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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1204**

John Spalla,  
Relator,

vs.

Peterson Mechanical, Inc. (2000),  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed March 11, 2013  
Affirmed  
Larkin, Judge**

Department of Employment and Economic Development  
File No. 29244561-3

John G. Spalla, Mahnommen, Minnesota (pro se relator)

Peterson Mechanical, Inc., Fargo, North Dakota (respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and  
Rodenberg, Judge.

## **UNPUBLISHED OPINION**

**LARKIN**, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that he was discharged for employment misconduct and therefore is ineligible to receive unemployment benefits. We affirm.

### **FACTS**

Respondent Peterson Mechanical Inc. (PM) discharged relator John Spalla from his employment with PM in November 2011. Spalla established an unemployment-benefits account with respondent Minnesota Department of Employment and Economic Development (DEED). Spalla initially received benefits. Later, DEED determined that Spalla is ineligible for benefits because he had quit his employment. Spalla appealed the determination, and a ULJ held a de novo telephonic hearing.

Evidence presented at the hearing showed that PM performs mostly commercial and industrial plumbing, heating, and air-conditioning work. In the fall of 2011, Spalla was employed by PM and in charge of a large plumbing and piping project at the White Earth Circle of Life school near Mahanomen. It was a union job, and Spalla's union contract provided that the union would not sanction any employee's performance of plumbing and piping for entities other than his current employer.

White Earth Builders asked Spalla if he would install piping and plumbing in a concession stand that was part of the overall Circle of Life project but that was not included in PM's contract. Spalla agreed, and he enlisted PM's apprentice to assist him. At the hearing before the ULJ, the parties referred to the concession-stand project as

“moonlighting.” And Michael Peterson, PM’s project manager and vice president, testified that PM does not “allow employees to moonlight.” Spalla’s testimony was similar: he stated that “[e]verybody knows it’s not appropriate.”

On November 2, Peterson asked Spalla who was doing the plumbing work on the concession stands at the worksite. Spalla informed Peterson that he was doing the work but that he was doing it on his own time. Peterson, according to Spalla, was “furious.” Spalla told Peterson that it was not PM’s job, that PM did not bid on it, and that White Earth Builders had asked him to do it. A PM employee testified that Spalla threatened to quit his employment with PM so he could complete the concession-stand work. And Spalla testified that Peterson told him “that’s the last straw, you’re done.”

Following the hearing, the ULJ concluded that PM discharged Spalla for employment misconduct and that Spalla was therefore ineligible to receive unemployment benefits. Spalla requested reconsideration, but the ULJ affirmed her initial determination. This certiorari appeal follows.

## **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 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) (2012).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). 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) (2012).

Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* This court reviews the ULJ’s factual findings “in the light most favorable to the decision” and defers to the ULJ’s credibility determinations. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Spalla argues that the ULJ erred because “some of the facts upon which the ULJ based her decision are not in evidence” and because “the ULJ based her decision on a misunderstanding of other material facts.” For instance, Spalla contends that “[t]he testimony does not bear out that [Peterson] had an expectation that his employees would not moonlight” and that “Peterson was unable to cite to any company policy or rule that prohibits moonlighting.”

Although there is no evidence that PM had a formal, written policy prohibiting moonlighting, Peterson testified that moonlighting was not allowed, and Spalla testified

that he was aware that moonlighting was “not appropriate.” Moreover, the ULJ’s misconduct determination was not based solely on Spalla’s initiation of work on the concession-stand project—it was also based on Spalla’s stated refusal to end that work when his employer indicated that it was not allowed. The ULJ concluded that “Spalla showed a substantial lack of concern for his employment by conveying to Peterson that he intended to finish the [concession-stand] job despite the fact that Peterson was furious about it and told him he could not do so.” This conclusion is not in error. The ULJ found, based on the testimony of another PM employee, that Spalla told Peterson “that he would quit if he could not finish the moonlighting job.” Spalla’s threat to quit his employment, rather than end his work on the concession-stand project after Peterson communicated that his work on the project was unacceptable, showed a substantial lack of concern for his employment.

Spalla makes several other arguments in support of reversal. None is persuasive. For example, Spalla argues that the ULJ erred by concluding that he displayed a lack of concern for his employment by telling Peterson that he intended to complete the concession-stand project even though Peterson was furious. He argues that when he “testified that Peterson was furious, he was not speaking about the work that was being performed on the concession stand.” The record belies this assertion. During the hearing, the ULJ asked Spalla if he was “performing plumbing work on the concession stands at the job site that [he was] working on for [PM]?” Spalla answered yes. The ULJ then asked Spalla if Peterson had told him that he could not do it, and Spalla responded, “Not in a yes or no, he was furious that I was doing it.”

Spalla also argues that “Peterson is unable to show that [his] actions [were a] serious violation of a standard he expects out of his employees” because “other [PM] employees engaged in moonlighting and were neither disciplined nor fired by the company.” According to Spalla, this “shows a pattern of acquiescence.” But the conduct of PM’s other employees, and PM’s reaction thereto, is not relevant to our decision on appeal. *See Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986) (“The sole question before this court is whether [the employee’s] violation of [the employer’s] rules constituted misconduct. Whether or not other employees violated those same rules and were disciplined or discharged is not relevant here.”), *review denied* (Minn. Aug. 20, 1986).

Spalla further argues that “the testimony does not show that Peterson was adversely impacted” and that “taking on the concession stand project, for no monetary gain, did not adversely impact the business of [PM].” However, “[h]arm is not necessary for a determination of misconduct.” *Id.* Spalla’s reliance on caselaw stating “that a single incident of behavior, may not constitute misconduct, if the incident does not have an adverse impact on the employer” is misplaced. Minnesota statutes previously stated that “a single incident that does not have a significant adverse impact on the employer” is not misconduct. Minn. Stat. § 268.095, subd. 6(a) (2008). Although the law still provides that “[i]f the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct,” Minn. Stat. § 268.095, subd. 6(d) (2012), the statute no longer requires an “adverse impact.”

Spalla also argues that his actions, including his willingness to help other contractors on the job site and his desire to assist in the completion of the project, even after his discharge, demonstrate his concern for his employment. Although those actions may show a general concern for employment, they do not outweigh Spalla's threat to quit when Peterson advised him that his work on the concession-stand project was unacceptable. The ULJ asked Spalla why he "would continue to do the plumbing work on the concession stands while you're employed at [PM] while Mr. Peterson is telling you not to do that work and he was furious in your own words." Spalla responded that "it was just that Saturday and Sunday, it was no big deal, just a small little project." But Spalla also testified that "everybody knows [moonlighting is] not appropriate." And he threatened to quit when his employer told him he could not moonlight. We have no difficulty concluding that this conduct shows a substantial lack of concern for Spalla's employment with PM. See *Schmidgall*, 644 N.W.2d at 804 ("As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct.").

Lastly, Spalla argues that the ULJ's finding that he continued to work on the concession-stand project "should not be based on his actions after he was discharged from employment." In her order on reconsideration, the ULJ reasoned that "Peterson told Spalla to stop performing the plumbing work as it was moonlighting and despite this order by the employer, Spalla continued to moonlight." She further stated that "the preponderance of evidence showed that Spalla continued to moonlight even when Peterson told him he could not do so."

Spalla contends, and we agree, that he was discharged when Peterson first confronted him regarding the concession-stand project. Any work that Spalla did on that project *after* his discharge does not inform our decision regarding the reason for his discharge. Accordingly, we have not relied on such evidence in our de novo determination of law regarding whether Spalla was discharged for employment misconduct. Thus, the alleged error does not provide a basis for reversal. *See* Minn. Stat. § 268.105, subd. 7(d) (providing that this court may reverse the ULJ’s decision “if the substantial rights of the petitioner may have been prejudiced” by error).

In conclusion, Spalla showed a substantial lack of concern for his employment when he threatened to quit rather than stop moonlighting, even though he acknowledges that moonlighting was inappropriate. We therefore affirm the ULJ’s decision that Spalla was discharged for employment misconduct and is ineligible for unemployment benefits.

**Affirmed.**