This opinion is nonprecedential except as provided by Minn.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
A22-0472

Yaohua Sun,
Relator,

vs.

Pepperl & Fuchs, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 19, 2022
Affirmed
Johnson, Judge

Department of Employment and Economic Development
File No. 48203645-3

Yaohua Sun, Plymouth, Minnesota (*pro se* relator)

Cory D. Olson, Anthony Ostlund Louwagie Dressen & Boylan, P.A., Minneapolis, Minnesota (for respondent Pepperl & Fuchs, Inc.)

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

Considered and decided by Larson, Presiding Judge; Johnson, Judge; and Tracy M. Smith, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

In November 2021, Pepperl & Fuchs, Inc., required its Minnesota-based employees to be on site at the company's Minnesota facilities for a week-long series of meetings and, in addition, required them either to be vaccinated against the COVID-19 coronavirus or to test for the virus and wear a mask at the workplace. Yaohua Sun refused to comply with the policy, and his employment was terminated. An unemployment-law judge determined that Sun is ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Sun was employed by Pepperl & Fuchs as a software engineer from November 2019 to November 2021. At the end of his employment, he was earning a salary of $97,375 per year.

On November 6, 2021, Pepperl & Fuchs informed Sun and other Minnesota-based employees that, during the week of November 15-19, 2021, they would be required to attend a series of in-person meetings in Minnesota with management-level employees visiting from the company's German headquarters. The employer also informed Sun and other employees that the company would implement a new COVID-19 policy. Employees were required either to provide proof of a COVID-19 vaccination or to test for the virus before the meetings and wear a mask while at the company's workplace.

Sun was not vaccinated against COVID-19 and did not test for the virus before the meetings. He attended the meetings but did not always wear a mask while at the company's

workplace. On Wednesday, November 17, Sun's manager told him to go home early. In a video call later that day, Sun's manager told Sun that he could be discharged if he refused to comply with the company's COVID-19 policy. The following day, a Pepperl & Fuchs human-resources representative spoke with Sun on a video call. Sun did not agree to comply with the company's COVID-19 policy. Instead, he requested that he be allowed to work from home until the risk of COVID-19 abated. His request was denied. The human-resources representative informed Sun on the November 18 video call that he was terminated.

Sun applied to the department of employment and economic development for unemployment benefits. The department made an initial determination that Sun is ineligible for benefits because he was discharged for employment misconduct. Sun filed an administrative appeal. In January 2022, an unemployment-law judge (ULJ) conducted a telephonic hearing. Sun was the only participant in the hearing. The ULJ determined that Sun is ineligible for unemployment benefits because he was discharged for employment misconduct for refusing to comply with the company's COVID-19 policy. Sun appeals by way of a petition for writ of certiorari.

DECISION

Sun argues that the ULJ erred by determining that he is ineligible for unemployment benefits.

An applicant is ineligible for unemployment benefits if the applicant was discharged due to employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2022). "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." *Id.*, subd. 6(a). In general, refusing to follow an employer's reasonable policy qualifies as employment misconduct, and "[a] single incident can constitute misconduct when an employee deliberately chooses a course of conduct that is adverse to the employer." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804, 806 (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). Whether an employee's conduct disqualifies the employee is a mixed question of fact and law. *Schmidgall*, 644 N.W.2d at 804. "We view the ULJ's factual findings in the light most favorable to the decision" and "will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Skarhus*, 721 N.W.2d at 344.

Sun makes three arguments for reversal.

I. Hearsay Evidence

Sun first argues that the ULJ erred by relying on hearsay evidence. He contends that the error is prejudicial because there is no non-hearsay evidence of Pepperl & Fuchs's reason for terminating his employment.

The rules of evidence, which govern the introduction or exclusion of hearsay evidence in the district courts, do not apply to telephonic hearings in unemployment appeals. *See* Minn. R. Evid. 801-07. The rule that governs an unemployment hearing provides, "An unemployment law judge may receive any evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2021).

This rule allows ULJs "to consider all of the circumstances of an employee's departure in reaching unemployment benefits qualification determinations." *Jenkins v. American Express Fin. Corp.*, 721 N.W.2d 286, 288 n.1 (Minn. 2006).

Sun was the only person who testified at the telephonic hearing. He did not introduce any exhibits. He testified about Pepperl & Fuchs's COVID-19 policy by reading aloud from a letter that he had received in advance of the meetings with the visiting German employees. He also testified about his conversations with his manager and a human-resources representative after he was sent home. Sun does not explain why his own testimony is not "the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." *See* Minn. R. 3310.2922. We believe that his testimony satisfies the requirements of rule 3310.2922.

Sun's testimony provides substantial evidence that Pepperl & Fuchs terminated his employment because he did not comply with the company's COVID-19 policy. Sun testified that, on both the November 17 and November 18 video calls, he was told that he "would need to either conform to the vaccine or testing requirement [or] be discharged." Sun also testified that, during the second video call, he was asked whether he would comply with the company's COVID-19 policy. He responded by saying that he would not comply, and he was told that he was terminated. Sun admitted in his testimony that "it was implied" that the company terminated him because he did not comply with the COVID-19 policy. We believe that is the only reasonable way to interpret the evidence.

Thus, the ULJ did not err by relying on hearsay evidence.

II. Reasonableness of COVID-19 Policy

Sun next argues that Pepperl & Fuchs's COVID-19 policy was not reasonable. He contends that he could have worked from home, which would have made it unnecessary to either be vaccinated or to be tested and wear a mask.

Employment misconduct is defined by statute to mean "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). As a general rule, "if the request of the employer is reasonable and does not impose an unreasonable burden on the employee, the employee's refusal to abide by the request constitutes misconduct." *Vargas v. Northwest Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004), *rev. denied* (Minn. Mar. 30, 2004). Reasonableness varies by the circumstances of the case. *Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985).

Sun testified that Pepperl & Fuchs's letter announcing its COVID-19 policy stated that, when German headquarters personnel were in Minnesota, it would be "critical to get the team connected" so that employees could "establish personal communications, share successes and ideas, gather feedback, and build . . . momentum." Sun's testimony about the letter provides ample evidence to support the ULJ's finding that the company's COVID-19 policy was reasonable. Sun has not cited any caselaw for the proposition that it is unreasonable for an employer to require an employee to work at the company's workplace, and we are unaware of any such caselaw. In addition, this court has, in a non-precedential opinion, affirmed a ULJ's finding that a company policy reasonably required

a front-desk employee to become vaccinated against COVID-19 because the employer's policy was motivated by "health and safety reasons." *Costello v. Fond du Lac Rsrv.*, No. A22-0218, 2022 WL 3348567, *2-3 (Minn. App. Aug. 15, 2022). The employer policy in this case is more lenient than the policy in *Costello* because Sun had the option of complying with the policy in either of two ways: getting vaccinated or getting tested and wearing a mask.

Sun also contends that the policy is unreasonable because he has a constitutional right under the Fourth Amendment to the United States Constitution to be free of unreasonable searches and seizures, which right he contends would be violated if he were required to be vaccinated. This contention fails for the simple reason that Pepperl & Fuchs is a private entity, not a state actor, so the Fourth Amendment does not apply. *See New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985); *see also Johnson v. Tyson Foods, Inc.*, ____ F. Supp. 3d ____, ____, 2022 WL 2161520, *3-6 (W.D. Tenn. June 15, 2022) (dismissing constitutional claims alleged against private employer based on COVID-19 vaccine mandate); *Beckerich v. St. Elizabeth Med. Ctr.*, 563 F. Supp. 3d 633, 639-40 (E.D. Ky. Sept. 24, 2021) (concluding that plaintiffs are unlikely to succeed on constitutional claims alleged against private employer based on COVID-19 vaccine mandate).

Thus, the ULJ did not err by concluding that Pepperl & Fuchs's COVID-19 policy was reasonable.

III. Subpoena to Employer

Sun last argues that the ULJ erred by not issuing a subpoena to compel Pepperl & Fuchs to appear at the telephonic hearing for the purpose of submitting evidence about the reason for Sun's termination.

A ULJ "may issue subpoenas to compel the attendance of witnesses . . . upon a showing of necessity by the requesting party." Minn. R. 3310.2914, subp. 1 (2021). A party requesting a subpoena must make the request "to the chief unemployment law judge, by electronic transmission or mail, sufficiently in advance of the scheduled hearing to allow for the service of the subpoenas." *Id.* The chief ULJ may deny a request for a subpoena "if the testimony or documents sought would be irrelevant, immaterial, or unduly cumulative or repetitious." *Id.* A ULJ "*may* issue a subpoena even if a party has not requested one." *Id.* (emphasis added). A ULJ could issue a subpoena to comply with the duty to "ensure that all relevant facts are clearly and fully developed." Minn. R. 3310.2921 (2021). A ULJ also has a duty to "assist all parties in the presentation of the evidence." Minn. R. 3310.2921. However, ULJs are neutrals and should not act as "the unrepresented party's advocate." *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 32 (Minn. App. 2012) (citing Minn. Stat. § 268.105, subd. 1(b) (2010)). This court applies an abuse-of-discretion standard of review to a ULJ's decision not to issue a subpoena. *Icenhower v. Total Auto., Inc.*, 845 N.W.2d 849, 853 (Minn. App. 2014), *rev. denied* (Minn. July 15, 2014).

The department argues in its responsive brief that there is no reversible error because Sun never requested a subpoena. The department is correct that Sun did not request a

subpoena. At the beginning of the telephonic hearing, the ULJ informed Sun that Pepperl & Fuchs would not be appearing, that he had a right to request a rescheduled hearing "so that documents or witnesses can be presented, by subpoena if necessary," and that the hearing was his "only opportunity available to present testimony and other evidence." Sun did not ask the ULJ to issue a subpoena to Pepperl & Fuchs.

In addition, there is no reversible error because the record was well developed on the issue of the company's reason for terminating Sun. He testified that his manager and a human-resources representative told him that he could be terminated if he did not comply with the company's COVID-19 policy, that he persisted in refusing to comply, and that he was informed of his termination promptly thereafter. In light of that evidence, it was unnecessary for the ULJ to subpoena the company to elicit additional evidence about the reason for Sun's termination.

Thus, the ULJ did not err by not issuing a subpoena to Pepperl & Fuchs.

In sum, the ULJ did not err by concluding that Sun is ineligible for unemployment benefits.

Affirmed.