This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1090

Jean-Yves Viardin,
Relator,

vs.

Eclipse Select MN LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 25, 2022
Reversed and remanded
Smith, Tracy M., Judge

Department of Employment and Economic Development
File No. 4268326-3

Matthew E. Anderson, Anderson Law Group PLLC, St. Paul, Minnesota (for relator)

Eclipse Select MN, LLC, Vadnais Heights, Minnesota (respondent employer)

Keri Phillips, Anne B. Froelich, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and Kirk, Judge.[*]

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

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for employment misconduct and aggravated employment misconduct. Relator argues that (1) the ULJ's factual findings are clearly erroneous and (2) the ULJ abused their discretion by declining to order an additional hearing on reconsideration. Because the ULJ abused their discretion by declining to order an additional hearing, we reverse and remand.

FACTS

Mark Bigelbach is the owner of respondent Eclipse Select MN LLC (Eclipse), an amateur soccer club. At some point, Eclipse and MapleBrook Soccer Association (MapleBrook) entered into a "Cooperation and Services Agreement" (agreement). Bigelbach claimed that, pursuant to the agreement, Eclipse and MapleBrook merged to operate as one entity named Minnesota Eclipse MapleBrook (Eclipse/MapleBrook). Relator Jean-Yves Viardin, an employee of MapleBrook, was hired as the director of coaching of Eclipse/MapleBrook.

At issue is a rewards program offered through Adidas in which promotional dollars are awarded by Adidas to participating soccer clubs when players purchase Adidas products at Planet Soccer. The promotional dollars could then be spent on Adidas products.

Bigelbach believed that, under the agreement, Eclipse/MapleBrook owned the Adidas account. He also believed that Viardin was still employed with MapleBrook and began to suspect that Viardin was misallocating the Adidas promotional dollars. On

July 30, 2020, Bigelbach emailed Viardin and demanded the username and password for the Adidas account. Upon accessing the account, Bigelbach observed that in January 2020, Adidas paid Eclipse/MapleBrook approximately $35,000 in promotional dollars for uniform purchases at Planet Soccer for the 2019-2020 soccer season. Bigelbach believed that Viardin spent most of the promotional dollars on himself and on his semi-pro adult soccer teams. Viardin was subsequently discharged for using the Adidas promotional dollars for personal use.

Viardin established an unemployment benefits account with respondent Minnesota Department of Employment and Economic Development, and a department administrative clerk determined that Viardin was ineligible for unemployment benefits because he was discharged for aggravated employment misconduct. Viardin appealed that decision, and a de novo hearing was conducted. At the hearing, Viardin claimed that he did not misallocate the Adidas promotional dollars because, under the agreement, the promotional dollars "never belonged to Eclipse," they belonged to MapleBrook.

The ULJ found that "[a]t some point, Eclipse and MapleBrook . . . became one entity," and that "[w]hen Eclipse/MapleBrook purchases uniforms and gear from Adidas, Adidas awards promotional support dollars to Eclipse/MapleBrook." The ULJ also found that by spending "over $30,000 worth of Eclipse/MapleBrook promotional support dollars on products for himself and his businesses," Viardin "stole over $30,000 worth of Adidas promotional support dollars from Eclipse/MapleBrook." The ULJ concluded that because an "employer has a right to reasonably expect that an employee will not steal from the business," Viardin's conduct constituted employment misconduct and, therefore, Viardin was ineligible for unemployment benefits.

Viardin requested reconsideration of the ULJ's decision, seeking a new hearing at which additional evidence could be submitted. The ULJ denied an additional evidentiary hearing and affirmed the decision, concluding that the "evidence Viardin submitted with his request for reconsideration would not likely change the outcome of the decision and does not show that the evidence that was submitted at the hearing was likely false and that the likely false evidence had an effect on the outcome of the decision."

Viardin appeals, requesting that this court reverse the decision of the ULJ and rule that he is eligible for unemployment benefits. In the alternative, Viardin requests reversal and remand for an additional evidentiary hearing.

DECISION

I. The ULJ's determination of employment misconduct was not erroneous.

Viardin challenges the ULJ's decision that he was discharged for employment misconduct. "Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job, that is a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." Minn. Stat. § 268.095, subd. 6(a) (2020). An employee who is discharged for employment misconduct is ineligible for unemployment benefits. *Id.*, subd. 4(1) (2020).

Whether an employee committed employment misconduct is a mixed question of law and fact. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). On appeal, this court defers to the ULJ's credibility determinations and will uphold the ULJ's findings of fact if supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2020); *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gonzalez Diaz v. Three Rivers Cmty. Action, Inc.*, 917 N.W.2d 813, 816 n.4 (Minn. App. 2018) (emphasis omitted) (quotation omitted). We do not reweigh conflicting evidence; rather we look to the record only to determine whether the evidence reasonably supports the ULJ's factual finding. *See Wilson*, 888 N.W.2d at 460. But we review de novo whether the facts found by the ULJ constitute employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Viardin argues that the ULJ's decision is not supported by substantial evidence because "overwhelming evidence supported Viardin's testimony" that "MapleBrook owned the [Adidas] account and he did not steal from it." He also contends that "the merger of Eclipse and MapleBrook is legally impossible" because there is no evidence indicating that the merger satisfied the applicable Minnesota laws. The department acknowledges that "Eclipse and MapleBrook may not have undergone a legal 'merger.'" But the department contends that evidence submitted to the ULJ supports the finding that Eclipse and MapleBrook operated as one entity.

Based on the limited record before the ULJ, we agree with the department. Bigelbach testified that MapleBrook "was the club that merged into my business," and that, through this merger, the Adidas promotional dollars belonged to Eclipse/MapleBrook. This evidence supports the ULJ's findings that Eclipse and MapleBrook became one entity and operated jointly. Bigelbach's testimony also supports the finding that the Adidas promotional dollars belonged to Eclipse/MapleBrook. Although Viardin testified that the Adidas promotional dollars belonged to MapleBrook because there was no merger of Eclipse and MapleBrook and provided some evidence to support his position, the ULJ did not find this evidence to credible. Instead, the ULJ found that "Viardin's testimony is not credible because it was indirect and evasive." And, apart from his own testimony, Viardin provided no evidence specifically refuting Bigelbach's position. Therefore, because we defer to the ULJ's credibility findings, and the ULJ's findings are supported by the evidence presented at the hearing, we conclude that the ULJ did not clearly err in finding that Viardin stole the Adidas promotional dollars.

It is well settled that "[a] single incident of theft by an employee is employment misconduct." *Pierce v. DiMa Corp. (1992)*, 721 N.W.2d 627, 630 (Minn. App. 2006). The ULJ here found that "Viardin stole over $30,000 worth of Adidas promotional support dollars from Eclipse/MapleBrook." Because the ULJ found that Viardin stole from his employer, and that finding is supported by substantial evidence, the ULJ did not err in determining that Viardin was discharged for employment misconduct.

II. The ULJ should have granted an additional hearing on reconsideration.

Viardin also challenges the ULJ's decision not to order an additional hearing on reconsideration. "In deciding a request for reconsideration, the [ULJ] must not consider any evidence that was not submitted at the hearing, except for purposes of determining whether to order an additional hearing." Minn. Stat. § 268.105, subd. 2(c) (2020). A ULJ "must order an additional hearing if a party shows that evidence which was not submitted at the hearing" either, first, "would likely change the outcome of the decision" and the party had good cause for not submitting it earlier or, second, "would show that the [other] evidence that was submitted at the hearing was likely false" and that the false evidence affected the decision. *Id.* We will "not reverse a ULJ's decision to deny an additional evidentiary hearing unless the decision constitutes an abuse of discretion." *Kelly v. Ambassador Press, Inc.*, 792 N.W.2d 103, 104 (Minn. App. 2010).

In his request for reconsideration, Viardin submitted a copy of the agreement between Eclipse and MapleBrook. Viardin contends that because this evidence shows that the "evidence presented by Eclipse at the hearing was likely false," the ULJ abused their discretion by declining to order an additional hearing. We agree.

The agreement between Eclipse and MapleBrook states:

> This Agreement does not make either Party the agent, employee, or representative of the other for any purpose whatsoever. Nothing herein contained shall be construed to imply a joint venture, partnership, or principal-agent relationship between MapleBrook and Eclipse. Neither party is granted any express or implied right or authority by the other Party to assume or create any obligation or responsibility on behalf of or in the name of the other Party, or to bind the other Party in any manner whatsoever.

The agreement also states that it "may be terminated by any Party," and that "[n]othing herein contained shall be deemed to be a sale, transfer or assignment of the monetary or tangible assets of either party."

The agreement's language stating that the monetary assets of each entity are not transferred under the agreement appears to support Viardin's testimony that the Adidas promotional dollars were retained by MapleBrook. The plain language of the agreement also seems to contradict Bigelbach's testimony that Eclipse and MapleBrook merged and that Eclipse/MapleBrook owned the Adidas promotional dollars. And because the agreement appears to contradict Bigelbach's testimony, consideration of the agreement would likely affect the decision, particularly when considered in conjunction with the additional evidence submitted by Viardin at the evidentiary hearing, which includes the declaration of the Adidas representative, who stated that the Adidas promotional dollars belonged to MapleBrook and that Viardin did not misappropriate the Adidas account. Therefore, we conclude that the ULJ abused their discretion by declining to order an additional hearing after reconsideration.

Reversed and remanded.