STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1905

Thomas Matz,
Relator,

vs.

AMF Bowling Centers, Inc.,
Respondent,
Department of Employment and Economic Development,
Respondent.

Filed July 1, 2013
Affirmed
Stauber, Judge

Department of Employment and Economic Development
File No. 297116573

Daniel R. Trost, Lake City, Minnesota (for relator)

AMF Bowling Centers, Inc., c/o Corporate Cost Control, Inc., Londonderry, New Hampshire (respondent employer)

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

Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and Toussaint, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving 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

STAUBER, Judge

In this certiorari appeal from a decision by an unemployment-law judge (ULJ) that relator is ineligible for unemployment insurance benefits because he was discharged for employment misconduct, relator argues that the ULJ's finding that he admitted to violating a work-safety policy was based on unreliable hearsay and unsupported by substantial evidence in the record, the ULJ's credibility determination was based on testimony by a witness whose testimony was not detailed and was inconsistent, and his alleged policy violation did not constitute employment misconduct. We affirm.

FACTS

Relator Thomas Matz began working for respondent-employer AMF Bowling Centers, Inc. (AMF) in August 1980 as a full-time facility manager. AMF has a policy, called "lock out/tag out" (LOTO) that requires mechanics working on the bowling machines to carefully shut down and lock machines before making repairs. Relator was trained and evaluated on the LOTO policy. On March 20, 2012, relator's supervisor, Trista Kimmes observed relator working on a machine that was not locked, in violation of LOTO. Relator was given a final written warning on March 26, 2012, stating that he was required to follow LOTO consistently. The warning also indicated that Kimmes had two prior conversations with relator about following company policy and that relator "didn't care" if he was written up.

On April 27, 2012, Kimmes again observed relator working on a machine without LOTO in place. Relator was terminated from his employment and given a written notice stating that he was terminated because he violated LOTO.

Relator applied for unemployment benefits and was denied because it was determined he was discharged for employment misconduct. Relator appealed the determination of ineligibility, and a telephonic hearing was held before a ULJ on July 3, 2012. At the hearing, relator admitted to violating LOTO on March 20, 2012, but indicated that it was an accident. Relator denied violating LOTO on April 27, 2012, and testified that he locked out the machine, did some work on it, then unlocked it, and was testing the machine when Kimmes walked by. Relator then said to Kimmes, "what did I do wrong now," but Kimmes just kept walking. He said that he was on his way to get the LOTO equipment because there was additional work that needed to be done on the machine. He stated that, "I never touched that machine. Fifteen minutes later, [Kimmes] sent me home. I asked why. She goes lock out/tag out and shrugged her shoulders and that was it." Relator stated that he believed they were "trying to get rid of me."

By contrast, Kimmes testified that she was doing paperwork in her office when she heard someone throwing balls in the bowling alley. Kimmes left her office to see what was going on, and saw relator adjusting an unlocked machine with an Allen wrench. As she walked away from relator, she observed him go get the LOTO equipment, but she observed that no locks were in place while he was adjusting the machine. She also testified that when she confronted relator about the incident, relator said, "really[,] for sticking my hand in that far," and raised his hand, "demonstrating how far he stuck his

hands in." She then told him that it was a policy violation, "and that was it." She testified that relator put his hand in the machine about "five inches, approximately," and although there is "open space" in the machine, "there[] [are] belts that run the . . . ball lift that are right there, one for the left lane and one for the right lane."

Human resources manager Kelly Shannon testified on behalf of AMF that relator admitted to Don Tuttle, the regional vice-president that he violated LOTO on April 27, 2012. Shannon said she had a letter in which Tuttle stated that relator admitted the policy violation to him and that, based on this violation, Tuttle declined to intervene on relator's behalf. Relator objected to the admission of this letter into evidence on the grounds that it was hearsay. The ULJ stated that hearsay is admissible, but rather than admitting the letter into evidence, the ULJ asked Shannon to summarize its contents. Relator denied ever admitting to Tuttle that he violated LOTO.

On July 12, 2012, the ULJ issued a decision affirming relator's ineligibility determination. The ULJ found that relator violated LOTO on March 20 and on April 27 and that he admitted the violation to Tuttle. The ULJ concluded that the April 27 violation was "a serious violation of the standards of behavior AMF had a right to reasonably expect of [relator], and further showed a substantial lack of concern for the employment." Furthermore, the ULJ stated that Kimmes's testimony was more credible than relator's testimony "due to the level of detail and consistency in her testimony, and because it is more in line with [relator's] opposition to the LOTO policy." The ULJ found that relator "has a significant amount of contempt toward the [LOTO] policy" because relator stated that it was impossible to do his job with LOTO in place and that

AMF is the only bowling alley company that imposes this policy on its employees. Relator requested reconsideration of the determination, and the ULJ affirmed. This certiorari appeal followed.

D E C I S I O N

On a certiorari appeal, this court may reverse or modify a decision of a ULJ "if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusions, or decision are . . . unsupported by substantial evidence in view of the entire record." Minn. Stat. § 268.105, subd. 7(d)(5) (2012).

"Whether an employee committed employment misconduct is a mixed question of fact and law." *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether an act was committed is a question of fact; but, whether the act constitutes employment misconduct is a question of law, which this court reviews de novo. *Id.* On appeal, this court reviews the ULJ's fact findings in the light most favorable to the decision, giving deference to the ULJ's credibility determinations. *Id.* "[T]his court will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id.*

Relator argues that the evidence in the record was insufficient to support the finding that relator violated LOTO on April 27, 2012. He argues that it was improper for the ULJ to rely on the statement relator allegedly made to Don Tuttle admitting the LOTO violation because that statement was hearsay and therefore unreliable. Respondent-department concedes that the ULJ erred by not fully developing the record on the issue of the Tuttle letter, but argues that relator's alleged admission is not essential

to support the ULJ's findings. Rather, respondent-department argues that Kimmes's eye-witness testimony is sufficient to support the finding that relator violated LOTO. We agree.

In a hearing before a ULJ, hearsay evidence is admissible so long as "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 (2011). Where exhibits are not mailed to the parties before the hearing, the better practice is to provide an opportunity for the parties to mail or fax documents for inclusion in the record rather than have a party summarize an exhibit. *See* Minn. R. 3310.2912 (2011) (providing that "[i]f a party moves to introduce additional documents during the course of the hearing, . . . the moving party must send copies of the documents to the [ULJ] and the opposing party," and the record must be left open). But, because Kimmes's testimony provided substantial evidence in support of the ULJ's decision, we conclude that the Tuttle letter is not dispositive of whether relator committed employment misconduct.

Relator argues that Kimmes's testimony regarding the alleged LOTO violation on April 27, 2012 was not credible because Kimmes was equivocal about the extent to which relator placed his hands inside the machine and whether he was holding an Allen wrench at the time. "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 [ULJ] must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2012). "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 345

(Minn. App. 2006). In his decision, the ULJ stated that Kimmes's testimony was more credible than relator's testimony because it was more detailed and consistent, and because it was consistent with statements by relator indicating his contempt for the LOTO policy. Although relator argues that Kimmes's testimony changed regarding whether relator put one or two hands in the machine, whether he was holding a wrench, and how deep his hands were in the machine, the record confirms that Kimmes saw relator working on the machine in violation of company policy. Moreover, when her statements are read in context, they provide further elaboration on what Kimmes observed, and are not contradictory statements. Therefore, we conclude that the ULJ did not err by concluding Kimmes's testimony was more credible than relator's.

Relator also argues that the LOTO policy was not reasonable, and that his violation of that policy by placing his hands in the "open space" of an unlocked machine was not sufficiently serious. To be ineligible for unemployment benefits, relator must have been discharged for "employment misconduct," which is defined as "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, subds. 4, 6(a) (2012). "As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). The fact that no actual harm occurred as a result of the violation is irrelevant, since the mere

chance of an accident itself has an adverse impact on the employer. *Peterson*, 753 N.W.2d at 776.

At the hearing, Shannon and Kimmes both testified that the LOTO policy was a reasonable and important safety measure. Kimmes stated that the purpose of the policy was to ensure employee safety and that, without the policy, employees could be seriously injured by the equipment, and that in fact one employee was crushed to death when he did not follow LOTO protocol. Shannon corroborated Kimmes's view, stating that she was also aware of an employee who was killed by a machine, and that "[t]he machines are very strong," and that AMF "take[es] the safety of our employees very seriously." Shannon also emphasized that, "regardless of length of service with any employee . . . it takes one time to get killed from one of these machines. . . ." Given these overriding employee safety concerns, we conclude that AMF's LOTO policy was reasonable.

"Serious violation" is not defined by statute. Whether an employee's act amounts to a serious violation depends upon the circumstances of each case. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 316 (Minn. 2011). "An employer has the right to expect its employees not to engage in conduct that seriously endangers people's safety." *Shell v. Host Int'l (Corp.)*, 513 N.W.2d 15, 18 (Minn. App. 1994); *see also Peterson*, 753 N.W.2d at 774-75 (concluding that violation of an airline's no-alcohol policy while pilots are on flight reserve is employment misconduct because employers have a right to reasonably expect that employees will refrain from endangering others). Because relator violated a

policy designed to ensure the safety of all employees, we conclude that he committed a serious violation of his employer's policy.

Affirmed.