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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-1154**

Isaac Erickson,  
Relator,

vs.

OTG Management, LLC,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed June 18, 2018  
Affirmed  
Bratvold, Judge**

Department of Employment and Economic Development  
File No. 35300367-3

Isaac R. Erickson, St. Paul, Minnesota (pro se relator)

OTG Management LLC, North Wales, Pennsylvania (respondent employer)

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

Considered and decided by Florey, Presiding Judge; Larkin, Judge; and Bratvold,  
Judge.

## **UNPUBLISHED OPINION**

**BRATVOLD**, Judge

Relator Isaac Erickson challenges an unemployment-law judge's (ULJ) determination that Erickson is ineligible for unemployment benefits because he was discharged for employment misconduct after he failed to follow company policy and used profanity in front of customers. Because the record supports the ULJ's decision that Erickson was discharged for employment misconduct, we affirm.

### **FACTS**

Erickson worked as a bartender for respondent OTG Management LLC, at a restaurant located in the airport, from May 28, 2015, until his discharge on December 30, 2016. OTG's "Steps of Service" manual requires servers to ask customers to place their orders on iPads and an OTG manager explained that company policy requires "any drink or any food items ordered [be] paid for in advance before the customer receives the drink or any food."

On December 29, 2016, Erickson served a customer, C.M. Erickson initially demonstrated how to order and pay using the restaurant iPad. C.M. was at the bar for "over four hours" and ordered three drinks on the iPad. E.H., an OTG server, testified that, at around 5:15 p.m., she saw C.M. attempt to "reach over the bar" to the "beer tap lines." E.H. believed that C.M. was intoxicated so she asked an airport police officer to "hang out for a moment to help" with the situation. E.H. asked C.M. to leave the bar. C.M. told her that "he still had to pay for his last drink," and E.H. replied that she "would gladly take care of

it.” Erickson had already served C.M. his last drink, even though C.M. had not paid for the drink via the restaurant iPad. Erickson testified that he “was expecting payment” on it.

Also on December 29, Erickson worked with another OTG bartender, B.C. Erickson testified that B.C. was a “very tough guy to get along with,” and that Erickson had concerns about how B.C. treated some customers, particularly people of color. During their shift, Erickson asked B.C. to switch job responsibilities because he felt that B.C. was “pretty ineffective as far as customer service.” B.C. refused, called Erickson a “douche,” and walked away to speak with the manager, C.L. Erickson followed B.C. because he was concerned that B.C. would make negative comments about him. Erickson and B.C. had a heated conversation with the manager. B.C. walked away from Erickson and the manager; according to another OTG server, J.M., Erickson loudly said “f-ck you” to B.C. as B.C. walked away. The ULJ found that “many customers” overheard Erickson’s comment.

On December 30, Erickson spoke to OTG manager, C.R., who discussed the exchange with B.C., as well as the report that Erickson had served an unpaid drink. Erickson denied that he served a drink without requiring the guest to pay for it. OTG discharged Erickson that day. The termination notice states that Erickson was involved in a “verbal argument with a coworker,” that Erickson “over served” a guest, and that Erickson failed to follow OTG’s “prepay system.”<sup>1</sup>

Erickson applied for unemployment benefits with respondent Department of Employment and Economic Development (DEED), and on January 25, 2017, DEED issued

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<sup>1</sup> DEED’s brief to this court states that OTG does not contend that it discharged Erickson because he overserved C.M. OTG did not file a brief in this court.

a determination that Erickson was eligible for unemployment benefits. OTG appealed the eligibility determination.

The ULJ conducted an evidentiary hearing on February 24, 2017. Server E.H., manager C.R., and server J.M., among others, testified for the employer. Erickson, customer C.M., and a former OTG cook D.V. testified for Erickson. C.L., the OTG manager on duty on December 29, did not testify.

At the hearing, Erickson testified that he never said “f-ck you” to B.C., and in fact, that it was B.C. who used that phrase, to which Erickson responded “right back at you, buddy.” Erickson also testified that he was trained on OTG’s Steps of Service but was told that bartenders “were allowed to have drinks sent out before . . . the iPad systems were done as long as it was properly paid for and swiped.” Erickson questioned D.V. about B.C.’s reputation and actions on December 29, but the ULJ did not allow D.V. to respond. Customer C.M. testified that he had been reaching for a napkin, not the beer tap line, when E.H. asked him to leave the bar. C.M. also testified that he planned on paying for the final drink that Erickson served him. Erickson questioned C.M. about his level of intoxication, but the ULJ did not allow C.M. to respond.

On March 23, 2017, the ULJ issued his decision, finding that Erickson had been discharged for employment misconduct and was ineligible to receive unemployment benefits. The ULJ found that Erickson failed to follow OTG’s policy because he did not require payment on the restaurant iPad before he served a customer. The ULJ rejected Erickson’s explanation that C.M. offered to pay after service because “Erickson had taught

this customer how to use the iPad system.” The ULJ also found that Erickson argued with a coworker and yelled “f-ck you” in front of customers.

On March 27, Erickson requested reconsideration. In his letter, Erickson first claimed that he did not have an opportunity to review OTG’s exhibits before the hearing began. Next, Erickson contended that the ULJ did not conduct the proceedings fairly because Erickson was not allowed to fully question the witnesses, who, he asserted, would have “supported [his] depiction of the events of December 29” and “further drawn into question the credibility” of OTG. Erickson also stated that the ULJ “interrupted” him several times and the judge’s “tone with [him] was often harsh and impatient.” Finally, Erickson argued that the ULJ failed to “factor into the credibility determination . . . [OTG’s] decision to not call” C.L., the manager on duty on December 29.

On June 20, 2017, the ULJ issued a revised order, modifying his reasons for the decision, but affirming the denial of benefits due to employment misconduct. This certiorari appeal follows.

## **D E C I S I O N**

We understand Erickson’s pro se brief as making two arguments: (1) the ULJ erred in his determination that OTG terminated Erickson for employment misconduct, and (2) the ULJ did not provide Erickson with a fair hearing.

### **I. Substantial evidence supports the ULJ’s determination that OTG discharged Erickson for employment misconduct.**

An employee generally is ineligible for unemployment benefits if he “was discharged because of employment misconduct.” Minn. Stat. § 268.095, subd. 4(1) (2016).

Employment misconduct is defined, in part, 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.” *Id.*, subd. 6(a) (2016). We have held that “[a]n employee’s refusal to abide by the employer’s reasonable policies ordinarily constitutes employment misconduct.” *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011).

This court may reverse or modify a ULJ’s decision “if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are . . . unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(5) (Supp. 2017). “Whether an employee engaged in employment misconduct presents a mixed question of fact and law.” *Cunningham*, 809 N.W.2d at 235. Whether an employee committed a particular act is a question of fact. *Id.* Appellate courts review the ULJ’s findings of fact in the light most favorable to the decision and will not disturb the findings if “there is evidence in the record that reasonably tends to sustain them.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether the factual findings establish employee misconduct is a question of law, which is reviewed de novo. *Cunningham*, 809 N.W.2d at 235.

Here, the record evidence supports the ULJ’s finding that two incidents led to Erickson’s discharge for employment misconduct. First, the ULJ found that Erickson failed to follow OTG’s policy. Erickson admitted that he served a customer before that customer paid. This is a violation of OTG’s policy, and thus constituted employment misconduct.

*See Cunningham*, 809 N.W.2d at 235 (providing that failure to “abide by the employer’s reasonable policies ordinarily constitutes employment misconduct”). The ULJ’s determination that Erickson was terminated for employment misconduct is supported by this incident alone. *See Nieszner v. Minn. Dep’t of Jobs & Training*, 499 N.W.2d 832, 838 (Minn. App. 1993) (“A single incident may constitute misconduct if the employee sufficiently disregards his or her employer’s expectations.”). We nonetheless consider the ULJ’s alternative basis for finding misconduct.

Second, the ULJ found that Erickson engaged in a “heated” argument with a coworker and “used profanity in front of customers.” At the hearing, Erickson testified that he never said “f-ck you” to B.C., and in fact, it was B.C. who used that phrase. But server J.M. testified that Erickson used profanity in front of customers, and the ULJ found her testimony to be “more likely than Erickson’s self-serving testimony to the contrary.” The ULJ noted that no evidence indicated that J.M. would “fabricate her consistent and detailed testimony” because she “was a neutral, third party.” This court defers to the ULJ’s credibility determinations; thus, the ULJ did not clearly err by finding that Erickson argued and used profanity in front of customers. *See Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006) (“Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.”).

Erickson objects that other bartenders also served drinks without requiring prepayment and that the ULJ failed to consider B.C.’s inappropriate actions that lead to the confrontation and profanity. As pointed out by DEED, this court has held that “[v]iolation of an employer’s rules by other employees is not a valid defense to a claim of misconduct.”

*Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986). Next, Erickson alleges that he had a ribcage injury that the ULJ did not take into account. However, there is no evidence linking any injury to Erickson’s violation of company policy or his use of profanity in front of customers.

## **II. Erickson received a fair evidentiary hearing.**

### **A. Erickson had an opportunity to prepare for the evidentiary hearing.**

DEED has authority to adopt procedural and evidentiary rules governing unemployment hearings. *See* Minn. Stat. § 268.105, subd. 1(b). DEED has adopted rules providing that parties must submit documents that they wish to offer as exhibits “no later than five calendar days before the scheduled date of hearing”; DEED then mails the exhibits to the parties in advance of the hearing. Minn. R. 3310.2912 (2017). The ULJ “must rule upon evidentiary objections on the record.” Minn. R. 3310.2921 (2017). Importantly, the ULJ exercises control over the hearing to protect the parties’ rights to a fair hearing and ensure that relevant facts are clearly and fully developed, and may receive any evidence that possesses probative value, including hearsay. *Id.* Erickson claims that he was denied an adequate opportunity to prepare for the evidentiary hearing in three distinct ways, which we will discuss in turn.

First, Erickson challenges the late production of Exhibit 5, which contains OTG’s Steps of Service and training materials. He argues that the ULJ relied on Exhibit 5 in his final decision. Erickson claims that he did not have access to Exhibit 5 before the hearing. Indeed, the record shows that OTG submitted Exhibit 5 to DEED on February 20, 2017, only four days before the hearing.

In response to Erickson's objection to Exhibit 5, the ULJ stated that he would "try as best we can here to move ahead without" receiving the exhibit into the record. To be clear, Exhibit 5 is part of the administrative record, but was not received as evidence during the hearing. The ULJ explained that he would allow testimony about OTG's relevant policies, some of which were in Exhibit 5. OTG offered testimony about company policy, with manager C.R., testifying that "any drink or any food items ordered are paid for in advance [on the iPad] before the customer receives the drink or any food." In the modified order, the ULJ found that Erickson had committed employment misconduct based on the testimony presented at the hearing and did not rely on Exhibit 5.

We conclude that the ULJ properly exercised his discretion by refusing to receive Exhibit 5 into evidence, and allowing the witnesses to testify about OTG's relevant policies. We note that the ULJ had authority to continue the hearing to permit Erickson "additional time to obtain necessary evidence" or "to obtain documents." Minn. R. 3310.2908, subps. 1-2 (2017). And the ULJ considered granting Erickson a continuance, but decided not to because the parties had knowledgeable witnesses who could testify about OTG's relevant policies. In particular, the ULJ determined that a continuance was unnecessary because Erickson admitted that he had been trained on OTG's policies. Our review of the record does not support Erickson's contention that the ULJ relied on Exhibit 5, rather than witness testimony, in making his determination.

Moreover, Erickson was not prejudiced by the ULJ's evidentiary ruling. After OTG's witnesses described company policy, Erickson had the opportunity to cross-examine and present his own testimony or other evidence. This court does not reverse for

evidentiary errors that do not prejudice the relator. *Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 530 (Minn. App. 2007).

Second, Erickson contends that the ULJ received “testimony regarding a May 2, 2016 warning [he received at work,] and that he was not allowed to view the warning document before the hearing.” DEED responds that the ULJ excluded an exhibit about the May 2 warning because Erickson had not received it, and that the ULJ explicitly stated that he did not rely on the exhibit or the warning in his decision. We conclude that the ULJ acted within his discretion. In his testimony, Erickson admitted that he received the May 2 warning. Even so, Erickson was not prejudiced because the ULJ stated that he did not consider the warning in his decision.

Third, Erickson argues that he was disadvantaged because server J.M. “was not a listed witness until the trial started.” Erickson did not raise this issue with the ULJ at the hearing or in his request for reconsideration. Our review is limited to the issues actually considered by the ULJ. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate review is limited to issues raised and addressed below). Even so, we discern no error. Upon demand, a party has five calendar days to “disclose . . . the names of all witnesses the party intends to have testify at the hearing.” Minn. R. 3310.2914, subp. 2 (2017). The record does not include Erickson’s demand for OTG’s witnesses. In the absence of Erickson’s demand, advance disclosures by OTG were not required.

**B. Erickson received a fair evidentiary hearing.**

Erickson argues that the ULJ was biased against him and that the hearing was unfair. The ULJ is to conduct the evidentiary hearing as an “evidence-gathering inquiry” rather

than an adversarial proceeding, and “must ensure that all relevant facts are clearly and fully developed.” Minn. R. 3310.2921. The ULJ “must exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing.” *Id.* A hearing is generally considered fair if both parties are afforded the opportunity to give statements, cross-examine witnesses, and offer and object to exhibits. *Ywswf*, 726 N.W.2d at 529-30.

The ULJ “must assist all parties,” including pro se parties, “in the presentation of evidence.” Minn. R. 3310.2921. However, the ULJ is neutral and not either party’s advocate, even when the ULJ is assisting parties in the presentation of their evidence. *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 32 (Minn. App. 2012).

Erickson first argues that the ULJ interrupted him and prevented him from examining witnesses. Erickson specifically asserts that the ULJ was “abrupt with [him], cutting [him] off when [he] tried to question any of the witnesses to cross examine their statements, and refusing to allow [him] to offer testimony through questioning the witnesses which would have further called into question the credibility of [OTG’s] witnesses.” Erickson also argues that the ULJ was “unfair to him,” the ULJ’s “tone of voice was harsh” throughout the hearing, and that his “constitutional rights have been violated in not receiving a fair trial.”

Erickson is correct that the record reflects several instances when the ULJ did not allow Erickson to pursue his line of questioning. For example, the ULJ sustained OTG’s objection so that Erickson ceased further questions about customer C.M.’s level of intoxication, B.C.’s reputation at OTG, and whether server E.H. treated C.M. unfairly when he offered to pay for the last drink. The ULJ also interrupted Erickson when he asked server

J.M. questions that the ULJ determined had been previously asked and answered. The ULJ stated in his modified decision that he allowed Erickson to ask questions about the relevant issues in the case, and did not allow testimony not related to whether Erickson's conduct amounted to employment misconduct.

After reviewing the record, we conclude that the ULJ interrupted Erickson only for procedurally valid reasons, such as to discontinue repetitive questions or queries not relevant to the alleged employment misconduct. Erickson may have felt that the ULJ unfairly cut him off, and may have been understandably frustrated that he did not know which topics were relevant. When viewed in context, however, the ULJ was appropriately attempting to keep the record focused on events related to Erickson's discharge.

Erickson also contends that the ULJ should have subpoenaed C.L., the manager on duty on December 29. The ULJ has the authority to "issue subpoenas to compel the attendance of witnesses, the production of documents or other exhibits, upon a showing of necessity by the requesting party." Minn. R. 3310.2914, subp. 1. The record does not reflect that Erickson requested that the manager be subpoenaed, even though the ULJ stated at the beginning of the hearing that the parties may "request subpoenas." The ULJ advised, "[i]f a subpoena is issued, the hearing will be continued and rescheduled to another day so the subpoenaed testimony or evidence may be admitted into the record."

We conclude that the ULJ was not required to subpoena C.L. on the ULJ's own motion. The ULJ explained that, while C.L.'s testimony "would have been helpful," there was sufficient testimony presented by other witnesses for the ULJ to make the necessary factual determinations. Erickson makes no showing that C.L.'s testimony likely would

have affected the ULJ's misconduct determination. In the absence of prejudice, we cannot conclude that the ULJ erred by failing to subpoena C.L.

Having carefully considered each of Erickson's challenges to how the evidentiary hearing was conducted, we conclude that he had an adequate opportunity to prepare for the hearing and that the ULJ fairly conducted the proceedings.

**Affirmed.**