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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-722**

Richard John Loye,
Relator,

vs.

Lifespace Communities, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 5, 2012
Affirmed
Peterson, Judge**

Department of Employment and Economic Development
File No. 26651233-3

Ronald Steven Latz, St. Louis Park, Minnesota (for relator)

Kerry Lyle Middleton, Littler Mendelson, Minneapolis, Minnesota (for respondent employer)

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

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and
Collins, Judge.*

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

UNPUBLISHED OPINION

PETERSON, Judge

Relator challenges the decision of an unemployment law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for misconduct, arguing that his failure of a drug test and his use of marijuana while off-duty at home were not employment misconduct. We affirm.

FACTS

Relator Richard John Loye was employed full time as an overnight security guard for respondent Lifespace Communities, Inc. Relator's job duties as a security guard included doing security rounds and driving a bus to shuttle employees to an off-site parking area.

Lifespace has a drug-free-workplace policy. Its employee handbook states:

The use of controlled substances is inconsistent with the behavior expected of employees; it subjects all employees, residents, and visitors to our communities to unacceptable safety risks; and it damages our ability to operate effectively and efficiently. In this connection, the unlawful . . . use of a controlled substance in the workplace . . . is strictly prohibited. Such conduct is also prohibited during non-working time to the extent that, in the opinion of [Lifespace], it impairs an employee's ability to perform on the job or threatens the reputation or integrity of [Lifespace].

The handbook provides for random drug testing and testing when an employee is involved in an employee injury and states that a violation of the policy may result in disciplinary action, including discharge. When relator began working as a security guard,

he signed an acknowledgement of Lifespace's drug-free-workplace policy and consented to submitting to drug testing under the policy.

On October 29, 2010, shortly after midnight, relator decided to drive the shuttle bus to a parking garage to wash it and keep it warm. Washing the bus was not relator's responsibility, and the bus was not kept in the garage because it did not fit through the doorway. On the way to the garage, relator lost control of the bus when it hit a curb. The bus then hit a retaining wall and damaged about 10 to 15 feet of the wall and knocked down a 25-foot light pole. The accident caused \$12,000 in property damage, and relator's arm was fractured.

On October 31, relator used marijuana while at home. When relator went to Lifespace on November 2, to fill out an incident report for the bus accident, he was required to submit to a drug test. The test results were positive for marijuana. Lifespace discharged relator for driving the bus without permission, causing \$12,000 in property damage, and failing the drug test.

Relator filed a claim for unemployment benefits with respondent Minnesota Department of Employment and Economic Development. A department adjudicator determined that relator was discharged for employment misconduct and, therefore, was ineligible for unemployment benefits. Relator appealed to a ULJ.

Following an evidentiary hearing, the ULJ determined that relator committed misconduct by using marijuana because an employer has the right to reasonably expect that an employee will not use illegal substances, whether during or outside of work, and relator's use of marijuana, when his job duties included driving Lifespace vehicles and

transporting employees in a bus, could substantially damage Lifespace's reputation, particularly given the fact that relator had been involved in an accident that resulted in a fractured arm and \$12,000 in property damage.

Relator filed a request for reconsideration, and the ULJ issued an order affirming the initial decision. The ULJ explained:

If [relator's] use of marijuana, and the fact that Lifespace was aware of his marijuana use, became public knowledge, it could substantially damage Lifespace's reputation. Clients may not want to work with Lifespace if they became aware that a security guard was an illegal drug user, especially when Lifespace became aware of [relator's] drug use. The potential for harm was increased by the fact that [relator] had a serious accident that resulted in a compound fracture and \$12,000 damages to Lifespace property.

This certiorari appeal followed.

D E C I S I O N

This court reviews a ULJ's decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence in view of the record as a whole or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2010). This court views factual findings in the light most favorable to the decision and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Whether an employee committed misconduct is a mixed question of fact and law. *Stagg v. Vintage Place*, 796 N.W.2d 312, 315 (Minn. 2010). Whether the employee committed a particular act is a fact question, which we review in the light most favorable to the decision and will affirm if supported by substantial evidence. *Skarhus*, 721

N.W.2d at 344. Whether an employee's act constitutes employment misconduct is a question of law, which we review de novo. *Stagg*, 796 N.W.2d at 315.

A person who is discharged because of employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). "Employment misconduct means 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) (2010). Employment misconduct does not include inefficiency or inadvertence, simple unsatisfactory conduct, poor performance because of inability or incapacity, or good-faith errors in judgment. *Id.*, subd. 6(b).

Relator argues that the misconduct determination was based on the potential for damage to Lifespace's reputation but he was discharged solely "for 'testing positive for an illegal substance' and for the accident" and not for potentially damaging Lifespace's reputation. Although Lifespace's form that documents the termination only referred to the positive drug test, there was testimony at the hearing that Lifespace was concerned about an employee using drugs outside of the workplace and word getting out in the community about it. Relator also argues that he only used marijuana the one time after the accident, but he testified at the hearing that he used marijuana about two weeks before the accident.

Lifespace's drug-free-workplace policy provided that "[t]he use of controlled substances is inconsistent with the behavior expected of employees" and prohibited controlled-substance use "during non-working time to the extent that, in the opinion of

[Lifespace], it . . . threatens the reputation or integrity of [Lifespace].” The ULJ’s finding that relator’s use of marijuana on October 31, particularly given his position as a security guard and the serious accident in which he was involved, had the potential to damage Lifespace’s reputation or integrity is supported by evidence that Lifespace was concerned about relator’s marijuana use becoming public knowledge and damaging its reputation or integrity. Lifespace’s policy expressly permitted termination on that ground, and relator’s failure to comply with that policy was a serious violation of the standards of behavior Lifespace had the right to reasonably expect of relator. The ULJ did not err in determining that relator was discharged for employment misconduct, and, therefore, that he is ineligible for unemployment benefits.

Affirmed.