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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0304**

Dan Casey,
Relator,

vs.

Minnesota Department of Corrections,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed November 18, 2019
Affirmed
Cleary, Chief Judge**

Department of Employment and Economic Development
File No. 36763311-3

Dan Casey, Hammond, Wisconsin (pro se relator)

Minnesota Department of Corrections, St. Paul, Minnesota (respondent employer)

Anne B. Froelich, Department of Employment and Economic Development, St. Paul,
Minnesota (for respondent department of employment and economic development)

Considered and decided by Florey, Presiding Judge; Cleary, Chief Judge; and
Peterson, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

CLEARY, Chief Judge

In this certiorari appeal from an unemployment-law judge's (ULJ) decision, relator argues that he is entitled to unemployment benefits and that the ULJ should have granted him another evidentiary hearing. We affirm.

FACTS

Relator Dan Casey worked as a corrections officer for respondent Minnesota Department of Corrections (DOC) from 2011 to September 2018. In July 2018, Casey and other corrections officers were transporting an inmate. The inmate was uncooperative, resistant, and threatening to hurt officers. The officers placed the inmate in a restraint chair with handcuffs, a waist chain, and a spit mask. During the transfer, using his elbow, Casey struck the inmate near his nose and mouth.

The DOC trains officers on its use-of-force policy, which authorizes officers to use force in some circumstances, such as when an inmate is resistant. Striking an inmate in the face is not a permissible technique under this policy. As a result, the DOC discharged Casey for improper use of force.

Casey applied for and was determined eligible for unemployment benefits, and the DOC appealed. A ULJ conducted an evidentiary hearing, during which the parties presented conflicting evidence on whether Casey struck the inmate in the face or whether he instead used a technique permitted under DOC policy. The ULJ determined Casey to be ineligible for unemployment benefits because he was discharged for misconduct. Casey

submitted a request for reconsideration, which the ULJ denied. This certiorari appeal follows.

D E C I S I O N

I. Casey is ineligible for unemployment benefits.

An employee is ineligible for unemployment benefits if she or he was “discharged because of employment misconduct.” Minn. Stat. § 268.095, subd. 4(1) (2018). This court may reverse or modify the 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 hearing record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(5) (Supp. 2019). Whether an employee committed misconduct is a mixed question of law and fact. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether an employee committed a particular act is a fact question that we will review in the light most favorable to the ULJ’s decision and will affirm if substantial evidence supports the ULJ’s finding. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether the act constitutes misconduct is a question of law that we review de novo. *Stagg*, 796 N.W.2d at 315.

A. Substantial evidence supports the ULJ’s findings.

The ULJ found that Casey, using his elbow, intentionally struck the inmate near his nose and mouth, causing the inmate to bleed. But Casey contends that he attempted a brachial stun, a permissible technique under DOC policy.

Substantial evidence in the record supports the ULJ’s findings. The DOC presented two witnesses, David Reishus, the DOC’s associate warden of operations, and Sheryl

Maxwell, a DOC human-resources director. Both reviewed video footage of the incident. Reishus testified that Casey struck the inmate in the face with his elbow, hard enough to cause immediate, significant bleeding from the inmate's nose and mouth. Maxwell testified that the video of the incident shows that, after Casey struck the inmate, the spit mask filled with blood. Reishus also explained that he spoke to the officer in charge during the incident who confirmed that Casey intentionally struck the inmate near his nose and mouth.

Casey did not document his use of force in the incident report even though the DOC requires staff to do so. It was not until after the DOC began investigating the incident that Casey amended his report to include his use of force. Casey testified that he forgot to include the incident in his report because of the stress and anxiety of the situation.

Casey attacks the ULJ's credibility determinations and advances his version of the events. He maintains that he attempted a brachial stun to prevent the inmate from spitting on him and that he did not strike the inmate's face or mouth. But Reishus testified that the video shows that Casey struck the inmate's face. Reishus stated that Casey did not attempt a brachial stun because he delivered the strike to the middle of the inmate's face, while a brachial stun is meant to be delivered below the ear and above the shoulder on either side of the head. We defer to the ULJ's credibility determinations and do not reconcile conflicting evidence on appeal. *Skarhus*, 721 N.W.2d at 344.

When, as here, the credibility of the involved parties testifying had a "significant effect" on the ULJ's decision, the ULJ must "set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1a(a) (2018). Casey contended that the DOC discharged him because he wrote up a lieutenant for an unprofessional action a few months

before his discharge. The ULJ found that this was an illogical explanation for his termination. To the contrary, the ULJ credited Reishus and Maxwell's testimony because it provided a consistent, logical, and contemporaneous explanation for the chain of events that occurred. The ULJ also discredited Casey's testimony because it contained inconsistencies. For example, Casey alleged that the inmate spat in his face before he attempted the brachial stun. But later he testified that, as soon as the inmate attempted to spit on him, he was removed from the situation. He then testified that the inmate spat on him after he attempted the brachial stun. Moreover, the ULJ did not find it believable that Casey forgot to include the use of force in his incident report because the event was significant enough to require him to seek medical attention because the inmate spat blood on him.

The reasoning behind the ULJ's credibility determinations meets the statutory requirement of Minn. Stat. § 268.105, subd. 1a(a). *See Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532-33 (Minn. App. 2007) (considering reasonableness of testimony as compared to other evidence when making credibility determinations). We affirm the ULJ's finding that Casey intentionally struck the inmate near his nose and mouth.

B. Casey's conduct is employment misconduct.

Minnesota statutes define employment misconduct as any intentional, negligent, or indifferent conduct, on or off the job, that displays a serious violation of the standards of behavior the employer has set. Minn. Stat. § 268.095, subd. 6(a) (Supp. 2019).

An employer is entitled to establish reasonable policies and requests. *Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985). An employee's decision to

knowingly violate an employer's reasonable policies amounts to misconduct disqualifying the employee from receiving unemployment benefits. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002). A single incident of an employee deliberately choosing a course of action adverse to the employer can constitute misconduct. *Colburn v. Pine Portage Madden Bros.*, 346 N.W.2d 159, 161 (Minn. 1984).

Casey violated the DOC's use-of-force policy. The policy states that officers may only use an amount of force reasonable and necessary to control or resolve the situation, and they must only use techniques instructed by the DOC. The DOC does not tolerate excessive force.

Casey conceded in his testimony that intentionally striking an inmate in the face violates DOC policy. He does not contend that the DOC's policy is unreasonable. Rather, his argument is premised on his assertion that he attempted a brachial stun and did not strike the inmate in the face. But, for the reasons stated above, the record supports the ULJ's finding that Casey intentionally struck the inmate in the face.

Casey's conduct amounts to employment misconduct. Minnesota statutes provide that, if an inmate resists the lawful authority of a corrections officer or refuses to obey the corrections officer's reasonable demands, the officer may enforce obedience with the use of force. Minn. Stat. § 243.52 (2018). The officer is permitted to use "reasonable force." Minn. Stat. § 609.06, subd. 1 (2018). The DOC's implementation of a use-of-force policy in accordance with the statute is reasonable.

Casey testified that he was aware of the use-of-force policy. The DOC conducts use-of-force training annually. And Casey was on the "A Team," which is a group of

officers that responds to emergency incidents and is generally more experienced in handling disorderly inmates. The record is clear that Casey was aware that an intentional strike to an inmate's face violated the DOC's use-of-force policy. *See Schmidgall*, 644 N.W.2d at 806 (stating that employee's knowing violation of policy is misconduct).

Conduct is not employment misconduct if an average employee would have engaged in the same conduct under the circumstances. Minn. Stat. § 268.095, subd. 6(b)(4) (Supp. 2019). Casey argues that an average employee would have acted as he did under the same circumstances and that he had "no other options" than to attempt a brachial stun. But again, this argument relies on Casey's contention that he attempted a brachial stun, which is contrary to the ULJ's finding. Because Casey knowingly violated the DOC's reasonable use-of-force policy, we affirm the ULJ's determination that he is ineligible for unemployment benefits.

II. The ULJ did not abuse its discretion by declining to hold an additional hearing to allow Casey's witnesses to testify.

We defer to the ULJ's decision not to hold an additional evidentiary hearing and will reverse that decision only upon an abuse of discretion. *Skarhus*, 721 N.W.2d at 345. Casey contends that, given the opportunity, he would have secured witnesses to dispute the DOC's testimony. We construe this argument to be that the ULJ should have ordered an additional hearing to allow Casey's witnesses to testify after his motion for reconsideration.

On a request for reconsideration, a ULJ must order an additional evidentiary hearing if either party shows that evidence not submitted at the hearing (1) would likely change the outcome and the party had good cause for not having previously submitted the evidence,

or (2) would show that the evidence submitted at the hearing was likely false and the false evidence affected the outcome. Minn. Stat. § 268.105, subd. 2(c)(1)-(2) (2018). Good cause is a reason that prevented a reasonable person acting with due diligence from presenting the evidence. *Id.*

Casey submitted a request for reconsideration to the ULJ, arguing that he was not able to fully prepare for the hearing, and that, had he known the DOC's witnesses would be testifying, he would have secured witnesses to dispute their testimony. The ULJ denied his motion because, prior to the hearing, Casey was aware that Reishus and Maxwell would be participating. Moreover, the ULJ found that Casey did not show good cause for his failure to present witnesses. Casey has not made a showing that he met any of the statutory factors necessitating an additional hearing. He has not provided any specificity as to who would be testifying or what they would be testifying to. He merely states that his witnesses would corroborate his story. The ULJ did not abuse its discretion by declining to hold an additional evidentiary hearing.

Affirmed.