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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0020**

Eric Petersen,
Relator,

vs.

Custom Search, Inc.,
Respondent,

Department of Employment and
Economic Development,
Respondent.

**Filed August 27, 2018
Affirmed
Johnson, Judge**

Department of Employment and
Economic Development
File No. 35852407-3

Eric J. Petersen, Eden Prairie, Minnesota (*pro se* relator)

Custom Search, Inc., Medina, Minnesota (respondent employer)

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

Considered and decided by Connolly, Presiding Judge; Johnson, Judge; and
Kalitowski, Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Judge

Eric Petersen sought unemployment benefits after he was terminated from his employment. The department of employment and economic development concluded that he is ineligible for benefits because he was terminated for employment misconduct. We affirm.

FACTS

Custom Search Inc. (CSI) is in the executive-recruiting business. Petersen worked for CSI as a recruiter from May 2011 to December 2013 and from July 2014 to August 2017. His duties included recruiting qualified persons for openings at a medical-device company.

CSI terminated Petersen's employment on August 22, 2017. He applied for unemployment benefits. The department of employment and economic development made an initial determination that he is eligible for unemployment benefits on the ground that he was not discharged for employment misconduct because his termination was based on a single incident and because his conduct was not a serious violation of the employer's standards of behavior.

CSI filed an administrative appeal. An unemployment-law judge (ULJ) conducted an evidentiary hearing. CSI appeared through its president, Nicole Lemmerman. She testified that she terminated Petersen's employment because he made derogatory and disrespectful statements to her in a series of text messages, which caused her to lose trust

in him, and because his productivity had declined because he was not working full time and was focusing his time and energy on other employment.

Lemmerman testified in detail about the precipitating event that led to Petersen's abrupt termination. According to company policy, any CSI recruiter is permitted to contact an existing candidate if another CSI recruiter has not contacted the candidate for more than one week. The policy provides that the two recruiters later split any commission arising from a placement. In July 2017, Petersen was recruiting a candidate to fill a vacant position. Lemmerman testified that when she checked CSI's electronic candidate-contact records, she saw that Petersen's last contact with the candidate had occurred more than a week earlier. Lemmerman contacted the candidate to continue the recruiting process that Petersen had begun. The candidate agreed to an interview with CSI's client. Lemmerman informed Petersen at that time that she had set up an interview for the candidate, and Petersen responded by thanking her. Lemmerman reminded Petersen that, pursuant to CSI's policy, Lemmerman and Petersen would split the commission if the candidate eventually received and accepted an offer of employment. On August 22, 2017, Lemmerman texted Petersen to tell him that the candidate had accepted an offer and that he would receive half of the commission. Petersen responded in anger, accusing Lemmerman of manipulating CSI's candidate-contact records to delete Petersen's last contact with the candidate so that it would appear that he had not contacted the candidate for more than one week. Petersen wrote, among other things, that Lemmerman is a "liar" and that her business is "shady."

Petersen disputed Lemmerman's testimony. He testified that he had been in constant contact with the candidate who accepted the offer and maintained that Lemmerman had manipulated CSI's candidate-contact records to reflect otherwise. He also testified that his productivity was declining because CSI's business was declining. He further testified that he was in the office between 35 and 45 hours per week.

The ULJ found that Lemmerman's testimony was more credible than Petersen's testimony with respect to whether Lemmerman had manipulated the company's candidate-contact records. The ULJ found that Lemmerman terminated Petersen's employment because she had "lost trust in him after he attacked her and her company." The ULJ further found, "The manner in which Petersen expressed his concerns was a serious violation of the standards of behavior an employer has a right to reasonably expect." Accordingly, the ULJ concluded that Petersen is ineligible for unemployment benefits. Petersen requested reconsideration. The ULJ denied the request and affirmed his earlier decision. Petersen appeals.

DECISION

Petersen argues that the ULJ erred by concluding that he was terminated for employment misconduct.

Unemployment benefits are intended to provide financial assistance to persons who have been discharged from employment "through no fault of their own." *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). Accordingly, a person who has been discharged from employment based on "employment misconduct" is

ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2016); *Stagg*, 796 N.W.2d at 314. “Employment misconduct” is defined by statute to mean

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 (Supp. 2017). The statutory definition of misconduct is exclusive such that “no other definition applies” to an application for unemployment benefits. *Id.* § 268.095, subd. 6(e); *see also Wilson v. Mortgage Resource Ctr., Inc.*, 888 N.W.2d 452, 456-60 (Minn. 2016).

This court reviews a ULJ’s decision denying unemployment benefits to determine whether an applicant for benefits has been prejudiced because the ULJ’s findings, inferences, conclusion, or decision is erroneous. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2017). We review a ULJ’s findings of fact “in the light most favorable to the decision” to determine whether “there is evidence in the record that reasonably tends to sustain them.” *Stagg*, 796 N.W.2d at 315 (quotation omitted). We apply a *de novo* standard of review to mixed questions of fact and law, such as whether an employee’s conduct “disqualifies the employee from unemployment benefits.” *Id.* (quotation omitted).

Petersen challenges the ULJ’s decision in two ways. First, he argues that the ULJ erred by finding that Lemmerman was a truthful witness. The ULJ made a specific finding that Lemmerman’s testimony was more credible than Petersen’s testimony with respect to

whether she had manipulated the company's candidate-contact records. The credibility of witnesses is the "exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). Thus, we are unable to provide appellate relief on the ground that Lemmerman's testimony was not truthful.

Second, Petersen argues that the ULJ erred by finding that he engaged in misconduct when he sent his text messages to Lemmerman. He asserts, "My feedback to Ms. Lemmerman was non-argumentative and reasonable because the statements made were true" He further contends that Lemmerman had established a company culture in which it was acceptable to use strong language and that, as a result, his text messages were not "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." *See* Minn. Stat. § 268.095, subd. 6.

The ULJ expressly considered this issue and found that Peterson engaged in misconduct. The ULJ reasoned, "While an employee may reasonably voice concerns and express displeasure, making unfounded accusations, calling the business shady, and calling the owner a 'liar' are allegations that destroy a relationship, not repair it." The ULJ further reasoned, "An employer can reasonably conclude an employee who makes such harsh allegations does not have the interests of the company at heart or a sincere interest in remaining employed."

The ULJ's reasoning is consistent with this court's caselaw, which recognizes that an employer may reasonably expect that its employees will not be blatantly disrespectful and insubordinate in their interactions with their supervisors. *See, e.g., Deike v. Smelting*, 413 N.W.2d 590, 592 (Minn. App. 1987) (affirming finding of misconduct based on

evidence that employee walked off job despite supervisor's instruction to remain); *Montgomery v. F & M Marquette Nat'l Bank*, 384 N.W.2d 602, 603, 605 (Minn. App. 1986) (reasoning that employee was insubordinate by saying to supervisor, "You don't know what the hell you're talking about"), *review denied* (Minn. June 13, 1986); *Tester v. Jefferson Lines*, 358 N.W.2d 143, 145 (Minn. App. 1984) (stating that "employer had a right to expect Tester to refrain from uttering unprovoked obscenities at management personnel"), *review denied* (Minn. Mar. 13, 1985); *Snodgrass v. Oxford Properties, Inc.*, 354 N.W.2d 79, 79-80 (Minn. App. 1984) (affirming finding of misconduct based on evidence that employee refused to meet with supervisor to discuss complaints about her performance). The evidence in this case is, in a sense, stronger than the evidence in these prior cases because Petersen made direct accusations against Lemmerman that were personal in nature and impugned her integrity. We note that Petersen does not contend on appeal that his text messages were a single, isolated incident. *See* Minn. Stat. § 268.095, subd. 6(d); *cf. Windsperger v. Broadway Liquor Outlet*, 346 N.W.2d 142 (Minn. 1984). Such a contention would be inconsistent with Lemmerman's testimony that Petersen's text messages were part of a pattern of disrespectful communications toward her. Thus, there is substantial evidence in the record to support the ULJ's finding that Petersen engaged in misconduct.

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

Affirmed.