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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2083**

Barry E. Smith,
Relator,

vs.

FedEx Kinkos Office and Print Services Inc.,
Respondent,

Department of Employment
and Economic Development,
Respondent.

**Filed October 28, 2008
Affirmed
Hudson, Judge**

Department of Employment
and Economic Development
File No. 11102 07

Barry E. Smith, 4808 Bywood Street West, Minneapolis, Minnesota 55436 (pro se relator)

FedEx Kinkos Office and Print Services Inc., c/o TALX Employer Services LLC, P.O. Box 1160, Columbus, Ohio 43216-1160 (respondent)

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Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Relator challenges the decision by the unemployment law judge (ULJ) that he was disqualified from receiving unemployment benefits because he had been discharged for misconduct after trying to obtain an unauthorized discount from a corporation with which his employer did business. Because the ULJ did not err in ruling that this was a single incident that had a significant adverse impact on the employer, we affirm.

FACTS

Relator worked for respondent FedEx Kinkos Office and Print Services, Inc., as an assistant manager of production from September 2003 until his discharge on May 31, 2007. His job site was at a FedEx center within the campus of the Best Buy corporate offices. Although relator had a Best Buy badge and identification number, he was not entitled to a Best Buy employee discount.

The discharge arose out of an incident on May 30, 2007, when relator went to a Best Buy retail store to purchase a \$129.95 memory stick. He told the cashier that he worked at “corporate” and gave an identification number belonging to a Best Buy employee. The cashier noticed that the name on relator’s credit card did not match the name associated with the identification number and questioned relator about the discrepancy. Relator then asked the cashier to complete the sale without the discount.

The next morning, pursuant to a demand by Best Buy’s security department, relator’s manager escorted him from the premises and confiscated his Best Buy badge. After an investigation, FedEx fired him for attempting to obtain an unauthorized discount

after implying he worked at Best Buy and using a Best Buy employee's identification number.

Relator established an unemployment benefit account on June 17, 2007, but a department adjudicator ruled that he was disqualified because he had been discharged for misconduct. Relator appealed and a hearing was held.

After the hearing, the ULJ ruled that relator's testimony that he thought he qualified for a discount, although he did not know, lacked credibility, noting that an employee who is uncertain about whether he or she qualified for a discount would have asked a coworker or manager. Also, the ULJ found that relator acted like an individual who was trying to obtain an unauthorized discount because relator told the cashier he worked at "corporate" but failed to mention that he did not work for Best Buy and relator never asked the cashier—who should know—whether he was eligible for a discount. Further, relator testified that he did not know that the identification number that he used was assigned to a Best Buy employee, but he also testified he had access to many employee identification numbers during the course of his day and that he may have been confused about the number he used. The ULJ found it unlikely that relator would recall another employee's number and forget his own, or that in such a large organization, relator could randomly choose an employee number that happened to match an actual employee's number. The ULJ found that given these discrepancies, relator knew he was not entitled to a Best Buy employee discount but attempted to obtain an unauthorized discount by using the identification number belonging to a Best Buy employee. Because an employer may reasonably expect that its employees would refrain from using their

positions for unauthorized gain, and relator violated this expectation, the ULJ ruled that relator's actions clearly displayed a serious violation of the standards of behavior that an employer may reasonably expect from its employees and that relator had been discharged for misconduct.

Relator also asserted that this was a single incident without a significant adverse impact on the employer. The ULJ found that his actions did have a significant adverse impact on the employer, ruling that it had the potential of damaging FedEx's business relations with Best Buy and that FedEx could not trust that relator had refrained from committing similar transactions in the past or would refrain from doing so in the future. After the ULJ affirmed on reconsideration, relator brought this certiorari appeal.

D E C I S I O N

This court may reverse or modify the ULJ's decision if relator's substantial rights were prejudiced because the findings or inferences were "made upon unlawful procedure," "affected by . . . error of law," or "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d) (2006). Whether an employee committed a particular act is a question of fact, which is viewed in the light most favorable to the ULJ's decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether the act constitutes misconduct is a question of law reviewed de novo. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

An applicant who is discharged for employment misconduct is disqualified from receiving benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). Employment misconduct is defined as follows:

Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.

Id., subd. 6(a). Employment misconduct does not include “a single incident that does not have a significant adverse impact on the employer.” *Id.*

Relator does not dispute the ULJ’s credibility determinations or that his actions clearly displayed a serious violation of the standards of behavior an employer may reasonably expect from its employees. Instead, he argues that his conduct does not constitute misconduct because it was a single incident that did not have a significant adverse impact on his employer.

This court has held that even a single incident of a cashier’s minor theft from her employer had a significant adverse impact because the employer could no longer trust the employee with the responsibilities necessary to carry out her duties as a cashier. *Skarhus*, 721 N.W.2d at 344; *see also Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 776 (Minn. App. 2008) (holding significant adverse impact existed when intoxicated pilot could have been called on to fly airplane, resulting in employer’s loss of trust that pilot could carry on most essential job function of flying airplane), *review denied* (Minn. Oct. 1, 2008). Similarly, this court ruled that an employee’s fraudulent billing of a customer is the “sort of integrity-measuring conduct [that] will always constitute an act that has a significant adverse impact on the employer, who can no longer reasonably rely on the employee to manage the business’s financial transactions.” *Frank v. Heartland Auto. Servs., Inc.*, 743

N.W.2d 626, 631 (Minn. App. 2008). In contrast, a single instance in which the cashier opened the register by using an emergency switch rather than pressing the cash-total or no-sale key, as required by company policy, did not have a significant adverse impact on the employer where it did not involve theft or mishandling money. *Pierce v. DiMa Corp.* (1992), 721 N.W.2d 627, 630 (Minn. App. 2006).

The ULJ did not credit relator's assertions that the incident was an innocuous mistake. Instead, he found that relator used his position to try to obtain unauthorized gain. As the ULJ found, this affected the trust that FedEx had in relator, who obtained an employee number belonging to an employee of its customer Best Buy in the course of his service to Best Buy and used the number to try to obtain a discount for which he knew he was not eligible. This meant that the employer could no longer trust relator to handle employee numbers while employed by FedEx and working at Best Buy headquarters. Further, as to the possibility this incident could damage FedEx's business relations with Best Buy, the evidence demonstrated that Best Buy took the incident very seriously. On the morning following the incident, Best Buy's security department demanded that FedEx escort relator from its premises within an hour and confiscate his Best Buy badge. The ULJ's conclusion that the incident had a significant adverse impact on the employer is supported by substantial evidence and consistent with the law.

Relator also indicates that he felt it was unfair that the employer did not participate in the hearing. An application for unemployment benefits is not a claim against an employer, but a request for unemployment benefits from state funds. Minn. Stat. § 268.069, subd. 2 (2006). The decision is made on the evidence "regardless of the level

of interest or participation by an applicant or an employer in any determination or appeal.” *Id.* Consequently, the employer’s lack of participation at the hearing did not render it unfair.

Relator also complains that the ULJ had no evidence from the employer to support the determination that the incident had a significant adverse impact on the employer. First, much of the evidence came from relator himself. In addition, the ULJ considered the report by the employer’s district manager of his interview with relator. While relator initially objected on hearsay grounds, as the ULJ explained, hearsay is admissible. *See* Minn. R. 3310.2922 (2007) (providing that hearsay evidence may be admissible). When the ULJ later asked whether relator disagreed with, disputed as not having been discussed, or disputed as being inaccurate, anything in the district manager’s report, relator responded, “No, your Honor.” The ULJ noted on reconsideration that relator failed to specifically state how his employer’s statements were misleading or false and the ULJ found nothing to suggest that relator was put at a disadvantage by his employer’s failure to appear at the hearing. Relator has not shown that the hearing was unfair.

Affirmed.