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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0492**

Robert T. O'Neill,
Relator,

vs.

Ebenezer Realty Services Company,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed November 6, 2017
Affirmed
Hooten, Judge**

Department of Employment and Economic Development
File No. 35095808-3

Robert T. O'Neill, Bloomington, Minnesota (pro se relator)

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

Ebenezer Realty Services Company, St. Louis, Missouri (respondent employer)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Relator challenges the decision of an unemployment law judge (ULJ) that he is ineligible for unemployment benefits. Because there is substantial evidence in the record which supports the ULJ's determination that relator committed employment misconduct for which he was discharged, we affirm.

FACTS

Relator Robert O'Neill worked as a transportation driver for respondent Ebenezer Realty Services Company from January 2011 to November 2016. Ebenezer Realty provides assisted living and nursing services, including transportation, to elderly and vulnerable adults.

A series of incidents beginning in August 2016 led to O'Neill's termination in November 2016. On August 9, O'Neill drove several passengers, some of whom use wheelchairs, to an event. O'Neill failed to properly secure one of the wheelchair passengers according to safety procedure. A coworker noticed the mistake, and O'Neill then stopped the bus to secure the passenger. O'Neill was instructed to review Ebenezer Realty's safety procedures and received a written warning on August 17.

On August 29, Ebenezer Realty received a call from a driver who reported that one of its bus drivers, later identified as O'Neill, made a lane change without signaling and nearly caused a collision with the driver. That same day, O'Neill transported a passenger who used a wheelchair but did not tightly fasten the wheelchair to the bus. Because the wheelchair was not properly attached and the seatbelt was not correctly buckled, the

wheelchair moved while O'Neill drove and the seatbelt made it difficult for the passenger to breathe. O'Neill received another written warning for these two events.

On September 1, O'Neill backed his bus into a stationary generator after becoming distracted by a coworker, causing minor damage to the bus. O'Neill received a final written warning for this incident, meaning that another written warning within the next 12 months would result in his termination.

On November 3, O'Neill transported passengers to an event. As he assisted two passengers in exiting the bus, he experienced an episode of back and leg pain. Due to his pain, O'Neill allowed the two passengers, one of whom suffered from dementia, to walk without him from the bus to a community center facility. Both passengers arrived to the facility without incident. After the pain subsided, O'Neill got back onto the bus and drove the remaining passenger to his destination. Although he knew that he had violated Ebenezer Realty's expectations by not escorting the two individuals to the facility, he did not report the incident.

A staff member at the facility later notified Ebenezer Realty that O'Neill did not escort these passengers from the bus to the facility. As part of Ebenezer Realty's "door-to-door" customer service policy, it expected that its drivers would escort passengers from the bus to their destination. Ebenezer Realty terminated O'Neill's employment on November 4.

O'Neill applied for unemployment benefits, but respondent Minnesota Department of Employment and Economic Development (DEED) determined that he is ineligible for benefits because his actions constituted aggravated employment misconduct. O'Neill

appealed this determination to a ULJ. The ULJ conducted an evidentiary hearing at which O'Neill testified. The ULJ determined that O'Neill's actions during these events demonstrated a clear violation of Ebenezer Realty's reasonable expectations for employee standards of behavior. As a result, the ULJ concluded that O'Neill committed employment misconduct, and that he is not eligible for benefits. O'Neill requested reconsideration of the decision, and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

O'Neill argues that the ULJ erred in denying him unemployment benefits because his conduct does not rise to the level of employment misconduct under the statute. Additionally, his argument implies that his conduct falls under the unsatisfactory conduct and incapacity exceptions to employment misconduct. We may reverse, remand, or modify a ULJ's decision if a relator's substantial rights have been prejudiced because the findings, conclusions, or decision are affected by an error of law, lack the support of substantial evidence in the record, or are arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2017).

“Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). Whether an employee committed a particular act presents a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We will not disturb the ULJ's factual findings if the findings are supported by substantial evidence in the record. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But, whether an employee's particular actions

constitute employment misconduct is a question of law, which we review de novo. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

An employee is ineligible for unemployment benefits if he is discharged for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2016). Employment misconduct is statutorily defined as “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) (Supp. 2017).

Here, the ULJ found that O’Neill’s actions on August 9, August 29, and September 1 were not intentional. But the ULJ correctly noted that a person’s conduct does not need to be intentional to constitute employment misconduct. *See id.*; *see also Swanson v. Columbia Transit Corp.*, 311 Minn. 538, 539, 248 N.W.2d 732, 733 (1976) (explaining that series of negligent acts may amount to employment misconduct). Failing to adequately secure passengers, especially vulnerable adults, and driving negligently is the type of conduct that placed these individuals at risk and falls below an employer’s reasonable expectations for employee behavior.

Regarding the incident on November 3, the ULJ recognized that while O’Neill was not at fault for suffering back and leg pain, he could have handled the situation differently, especially considering that one of the passengers suffered from dementia. O’Neill argues that escorting passengers from the bus to their destination was not a formal requirement but rather part of best practices under Ebenezer Realty’s policies. But O’Neill acknowledged in his prehearing submissions that he knew escorting the passengers was

expected and that he could be discharged for his failure to provide this assistance to his passengers. He also admitted at the hearing that he should have reported the incident to management but failed to do so. These admissions themselves indicate that O’Neill’s conduct fell below Ebenezer Realty’s reasonable expectations for employee behavior.

O’Neill refers to *Bray v. Dogs & Cats Ltd.*, 679 N.W.2d 182 (Minn. App. 2004), as “somewhat analogous” to his case, and he asserts that he should not be denied unemployment benefits when the record suggests that he tried to be a good employee but failed to perform up to Ebenezer Realty’s satisfaction. *See Bray*, 679 N.W.2d at 185 (holding that relator who “attempted to be a good employee but just wasn’t up to the job and was unable to perform her duties to the satisfaction of the employer” did not commit employment misconduct). This argument also implies that his conduct may be within the statutory exceptions to employment misconduct for “simple unsatisfactory conduct” or “conduct that was a consequence of the applicant’s inability or incapacity.” *See Minn. Stat. § 268.095, subd. 6(b)(3), (5) (Supp. 2017).*

But *Bray* is distinguishable. The evidence in the record demonstrates that although O’Neill understood Ebenezer Realty’s policies, his repeated failure to follow these policies placed vulnerable adults at risk. For example, after the August 9 incident, O’Neill reviewed equipment safety procedures and was immediately corrected on how to secure a wheelchair on a bus. But on August 29, O’Neill failed to properly secure a wheelchair passenger, which caused the passenger to have difficulty breathing. And, while O’Neill’s flare-up of back and leg pain on November 3 may have made him physically unable to escort the passengers to the community center facility, he could have taken other steps to ensure their

safety. For instance, he could have called out for assistance from someone at the facility or have asked the passengers to wait until he could retrieve his phone. Moreover, the ULJ's decision demonstrates that the ULJ evaluated O'Neill's conduct as a whole and did not base his decision solely on O'Neill's actions on November 3.

Because the evidence substantially supports the ULJ's decision that O'Neill committed employment misconduct, we conclude that the ULJ did not err in determining that O'Neill is ineligible for unemployment benefits.

Affirmed.