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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0041**

Brad P. Engen,
Relator,

vs.

Clements Chevrolet-Cadillac Co.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed December 16, 2008
Affirmed
Connolly, Judge**

Department of Employment and Economic Development
File No. 11480 07

Brad P. Engen, 4413 Tenth Street N.W., Rochester, MN 55901-6531 (pro se relator)

Clements Chevrolet-Cadillac Co., 1000 12th Street SW, Rochester, MN 55902-3833
(respondent)

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respondent-department)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator was terminated by his employer for crashing a company-owned car. Relator subsequently filed for unemployment benefits but a decision of the unemployment-law judge (ULJ) determined that relator was ineligible for unemployment benefits because he had been fired for employment misconduct. After a request for reconsideration, the ULJ affirmed the decision. Relator appeals, arguing that (1) he did not commit employment misconduct; (2) the single-incident exception applies; and (3) the ULJ erroneously credited unreliable witness testimony. We affirm.

FACTS

Relator Brad Engen began working for Clements Chevrolet-Cadillac Co. on October 16, 2006. Clements supplied relator with a company-owned car, a “demo,” for relator’s off-duty, personal use. Clements periodically reminded its sales staff of the responsibilities associated with driving a company-owned car and the penalties that would ensue if employees violated the policy. On May 18, 2007, relator drank beer with some coworkers after playing in a softball game. Relator and some of his coworkers then went to a bar down the street. At the bar, relator became visibly intoxicated. He was observed slurring his speech and was unable to walk straight. Coworkers attempted to get him a cab but he refused. Instead he chose to drive Clements’ company-owned car.

About a mile from the bar, relator lost control of the car and went into a ditch. The company-owned car was destroyed, and relator, who was not wearing his seatbelt, was hospitalized for two days. The accident report indicated that relator was cited for

DWI. Relator did not receive a copy of the citation at that time, but received the DWI in the mail approximately one month later.

About a week after relator destroyed the company-owned car, relator went to his employer and spoke with his general manager, James Orke. Relator told Orke that his doctor had not cleared him to work. Orke then told relator that he was not to return to work until he discussed the matter further with Orke. Sometime after his conversation with Orke, relator spoke to Mike Knutson, his sales manager, and was given permission to work for a day. Despite Orke's instructions to the contrary, relator returned to work for one day. He was then told by Knutson that he had to go home while Clements determined relator's employment status. Orke testified that Clements did not fire relator immediately because the company was gathering facts to determine what had happened before making a decision to terminate relator.

Approximately two days after being sent home, relator received his DWI citation in the mail and called Knutson to tell him about the citation. About two days later, Clements fired relator, citing relator's drinking and driving and destruction of a company-owned car as reasons for the termination. Mr. Bridwell, one of the owners and the person ultimately responsible for the termination decision, stated that destruction of the company-owned car was a violation of company policy and that he made the termination decision after discussing the issue with his legal counsel. The termination occurred on June 15, 2007, about one month after the accident.

Relator applied for unemployment compensation benefits with the Department of Employment and Economic Development (DEED) and a DEED adjudicator determined

he was ineligible. Relator appealed and, on August 24, 2007, the ULJ filed a decision finding that relator was not eligible for unemployment benefits because he had been fired for employment misconduct. Relator filed a request for reconsideration, and the ULJ affirmed the decision on December 6, 2007. Relator filed a petition for a writ of certiorari with this court on January 9, 2008. This appeal follows.

D E C I S I O N

An employee discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). 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) (Supp. 2007). The misconduct definitions set out in the act are exclusive and “no other definition applies.” *Id.*, subd. 6(e) (Supp. 2007).

The statute specifies that “[a] driving offense in violation of sections 169A.20, 169A.31, or 169A.50 to 169A.53 that interferes with or adversely affects the employment is employment misconduct.” *Id.*, subd. 6(d) (Supp. 2007). The statutory definition of employment misconduct includes an exception for a single incident of misconduct, with the qualification that the incident must “not have a significant adverse impact on the employer.” *Id.*, subd. 6(a).

The standard of review is set forth in Minn. Stat. § 268.105, subd. 7(d) (Supp. 2007), which provides:

The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmigdall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Whether a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* This court reviews the ULJ's factual findings "in the light most favorable to the decision." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

I. Relator Committed Employment Misconduct.

The first statutory definition of misconduct is conduct that "displays clearly 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). This definition requires an objective determination that the employer's expectations for the employee were reasonable under the circumstances. *Jenkins v. American Express Fin. Corp.*, 721

N.W.2d 286, 290 (Minn. 2006). Here, Clements reasonably expected that its employees will not drive the demo cars it provides to them while under the influence of alcohol. Responsible use of alcohol is presumed knowledge for employees. *Risk v. Eastside Beverage*, 664 N.W.2d 16, 21 (Minn. App. 2003). Driving a company-owned vehicle under the influence of alcohol, even during non-working hours, displays a violation of the standards of behavior an employer reasonably expects of its employees. Thus, relator committed employment misconduct under the first definition of misconduct.

The second definition of employee misconduct is conduct “that displays clearly a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a). Driving a company-owned vehicle provided to the relator as a benefit of working for the employer while under the influence of alcohol, demonstrates a substantial lack of concern for his employment. The risk of damage to company property, combined with the potential liability to Clements, demonstrates that the relator acted without concern for his continued employment at Clements, and committed employment misconduct under this second definition.

Relator makes several arguments as to why his actions did not amount to employment misconduct. First, relator claims his actions were not misconduct because other employees consumed alcohol on the night of May 18, 2007, drove their demo cars home, and yet were not terminated. This argument is unavailing. The other employees did not get into accidents or destroy company property, nor is there even any evidence that the other employees were driving under the influence of alcohol.

Next, relator claims that Clements did not terminate him after the accident, but only upon learning of relator's DWI. Relator argues that if drinking or destroying the company-owned car amounted to misconduct, Clements would have terminated him immediately after the accident rather than waiting almost a full month. Relator particularly relies on the fact that he worked one day during the month between the accident and his termination.

Relator's argument is directly refuted by *Redalen v. Farm Bureau Life Ins. Co.*, 504 N.W.2d 237 (Minn. App. 1993). In that case, this court held that a lapse of time between the alleged misconduct and the discharge may tend to negate a causal relationship between the misconduct and the discharge. *Id.* at 239. The court found, however, that a valid explanation for a delay could excuse such a lapse. *Id.*

In *Redalen*, a former Farm Bureau employee accused Redalen of sexual harassment. *Id.* Farm Bureau conducted its own investigation and, after concluding that the claims were unsubstantiated, retained Redalen throughout the course of the trial. *Id.* When the jury reached a verdict in favor of the employee claiming sexual harassment, Farm Bureau terminated Redalen, approximately three years after the initial complaint was filed. *Id.* The court found that Farm Bureau was justified in terminating Redalen despite the three year delay because the jury finding confirmed the sexual harassment allegations, which constituted misconduct. *Id.*

As in *Redalen*, the delay in this case is excusable. Clements waited a month before firing relator because it was conducting its own internal investigation, talking to employees who were at the bar and who responded to the accident, and speaking with

legal counsel. The single day that relator worked at the dealership was due to a misunderstanding between relator, Knutson, and Orke, and did not reflect a decision on the part of Clements to retain relator. Moreover, a delay of one month, particularly when relator was not medically authorized to work for a period of that time, does not tend to negate a causal relationship between the incident and the termination.

Relator also argues that Clements did not terminate him because of his accident, but because its insurance rates would go up after relator received a DWI. It is not employee misconduct when the employer's insurance rates increase as a result of the employee's actions. This court has held that, "[i]f we were to conclude that an employee is guilty of misconduct simply because his employer's insurance company refuses to cover him, we would, in effect, delegate to insurance companies the responsibility for determining employee misconduct." *Walseth v. L.B. Hartz Wholesale*, 399 N.W.2d 207, 209 (Minn. App. 1987). There is no evidence on the record, however, suggesting that Clements terminated relator because of its increased insurance rates. Rather, Clements terminated relator based on his own actions: destroying a company-owned vehicle while driving under the influence of alcohol.

Finally, relator argues that there is no evidence showing that he was drinking or drunk on the night of the accident and that, without a conviction for DWI, he cannot have been terminated for misconduct. While relator argues he was not drinking or driving under the influence of alcohol, the ULJ specifically found that he consumed beer after the softball game and then consumed three drinks in 1.5 hours at the bar before driving home. Moreover, two employees testified that he was intoxicated, unable to walk

straight, and was slurring his speech. This court will not overturn findings of the ULJ unless they are unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d)(5). There is substantial evidence in the record showing both that relator was drinking alcohol and that he then drove a car while under the influence of alcohol on the night of the crash.

Paragraph (d) of Minn. Stat. § 268.095, subd. 6 makes certain criminal driving violations employment misconduct per se. A DWI conviction, however, is not necessary to find employment misconduct under paragraph (a) of Minn. Stat. § 268.095, subd. 6 (Supp 2007). *Risk*, 664 N.W.2d at 21. Driving under the influence can be employment misconduct even if the employee is not convicted, as long as it violates a reasonable employer policy or demonstrates a lack of concern for continued employment. *Id.* at 22. Because the ULJ found that relator drove a car while under the influence of alcohol, and because the employer found this activity violated its policies, relator's actions constitute employee misconduct, despite his lack of a DWI conviction.

II. The Single-Incident Exception Does Not Apply.

The single-incident exception provides:

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Minn. Stat. § 268.095 subd. 6(a). The single-incident exception does not apply to relator's actions because his conduct caused Clements a significant adverse impact: relator destroyed a company-owned vehicle.

“A single incident can constitute misconduct when an employee deliberately chooses a course of conduct that is adverse to the employer.” *Schmidgall*, 644 N.W.2d at 806. An employee's decision to knowingly violate a reasonable policy of the employer is misconduct. *Id.* Clements has a clear and substantial interest in maintaining its company property. Furthermore, Clements periodically reminded its sales staff of the responsibilities associated with driving a company car and the penalties that would ensue if employees violated the policy. Relator's decision to drive his demo car home from the bar after consuming alcohol to the point of intoxication was a knowing violation of a reasonable policy of his employer. Moreover, relator's decision to drive a company car while intoxicated had a significant adverse effect on Clements. Therefore, the single-incident exception does not apply.

III. The ULJ's Credibility Determinations are Supported by Substantial Evidence.

Finally, relator argued in his request for reconsideration that the testimony of Chris Grassle and Chris Noble was not credible. Relator argued that Grassle, son of the owner and the future owner of the dealership, lied about ordering relator a cab, and that Noble would not say anything against Clements in the presence of Bridwell (husband of the owner) and Grassle.

This court gives deference to the credibility determinations made by the ULJ: “[c]redibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.” *Skarhus*, 721 N.W.2d at 345. When the credibility of a party or witness has a significant effect on the outcome of a decision, the ULJ “must set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c) (Supp. 2007). This court may only reverse or modify the ULJ’s findings if they are “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(5).

In the original decision, the ULJ noted that relator’s testimony is less credible than Clements’ witnesses because relator’s testimony is self-serving and the other witnesses corroborated each other. Moreover, the ULJ provided relator with the opportunity to “cross-examine” both witnesses at the evidentiary hearing. Because the ULJ’s findings are supported by the record and set out in the decision, the credibility determinations may not be disturbed.

Affirmed.