertence has been defined as "an oversight or a slip," and inadvertent as "[n]ot duly attentive" or "[m]arked by unintentional lack of care." *Dourney*, 796 N.W.2d at 540 (quoting *The American Heritage Dictionary of the English Language* 910 (3d ed.1992)). An employee's single instance of forgetting to check the identification of a customer before serving alcohol was held to be inadvertent and not misconduct, because it had been "marked by unintentional lack of care." *Id.* (citing employee's testimony that she always carded customers; she could not explain why she did not in this instance; the restaurant had a new menu, requiring more concentration to take down the order correctly, and she had never previously been reprimanded for failure to check identification). Nonetheless, *Swanson* did "not rule out the possibility of a series of

negligent or inadvertent acts amounting to misconduct." *Swanson*, 311 Minn. at 539, 248 N.W.2d at 733. In fact, this court held under *Swanson* that a truck driver's four speeding tickets within an eight-month period, where the employer issued a warning following the third ticket, were not mere inadvertent incidents and instead constituted misconduct. *Nelson v. Hartz Truckline*, 401 N.W.2d 436, 437-39 (Minn. App. 1987), *review denied* (Minn. Apr. 29, 1987). Leidner's four instances of accidents and driving violations involving unsafe driving, with warnings from SMSC after the first three, and which occurred within a 24-month period, are not mere acts of inadvertence.

Leidner next argues that his conduct in the July 13, 2011 accident could also be described as "conduct an average reasonable employee would have engaged in under the circumstances," which is not misconduct. Minn. Stat. § 268.095, subd. 6(b)(4). He contends that he was following SMSC's driving standards requiring that drivers "must observe his or her surroundings for any potential safety issues" by observing the pedestrian and thus he was doing what an average reasonable employee would have done. An average reasonable employee would not have so limited his or her observations but instead would have surveyed the surroundings for "any potential safety issue" as directed by SMSC's rules.

Finally, Leidner argues that his driving mistakes were good-faith errors in judgment, which are not misconduct. *Id.*, subd. 6(b)(6). Actions not consistent with the employee's training, past warnings, or established procedure do not constitute an error of judgment. *See Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 525 (Minn. 1989) (holding that nurse's unauthorized treatment of patient and disregard of doctor's orders

were not good-faith errors in judgment). Leidner argues that observing the pedestrian, rather than the truck that was backing out, was merely a good-faith error of judgment, as were the incidents in which his bus came into contact with the garbage can and stop sign, where he simply misjudged the distance. Based on substantial evidence in the record, we cannot agree.

In conclusion, the ULJ correctly ruled that Leidner's pattern of unsafe driving constituted employment misconduct, rendering Leidner ineligible for unemployment benefits.

Affirmed.