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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0420**

Patti A. Peroni,
Relator,

vs.

Minnesota Department of Natural Resources,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed October 9, 2017
Affirmed
Larkin, Judge**

Department of Employment and Economic Development
File No. 34922330-3

Patti A. Peroni, Laporte, Minnesota (pro se relator)

Sherry A. Enzler, Minnesota Department of Natural Resources, St. Paul, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Pro se relator challenges an unemployment-law judge's (ULJ) determination that she is ineligible for unemployment benefits because her employment was terminated for employment misconduct. We affirm.

FACTS

Relator Patti A. Peroni worked as a seasonal employee for respondent Minnesota Department of Natural Resources (DNR) from September 25, 2007 to June 29, 2016. She usually began working two weeks before Memorial Day. Prior to May 2016, the DNR warned Peroni about some of her behaviors, including losing patience with coworkers, getting frustrated easily, and coming to work intoxicated.

Several of Peroni's coworkers reported smelling an odor of alcohol on her from May 9 through May 12, 2016. A DNR investigator gathered information regarding these allegations. The DNR investigator interviewed five witnesses and obtained written statements from eight witnesses who reported that they smelled alcohol on Peroni between May 9 and May 24, 2016. On May 24, Peroni's supervisor told her that she smelled like alcohol. Peroni requested a breath test, but the DNR was unable to administer one due to an agreement with Peroni's union.¹ The DNR placed Peroni on administrative leave, and Peroni left the worksite. After Peroni left, her friend took her to a clinic, where Peroni

¹ The record indicates that the terms of the DNR's agreement with Peroni's union, "restrict[] alcohol testing to people who hold a commercial driver's license as condition of their employment" and that the DNR therefore could not provide Peroni a breath test.

asked if someone could give her a breath test. Clinic staff told Peroni that a breath test required a doctor's order and that a doctor was not available to order the test.

On June 1, the DNR investigator interviewed Peroni regarding the allegations and concluded that Peroni had been intoxicated at work on the days in question. On June 29, the DNR discharged Peroni based on the results of its investigation.

Peroni applied for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development (DEED) denied her request on the ground that she was discharged for employment misconduct. Peroni appealed DEED's ineligibility determination, and an ULJ conducted an evidentiary hearing. Peroni, as well as a friend and former employer of Peroni and one of Peroni's current coworkers, testified on her behalf. Four DNR employees, including the assigned investigator, testified for the DNR. The ULJ found that Peroni was not discharged due to employment misconduct because "[t]he preponderance of the evidence show[ed] that Peroni was not intoxicated at work." The ULJ determined that Peroni was eligible for unemployment benefits.

The DNR requested reconsideration, arguing that the ULJ's findings of fact and reasoning were inconsistent with the record evidence and that the ULJ erred by not allowing the DNR to cross-examine Peroni or her witnesses during the hearing. The ULJ reversed her decision, reasoning that "the preponderance of the evidence shows that Peroni was intoxicated while at work," that Peroni's conduct was a serious violation of "DNR's reasonable expectations and displayed clearly a substantial lack of concern for the employment," and that Peroni's conduct thus constituted employment misconduct disqualifying her from receiving unemployment benefits. The ULJ expressly found that

the testimony of the DNR's witnesses was more credible than Peroni's. Peroni appeals by writ of certiorari.

DECISION

An employee who is discharged from employment because of employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016). “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.” Minn. Stat. § 268.095, subd. 6(a) (2016).

“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). This court has held that reporting to work intoxicated in violation of an employer's policy, or following a warning that intoxication at work would not be tolerated, constitutes employment misconduct. *See, e.g., Umlauf v. Gresen Mfg.*, 393 N.W.2d 198, 200 (Minn. App. 1986) (work rules and union contract's chemical dependency policy); *King v. Little Italy*, 341 N.W.2d 896, 898 (Minn. App. 1984) (repeated warnings regarding alcohol use). However, the following is not employment misconduct: “[C]onduct that was a consequence of the [employee's] chemical dependency, unless the [employee] was previously diagnosed chemically dependent or had treatment for chemical dependency, and since that diagnosis or treatment has failed to make consistent efforts to control the chemical dependency[.]” Minn. Stat. § 268.095, subd. 6(b)(9) (2016).

“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). This court views the ULJ’s factual findings in the light most favorable to the decision and will not disturb those findings “as long as there is evidence in the record that reasonably tends to sustain them.” *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016) (quotation omitted). Whether a particular act constitutes employment misconduct is a question of law, which this court reviews de novo. *Id.*

Peroni’s appellate argument is unclear. She appears to argue that she is not chemically dependent and that she could not have committed employment misconduct based on alcohol use because she did not test positive for alcohol on the days in question. We construe Peroni’s argument as a challenge to the ULJ’s determination that she was discharged for employment misconduct. In doing so, we note that Peroni attached a number of documents to her appellate brief that were not before the ULJ at the evidentiary hearing. The record on appeal is limited to the record available to the ULJ when the ULJ made her decision. *See* Minn. R. Civ. App. P. 110.01 (“The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.”); Minn. R. Civ. App. P. 115.04, subd. 1 (providing that Minn. R. Civ. App. P. 110.01 applies to certiorari appeals). “An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.” *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). Because the documents attached to Peroni’s brief are not part of the record on appeal, we do not consider them.

The DNR investigator testified that in 2010, Peroni was discharged from DNR employment for “smelling of alcohol at work and . . . for waving a knife around while yelling at a coworker.” The investigator testified that Peroni was conditionally reinstated pursuant to a settlement agreement and that one of the conditions of the agreement was that Peroni not engage in any additional alcohol-related misconduct. In addition, the DNR regional manager for the Bemidji region testified that the state has a policy that “no employee shall report to work under the influence of alcohol.”

The DNR investigator either personally interviewed or received witness statements from eight different DNR employees who believed they had smelled alcohol on Peroni while she was at work. These witnesses collectively reported smelling alcohol on Peroni on May 9, 10, 11, 12, 13, and 24. One DNR employee observed that Peroni was “sweaty” and “shaking” on one of the days in question. The employee further reported that Peroni mentioned she had vomited and observed Peroni was unable to complete her tasks at the worksite. Another DNR employee reported that on one occasion, Peroni suddenly ran from the worksite and that her teeth were chattering when she returned.

In her testimony, Peroni suggested that the odor her coworkers reported resulted from a leak in her colostomy pouch. However, Peroni also testified that the colostomy pouch did not smell like alcohol, that it had only leaked at work on May 9 and 17, and that she did not know why DNR employees reported smelling alcohol on her on the other days in question.

The ULJ found Peroni’s testimony to be less credible than the testimony of the DNR’s witnesses because the DNR’s version of events was “detailed, specific, and

corroborated by multiple witnesses,” whereas Peroni’s testimony was “somewhat vague and a less likely chain of events.” “Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.” *Skarhus*, 721 N.W.2d at 345. Based on the DNR’s evidence, the ULJ found that Peroni was intoxicated at work on May 9-12. This finding is substantially supported by the testimony of DNR employees, particularly the DNR investigator, as well as the investigator’s reports.

Moreover, the DNR had previously warned Peroni not to engage in any additional alcohol-related misconduct following her conditional reinstatement in 2010. Peroni’s 2010 settlement agreement with the DNR specifically stated that if she “engage[d] in alcohol or drug related misconduct *or* ha[d] a positive test result while on or off duty, she [would] be subject to immediate discharge.” (Emphasis added.) The settlement agreement did not require a positive test result for the DNR to conclude that Peroni engaged in alcohol-related misconduct. By coming to work intoxicated on multiple days after being warned not to engage in such conduct, Peroni demonstrated a substantial lack of concern for her employment. The ULJ’s finding that Peroni was intoxicated at work on May 9-12 supports her conclusion that Peroni was discharged for employment misconduct, unless the chemical-dependency exception applies.

Once again, “conduct that [is] a consequence of the [employee’s] chemical dependency” is not employment misconduct unless certain exceptions apply. Minn. Stat. § 268.095, subd. 6(b)(9). Peroni testified that she was required to have a chemical-dependency assessment as part of the 2010 settlement agreement. Peroni also testified that she had the assessment and that she was not diagnosed as chemically dependent. She

further testified that she has never been diagnosed as chemically dependent. In fact, Peroni testified that she does not think she has ever had a drinking problem and makes no claim that she is chemically dependent, stating in her brief, “I am not chemically dependent.” The ULJ expressly found that there is a preponderance of evidence that “Peroni is not chemically dependent; therefore, Peroni’s conduct that led to her discharge was not a consequence of her chemical dependency.”² Because the record does not establish that Peroni is chemically dependent, the exception for conduct that is a consequence of chemical dependency is inapplicable. *See id.*

In conclusion, the ULJ did not err by concluding that Peroni was discharged for employment misconduct and that she is therefore ineligible for unemployment benefits.

Affirmed.

² Although the ULJ stated that “[w]hen Peroni was evaluated for chemical dependency, she was diagnosed as chemically dependent,” this appears to have been a typographical error given that there is no evidence in the record that Peroni was diagnosed as chemically dependent and that the ULJ ultimately concluded that Peroni was not chemically dependent.