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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0746**

Fitsum Yemane,
Relator,

vs.

Globeground North America, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 4, 2013
Affirmed
Schellhas, Judge**

Department of Employment and Economic Development
File No. 28601749-3

Fitsum B. Yemane, Bloomington, Minnesota (pro se relator)

Globeground North America, LLC, St. Louis, Missouri (respondent)

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

Considered and decided by Stauber, Presiding Judge; Schellhas, Judge; and
Collins, 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.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Relator challenges the denial by an unemployment-law judge of his request for a new evidentiary hearing, arguing that unfairness during the initial hearing and new evidence warrant a new hearing. We affirm.

FACTS

Respondent Globeground North America, LLC, doing business as Servisair, terminated relator Fitsum Yemane on April 8, 2011, from Yemane's position as an airplane fueler. On April 2, 2011, Yemane was supposed to work an eight-hour shift from 12:00 p.m. to 8:00 p.m. Because Servisair was "overstaffed," Yemane and a coworker "split" their shift, agreeing that Yemane would work from 12:00 p.m. to 4:00 p.m. and the coworker would work from 4:00 p.m. to 8:00 p.m. Yemane obtained the permission of his "lead"¹ to "leave the Servisair work area for a meal break and to visit . . . [a] break room." Servisair does not permit shift "splitting," and Yemane had never previously split a shift. During his four-hour break, neither Yemane's Servisair general manager nor his Servisair direct supervisor, who was not his lead, knew where he was, nor could they locate him. Yemane did not punch out until 8:45 p.m. Servisair terminated him for violating two company rules, which, according to Servisair's code of conduct, could result in "immediate termination":

2.5 Theft or willfully damaging property of the Company, employees, customers or vendors.

¹ The record indicates that the duties of a "lead" include "generally managing the shift," including "making sure that every fueler has a truck" and "a schedule."

....

2.7 Falsifying any Company record(s), reports(s) or document(s), including but not limited to personnel forms[,] physical exams, employment records, application forms, product reports, Trip Cards, checklists, etc.

Yemane applied for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development (DEED) determined that he was eligible, finding that he “completed his work assignment and after notifying his supervisor, he went to the break room to wait for additional work” and that his “submission of an inaccurate report or document . . . was not intentional or negligent, and therefore was not employment misconduct.” Servisair appealed, and an unemployment-law judge (ULJ) commenced an evidentiary hearing but shortly thereafter rescheduled the hearing, based on Yemane’s request and Servisair’s consent. Yemane based his request on his desire “to have witnesses on [his] behalf to come and witness.” Upon granting Yemane’s request, the ULJ told Yemane, “[I]t will be your responsibility to get in touch with your witnesses and make sure it works for them. If it doesn’t you need to call immediately and let us know so that we can make sure that we get a time that will work for everybody.” Yemane replied, “Sure, sure, that’s all I’m asking for.”

At the beginning of the rescheduled evidentiary hearing, the ULJ stated, “The applicant has the right to request that the hearing be rescheduled so that documents or witnesses can be subpoenaed.” The ULJ then attempted to telephone Yemane’s witness, could not reach the witness, and left the following recorded message before proceeding with the hearing: “[M]y name is Peter [sic] Nestingen, I’m calling from the state

unemployment office, I'm an unemployment law judge. Calling about the unemployment hearing of Fitsum Yemane. The current time is 8:30. As soon as you get this message could you call [phone number], [phone number]. Thank you." Yemane's witness did not call or participate in the hearing. Yemane indicated that his witness was the lead who had given him permission to split his shift but did not request that the ULJ reschedule the hearing. Servisair's general manager testified that Yemane's "direct supervisor" was someone who was not Yemane's lead and testified, "[T]here's a supervisor here if he wanted to leave early that day, he could have gone to the supervisor and said hey there's no work to do today, I'd like to get off the clock and leave."

The ULJ decided that Yemane was ineligible for unemployment benefits because he engaged in employment misconduct in two ways. First, Yemane violated Servisair's reasonable expectation by "leaving Servisair's work area for about a four hour period while on duty without Servisair's approval." Second, "Yemane waited 45 minutes past the end of his scheduled shift to punch out."

Yemane requested reconsideration and a new evidentiary hearing, arguing that he was prejudiced because his "witness was not present, having encountered difficult circumstances," and that he was "just looking for a chance at a fair trial." With his request for reconsideration, Yemane submitted letters from current and former Servisair employees, including his witness who did not attend the evidentiary hearing. A ULJ² affirmed the decision, noting that "Yemane's conduct of punching out 45 minutes late

² The ULJ who considered Yemane's request for reconsideration was not the ULJ who presided at the evidentiary hearing.

and therefore requesting payment of time in which he was not working or scheduled to work was never permitted by any supervisor, manager or lead.”

This certiorari appeal follows.

D E C I S I O N

Servisair terminated Yemane’s employment for misconduct. “Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). “[W]hether a particular act constitutes disqualifying misconduct is a question of law that [appellate courts] review de novo.” *Id.* “Whether the employee committed a particular act is a fact question” *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 539 (Minn. App. 2011). An employee is ineligible for unemployment benefits if he is discharged for “employment misconduct.” Minn. Stat. § 268.095, subd. 4(1) (2012).³ Employment misconduct includes “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.” Minn. Stat. § 268.095, subd. 6(a) (2012). An employee’s conduct is generally disqualifying employment misconduct when

³ “The general rule is that appellate courts apply the law as it exists at the time they rule on a case, even if the law has changed since a lower court ruled on the case.” *Interstate Power Co. v. Nobles Cnty. Bd. of Comm’rs*, 617 N.W.2d 566, 575 (Minn. 2000). But the supreme court has noted that “[a]n exception to this rule exists when rights affected by the amended law were vested before the change in the law” and observed that “[t]he United States Supreme Court also adheres to the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.” *Id.* (emphasis omitted) (quotation omitted).

the employee “refus[es] to abide by an employer’s reasonable policies and requests.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

When reviewing a ULJ’s decision, this court may reverse or modify a decision if the relator’s substantial rights were prejudiced by findings, inferences, or a decision “affected by . . . error of law” or “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(4)–(5) (2012). Appellate courts review “the ULJ’s factual findings in the light most favorable to the decision,” *Stagg*, 796 N.W.2d at 315 (quotation omitted), and this court, in doing so, “giv[es] deference to the credibility determinations made by the ULJ” and “will not disturb the ULJ’s factual findings when the evidence substantially sustains them,” *Rowan v. Dream It, Inc.*, 812 N.W.2d 879, 882 (Minn. App. 2012) (quotation omitted).

Request for Reconsideration and New Evidentiary Hearing

Yemane requested reconsideration and a new evidentiary hearing. When a party requests reconsideration, a ULJ may “direct[] that an additional evidentiary hearing be conducted.” Minn. Stat. § 268.105, subd. 2(a) (2012). Yemane requested a new evidentiary hearing, arguing that his evidentiary hearing was unfair because his witness did not appear. A ULJ “must exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing,” “should assist unrepresented parties in the presentation of evidence,” and “must ensure that relevant facts are clearly and fully developed.” Minn. R. 3310.2921 (2011).

Here, to accommodate Yemane’s desire to have his witness present, the ULJ rescheduled the December 7 hearing to December 29, and the ULJ informed Yemane that

he was responsible for ascertaining that his witness could appear on the new date. *See* Minn. R. 3310.2908 (2011) (stating that “[r]equests to reschedule a hearing must be addressed to the appeals office *in advance of* the regularly scheduled hearing date” and “[a] hearing may be rescheduled only once except in the case of an emergency” (emphasis added)). At the beginning of the rescheduled hearing on December 29, the ULJ informed Yemane of his right to request that the hearing be rescheduled so that documents or witnesses could be subpoenaed, but Yemane did not request that the hearing be rescheduled. *See* Minn. Stat. § 268.105, subd. 1(b) (2012) (requiring that, at beginning of hearing, ULJ must state “that the applicant has the right to request that the hearing be rescheduled so that documents or witnesses can be subpoenaed”).

Yemane argues that the ULJ abused his discretion by denying Yemane’s request for a new evidentiary hearing on the basis of new evidence that Yemane provided in the form of letters from “former coworkers and supervisors who would like to speak on [his] behalf,” including a letter from Yemane’s witness. We disagree. A ULJ may consider evidence not submitted at a previous evidentiary hearing only “for the purposes of determining whether to order an additional evidentiary hearing.” Minn. Stat. § 268.105, subd. 2(c) (2012). The ULJ “must order an additional evidentiary hearing” when a relator “shows that evidence which was not submitted at the evidentiary hearing . . . would likely change the outcome of the decision *and* there was good cause for not having previously submitted that evidence.” *Id.* (emphasis added).

Here, Yemane’s only good-cause argument for not producing his witness’s testimony at the December 29 evidentiary hearing is that his witness did not appear

because he “encountered difficult circumstances.” This assertion does not satisfy the good-cause requirement. “Good cause for failing to participate is defined as ‘a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing.’” *Petracek v. Univ. of Minn.*, 780 N.W.2d 927, 929 (Minn. App. 2010) (quoting Minn. Stat. § 268.105, subd. 2(d) (2008)). Yemane’s difficult-circumstances assertion is insufficient to establish good cause because Yemane failed to support that assertion by showing to the ULJ why his witness’s difficult circumstances constituted a reason that would have prevented a reasonable person acting with due diligence from participating in the December 29 evidentiary hearing. *See id.* at 930 (concluding that, even though “it is undisputed that relator was unavailable to participate in the evidentiary hearing due to being jailed, . . . that fact alone did not establish that he had *good cause* for failing to participate in the evidentiary hearing” because “[r]elator also had to give the ULJ an explanation that would show why the circumstance of his being jailed was a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing” (quotation omitted)). Moreover, Yemane’s new evidence would not likely have changed the outcome of the ULJ’s decision that Yemane’s employment misconduct renders him ineligible for unemployment benefits. None of the letters submitted by Yemane mentions or pertains to either of the grounds on which the ULJ determined that Yemane engaged in employment misconduct, that is, punching out from work 45 minutes late.

Yemane also argues that the ULJ erred by not granting his request for reconsideration because Servisair presented a “false claim” at the December 29

evidentiary hearing. But because Yemane did not present this argument at the evidentiary hearing, nor did the ULJ consider it, we will not consider it on appeal. *See Peterson v. Ne. Bank–Minneapolis*, 805 N.W.2d 878, 883 (Minn. App. 2011) (“[B]ecause this issue was not raised before the ULJ, it is not properly before this court on review.”).

Upon Yemane’s request for reconsideration and a new evidentiary hearing, the ULJ concluded that a new evidentiary hearing was not necessary. “We defer to a ULJ’s decision to grant or deny an evidentiary hearing and will reverse only for an abuse of discretion.” *Vasseei v. Schmitt & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 750 (Minn. App. 2010). We conclude that the ULJ did not abuse his discretion by declining to grant Yemane’s request for a new evidentiary hearing.

Employment Misconduct

The ULJ decided that Yemane engaged in employment misconduct, finding that he “waited 45 minutes past the end of his scheduled shift to punch out, even though he had not worked for approximately four hours” and that Yemane did not return to his work area before 8:00 p.m.—the end of his scheduled shift—because he “began chatting with a former colleague.” Servisair’s code of conduct provides that “immediate termination” may result if an employee engages in “[t]heft of . . . property of the company, employees, customers or vendors” or “[f]alsif[ies] any Company record(s), report(s), or document(s), including but not limited to . . . personnel forms . . . [and] employment records.” Servisair terminated Yemane for violating both rules. Although Servisair’s written code of conduct does not include a rule specifically prohibiting an employee from falsifying his time card, “[w]e are aware of no law that requires that an employer have an express ‘policy’

regarding prohibited behavior for employees.” *Brown v. Nat’l Am. Univ.*, 686 N.W.2d 329, 333 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004). Whether an employee seriously violated an employer’s reasonable expectations “is an objective determination.” *Jenkins v. Am. Exp. Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006).

This court “will not disturb the ULJ’s factual findings when the evidence substantially sustains them,” *Rowan*, 812 N.W.2d at 882 (quotation omitted), and substantial evidence is “(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) (quotation omitted).

Upon Yemane’s request for reconsideration, the ULJ stated that “Yemane’s conduct of punching out 45 minutes late and therefore requesting payment of time in which he was not working or scheduled to work was never permitted by any supervisor, manager or lead.” Yemane challenges the ULJ’s statement that, by punching his card at 8:45 p.m., Yemane was “requesting payment of time in which he was not working or scheduled to work.” Yemane argues that he “did not ask to be paid for the extra time . . . nor was [he] ever paid for that block of time.” But Yemane does not, and cannot, argue that he did not falsify his time card. Nothing in the record, including Yemane’s new evidence, disputes the reasonable inference that, when an employee punches a time card, the employee expects to get paid for the time reported on the time card. And no record evidence shows that any supervisor, manager or lead worker approved Yemane’s

45-minute late punch-out. Based on Yemane's 45-minute late punch-out, Servisair could reasonably have concluded that it could no longer trust Yemane to complete essential functions of his job. *See Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (concluding that, "[a]fter [employee]'s theft, [employer] could no longer entrust her with [various] responsibilities" and, "[t]hus, [employer]'s ability to assign the essential functions of the job to its employee was undermined by the employee's conduct").

We conclude that the ULJ properly concluded that Yemane did not show good cause to support his request for a new evidentiary hearing, that the ULJ's findings are substantially supported by the record, that the findings support the ULJ's decision that Yemane engaged in employment misconduct, and that the ULJ properly decided that Yemane is ineligible to receive unemployment benefits.

Affirmed.