STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0238
A13-0258

Jarrett Jusczak,
Relator (A13-0238),

Jadrien Jusczak,
Relator (A13-0258),

vs.

Lampert Yards, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed September 30, 2013
Affirmed
Smith, Judge

Department of Employment and Economic Development
File No. 30168013-3

Jarrett M. Jusczak, Moose Lake, Minnesota (pro se relator)

Jadrien C. Jusczak, Moose Lake, Minnesota (pro se relator)

Lampert Yards, Inc., St. Paul, Minnesota (respondent employer)

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

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Smith, Judge.

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

SMITH, Judge

We affirm the decision of the unemployment law judge (ULJ) that relator-brothers committed employment misconduct by failing to return to work after a confrontation with their supervisor because the ULJ's findings are substantially supported by the record.

FACTS

Relators, brothers Jarrett Jusczak and Jadrien Jusczak, worked at the Lampert Yards lumber yard in Moose Lake. On August 29, 2012, at the beginning of their lunch break, Jadrien Jusczak had a confrontation with their supervisor, yard manager Arnold Johnson, who is also the brothers' uncle. Tempers flared and the two men exchanged obscenities. Jarrett Jusczak joined the argument, taking his brother's side. Jarrett Jusczak and Johnson had a minor physical altercation. Johnson told the brothers to take their lunch break, and said words to the effect that if they did not come back after lunch they would no longer have jobs. The two men left, and did not return to work that day. When they arrived at work the next morning, Johnson terminated their employment.

The Minnesota Department of Employment and Economic Development (DEED) determined that both men were ineligible for unemployment benefits because they had been discharged for employment misconduct. The brothers appealed those determinations. The ULJ conducted a consolidated evidentiary hearing. Before the hearing, the brothers had identified a long list of witnesses, which the ULJ asked them to reduce to two or three in order to avoid repetitious testimony. The brothers selected four

witnesses from their list and the ULJ called all four, but only one was available to testify. The testimony of the one available witness did not support the brothers' arguments.

The ULJ decided that the brothers' employment had been terminated due to employment misconduct, and that they are ineligible for benefits. The brothers requested reconsideration, and the ULJ affirmed his decision. These certiorari appeals followed, and we consolidated them.

D E C I S I O N

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 the employee committed a particular act is a question of fact." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). "But whether the act committed by the employee constitutes employment misconduct is a question of law, which [this court] review[s] de novo." *Id*. "This court views the ULJ's factual findings in the light most favorable to the decision [and] gives deference to the credibility determinations made by the ULJ. As a result, this court will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citations omitted), *review denied* (Minn. Oct. 1, 2008). But because a ULJ's legal conclusions are subject to de novo review, a ULJ's overall determination that an applicant is ineligible for unemployment benefits is also subject to de novo review. *See Stassen v. Lone Mountain Truck Leasing LLC*, 814 N.W.2d 25, 30 (Minn. App. 2012) (stating, in a case presenting a mixed question of fact

and law, that "[w]e review de novo a ULJ's determination that an applicant is ineligible for unemployment benefits").

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). "Employment misconduct means any intentional, negligent, or indifferent conduct . . . 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). The statute specifies certain types of conduct that do not constitute employment misconduct, including "conduct an average reasonable employee would have engaged in under the circumstances." *Id.*, subd. 6(b)(4) (2012).

"As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall*, 644 N.W.2d at 804. "An employer has the right to establish and enforce reasonable rules governing absences from work." *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). "Even a single incident can be misconduct if it represents a sufficient enough disregard for the employer's expectations." *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986) (quotation omitted). And "except in certain limited circumstances, an employee engages in misconduct if he is absent even once without notifying his employer." *Id.*

The ULJ found that Johnson's directive that the brothers return to work after their lunch break was reasonable and that the brothers' eligibility turns on whether they had a

good reason for not complying with that directive. The definition of employment misconduct *excludes* "conduct an average reasonable employee would have engaged in under the circumstances." Minn. Stat. § 268.095, subd. 6(b)(4). Having a good reason for not returning would bring the brothers' afternoon absence within that exclusion.

The brothers claim that they did not return to work until the next morning because they felt threatened after the confrontation with Johnson. The ULJ found that this claim was not credible. This court defers to the credibility determinations of the ULJ. *Peterson*, 753 N.W.2d at 774. Other parts of their testimony undermine this claim. Both men testified that their relationship with Johnson was turbulent and that, although they knew about Lampert Yards' grievance policy, they never complained to superiors about Johnson's conduct. The ULJ's finding that the brothers' failure to return to work was not attributable to fear of Johnson is supported by substantial evidence.

The brothers also argue that the evidentiary hearing was unfair because most of their witnesses did not testify, and because additional witnesses should have been subpoenaed. With their request for reconsideration, they submitted additional evidence in the form of a letter from one of Johnson's former employees.

When an applicant requests reconsideration, the ULJ has the option of ordering an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(a)(2) (2012). But the ULJ "must not, except for the purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the [original] evidentiary hearing." *Id*. subd. 2(c) (2012). The ULJ "must order an additional

evidentiary hearing if an involved party shows that [the additional evidence] (1) would likely change the outcome of the decision and there was good cause for not having previously submitted the 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." *Id*. "This court will defer to the ULJ's decision not to hold an additional hearing." *Ywswf v. Teleplan Wireless Servs.*, 726 N.W.2d 525, 533 (Minn. App. 2007) (referring to a request for an additional evidentiary hearing based on a claim of new evidence).

The ULJ rejected the brothers' procedural claims, declined to order an additional hearing, and affirmed his initial decision. He found that, of the four witnesses the brothers identified at the outset of the hearing, only one was available when called. This finding is substantially supported by the record of the evidentiary hearing. The ULJ also found that the brothers were informed of their right to subpoena witnesses at the outset of the hearing and that they declined to do so. This finding is also substantially supported. As for the additional evidence the brothers submitted, the ULJ found that, although the letter mentioned incidents where Johnson lost his temper, it provided few specifics. He also found that it was based on interactions between Johnson and the letter writer that had occurred approximately five years earlier, suggesting that those interactions were too remote in time to be relevant. The ULJ concluded that the brothers failed to show good cause for not submitting their additional evidence at the initial hearing, did not show that evidence submitted at the hearing was likely false and that any false evidence affected the

outcome, and did not submit any new information that warranted an additional evidentiary hearing. Because all of these findings are substantially supported by the record, the brothers' procedural claims fail.

Affirmed.