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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-753**

Daniel Smith,
Relator,

vs.

Miller Chevrolet, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 22, 2011
Affirmed
Johnson, Chief Judge**

Department of Employment and Economic Development
File No. 24222158-3

Daniel Smith, Otsego, Minnesota (pro se relator)

Miller Chevrolet, LLC, Rogers, Minnesota (respondent)

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

Considered and decided by Johnson, Chief Judge; Shumaker, Judge; and Harten,
Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Chief Judge

Daniel Smith was employed in the parts department of Miller Chevrolet, LLC, which terminated his employment because he took credit for a sale of parts made by a co-worker, thereby depriving the co-worker of a commission on the sale. An unemployment law judge determined that Smith engaged in misconduct and, thus, is ineligible for unemployment benefits. We agree and, therefore, affirm.

FACTS

Smith worked behind the counter in Miller Chevrolet's parts department, writing up estimates for repair orders and making sales of parts. Employees in Smith's position earn a three-percent commission on their own sales. Parts employees sometimes are required to run errands to pick up parts, during which time they lose opportunities to make sales and earn commissions. In those situations, the parts manager sometimes compensates the employee who ran an errand by transferring one or more of the manager's sales to the employee.

On December 29, 2009, Smith ran an errand to obtain parts. When he returned, he transferred to himself a sale of parts that had been made by a co-worker. Smith did not tell anyone about the transfer. The co-worker happened to see the paperwork reflecting the transfer and reported it to the parts manager on duty that day. Miller Chevrolet management concluded that Smith had inappropriately transferred the sale credit and terminated Smith's employment.

Smith applied for unemployment benefits. The Minnesota Department of Employment and Economic Development (DEED) made an initial determination that Smith is eligible for benefits. Miller Chevrolet filed an administrative appeal, and a ULJ conducted a telephone hearing. At the hearing, Smith admitted that he made the transfer of a sale credit but stated that his actions were consistent with a common practice at Miller Chevrolet. The ULJ concluded that Smith was terminated for misconduct and, thus, is ineligible for unemployment benefits. The ULJ affirmed that decision after Smith requested reconsideration. Smith now appeals to this court by way of a writ of certiorari.

D E C I S I O N

Smith argues that the ULJ erred by determining that he is ineligible for unemployment benefits because he engaged in misconduct. This court reviews a ULJ's decision denying benefits to determine whether the findings, inferences, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. *See* Minn. Stat. § 268.105, subd. 7(d) (2008). The ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination whether an employee is eligible for unemployment benefits is a question of law, to which we apply a *de novo* standard of review. *Id.*

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct is defined as “intentional, negligent, or indifferent conduct” that clearly displays either “a serious violation of the standards of behavior the employer has the right

to reasonably expect” or “a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (Supp. 2009). “Whether a particular act constitutes disqualifying misconduct is a question of law, which this court reviews de novo.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Smith’s primary argument is that he did not engage in misconduct because his conduct was consistent with a common practice at Miller Chevrolet. The evidence on this point was in conflict. Miller Chevrolet’s parts manager testified that he sometimes transferred credit from himself to a parts employee he supervised but that he never transferred credit from one parts employee to another parts employee. The parts manager also testified that he had sole responsibility for transferring sales credits and that parts employees are not authorized to take sales credits away from one of their peers. This testimony is corroborated by the fact that the co-worker affected by Smith’s transfer reported it to management after detecting it. In attempting to rebut the parts manager’s testimony, Smith identified only two incidents that were allegedly contrary to the parts manager’s testimony about company policy. The parts manager offered an explanation for one of those incidents and could not recall the other incident.

The ULJ resolved the evidentiary discrepancies in Miller Chevrolet’s favor. The ULJ found: “The evidence shows that management occasionally made adjustments when an employee who initiated a sale was out on a parts run; not that employees were allowed to unilaterally, without management approval, make such adjustments.” This finding is based on the ULJ’s determinations of witness credibility. “Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.” *Skarhus*, 721

N.W.2d at 345. The testimony of the parts manager and the other Miller Chevrolet employees supports the ULJ's finding that Smith engaged in misconduct.

Smith also argues that, even if he violated company policy by transferring a sales credit from a co-worker to himself, it was not misconduct, as that term is defined by statute, because it was merely a single incident. "If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct" Minn. Stat. § 268.095, subd. 6(d) (Supp. 2009).¹ The ULJ expressly found that Smith's conduct involved only a single incident. But the ULJ nonetheless found that Smith should be ineligible for benefits. The ULJ reasoned that "when Smith removed his coworker's number and put a part under his own number without permission of management, he essentially stole from his coworker." The ULJ's analysis of the single-incident issue is supported by substantial evidence in the agency record. *See* Minn. Stat. § 268.105, subd. 7(d).

In sum, the ULJ did not err by determining that Smith engaged in employment misconduct and, thus, is ineligible for unemployment benefits.

Affirmed.

¹This analysis applies to eligibility determinations issued after August 1, 2009. *See* 2009 Minn. Laws ch. 15, § 9, at 48. Before that date, "a single incident that does not have a significant adverse impact on the employer" was excluded from the definition of misconduct. *See* Minn. Stat. § 268.095, subd. 6(a) (2008).