STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0031

Todd Leuze,
Relator,

vs.

Minnesota Valley Alfalfa Producers,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 17, 2020
Affirmed in part and reversed in part
Bratvold, Judge

Department of Employment and Economic Development
File No. 37461274-3

Todd C. Leuze, Watkins, Minnesota (pro se relator)

Minnesota Valley Alfalfa Producers, Raymond, Minnesota (respondent employer)

Anne Froelich, Keri A. Phillips, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Bratvold, Presiding Judge; Segal, Chief Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BRATVOLD, Judge

In this certiorari appeal, relator challenges the determination by an unemployment-law judge (ULJ) that he is ineligible for benefits because his employer discharged him for aggravated employment misconduct. Relator argues that the ULJ erred because the determination lacks substantial evidence, his employer failed to follow its own discipline policies, and he is protected by a chemical-dependency exception to ineligibility. Based on substantial evidence in the record supporting the ULJ's determination that relator missed two days of work while he was in jail, we conclude that the ULJ did not err in its determination that relator was discharged for employment misconduct. But because relator was discharged for absenteeism, we also conclude that he was not discharged for aggravated employment misconduct. We thus affirm in part and reverse in part.

FACTS

The following summary of the facts is based on the evidence received during the evidentiary hearing and the ULJ's written factual findings.

In August 2010, respondent-employer Minnesota Valley Alfalfa Producers (Minnesota Valley), a producer of alfalfa pellets for agricultural use, hired relator Todd Leuze to work as a panel operator at its Raymond facility. Leuze worked for Minnesota Valley until he was discharged on February 26, 2019.

Leuze is "chemically dependent on methamphetamine." In 2017, Leuze was convicted of fifth-degree possession of methamphetamine and placed on probation for five years. Leuze's probation conditions included that he complete chemical-dependency

treatment, attend sober support groups, and comply with random drug testing. Leuze completed treatment and attended support groups two to three times each week. In fall 2018, Leuze relapsed. He was arrested several months later for violating probation after he tested positive for methamphetamine. Leuze spent two days in jail and missed two days of work.[1]

Minnesota Valley discharged Leuze in February 2019. Leuze applied for unemployment benefits and respondent Department of Employment and Economic Development (DEED) determined that he was ineligible. Leuze appealed the initial determination and requested a hearing before a ULJ.

During an evidentiary hearing held by telephone, the ULJ took testimony from three witnesses, including Leuze, and received six exhibits. Zayna Eischens, former general manager of Minnesota Valley, testified for Leuze, and Donn Larson, an operating consultant, testified for Minnesota Valley. After the hearing, the ULJ issued written findings of fact and determined that Leuze was ineligible for benefits because Minnesota Valley discharged him for aggravated employment misconduct. Leuze requested reconsideration, and the ULJ issued a written order revising and clarifying some factual findings and reaffirming the ineligibility determination.

This certiorari appeal follows.

[1] The state later charged Leuze with felony fifth-degree possession and this charge was pending at the time of the evidentiary hearing.

D E C I S I O N

I. The ULJ did not err in its determination that Minnesota Valley discharged Leuze for employment misconduct.

Under the Minnesota unemployment insurance program, workers who "are unemployed through no fault of their own" are entitled to benefits in the form of "temporary partial wage replacement." Minn. Stat. § 268.03, subd. 1 (2018). When an employer discharges a worker for "employment misconduct," the worker is ineligible for all unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2018). Employment misconduct is defined as "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)(1)-(2) (2018).

By writ of certiorari, workers deemed ineligible for unemployment benefits may challenge the ULJ's decision. Minn. Stat. § 268.105, subd. 7(a) (2018). We may reverse or modify a ULJ's ineligibility determination if the worker's substantial rights "have been prejudiced" because the ULJ's "findings, inferences, conclusion, or decision" are, among other things, "affected by other error of law" or "unsupported by substantial evidence in view of the entire record as submitted." *Id.*, subd. 7(d)(4)-(5) (2018).

"Whether an employee committed employment misconduct is a mixed question of fact and law." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). "Whether the employee committed a particular act is a question of fact." *Id.* And we review a ULJ's factual findings "in the light most favorable to the decision," leaving those findings

undisturbed "as long as there is evidence in the record that reasonably tends to sustain them." *Wilson v. Mortg. Res. Ctr.*, 888 N.W.2d 452, 460 (Minn. 2016) (quoting *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011)). But "[w]hether a particular act constitutes disqualifying conduct is a question of law we review de novo." *Id.*

On appeal, Leuze challenges the ULJ's determination that Minnesota Valley discharged him for employment misconduct in three ways. Leuze contends that (A) the ULJ's decision lacks substantial evidence; (B) Minnesota Valley failed to follow its own discipline policy; and (C) the statutory chemical-dependency exception to ineligibility applies. We address each argument in turn.

A. Lack of substantial evidence

Leuze argues that the record evidence does not support the ULJ's decision. DEED argues that the ULJ correctly found that Minnesota Valley reasonably expected Leuze would report to work as scheduled. DEED also contends that "Leuze seriously violated [Minnesota Valley]'s reasonable expectations by using and possessing an illegal substance, resulting in his arrest, time in jail, and absence from work," and that "Leuze's conduct was intentional." DEED thus maintains that "[t]he ULJ correctly determined that Leuze's conduct was employment misconduct."

To address the parties' arguments, we determine whether substantial evidence supports the ULJ's findings. "Substantial evidence is defined as (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the

evidence considered in its entirety." *ITW Food Equip. Grp. LLC v. Minn. Plumbing Bd.*, 933 N.W.2d 523, 531 (Minn. App. 2019) (quotation omitted).

Here, substantial evidence establishes that law enforcement arrested Leuze in February 2019 on a probation-violation warrant after he tested positive for methamphetamine; he was jailed for two days and missed two work shifts, after which Minnesota Valley discharged him because of his absences. Based on this evidence, the ULJ determined that Leuze "serious[ly] violat[ed]" Minnesota Valley's reasonable expectations and his "conduct was intentional, negligent, or indifferent."

Absenteeism may be employment misconduct. *Stagg*, 796 N.W.2d at 317 (concluding employee's violation of employer attendance policy constituted a "serious violation" of the employer's reasonable expectations); *see also Torgerson v. Goodwill Indus., Inc.*, 391 N.W.2d 35, 37-38 (Minn. App. 1986) (affirming misconduct determination where relator's alcohol abuse caused his absence from work). We have held specifically that "[a]bsence from work due to incarceration for criminal acts is misconduct sufficient to disqualify an employee from receiving unemployment compensation benefits." *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 46 (Minn. App. 1984) (affirming misconduct determination where relator missed work while incarcerated for unpaid fines); *see also Winkler v. Park Refuse Serv., Inc.*, 361 N.W.2d 120, 123-24 (Minn. App. 1985) (affirming misconduct determination where relator's absence from work was because of his arrest).[2]

[2] *Cf. Jenkins v. Am. Exp. Fin. Corp.*, 721 N.W.2d 286, 290-91 (Minn. 2006) (reversing ULJ's misconduct determination because employee made diligent efforts to coordinate

In sum, substantial evidence shows that Leuze was absent from work for two days, his absences resulted from his arrest for a probation violation, and Minnesota Valley discharged him for absenteeism. And applicable law supports the ULJ's determination that Leuze committed employment misconduct because he violated his employer's reasonable expectation that he work as scheduled.

Still, Leuze contends that Minnesota Valley withdrew its objection to his application for unemployment benefits during the evidentiary hearing. Leuze asserts the ULJ "refused to let the employer withdraw its contest" and appears to believe that the ULJ should have deferred to Minnesota Valley's position. We find this argument unpersuasive for two reasons.

First, we disagree that the ULJ "refused" Minnesota Valley's withdrawal even though the ULJ's written decision did not state that Minnesota Valley withdrew its objection. To be clear, Minnesota Valley is a named party to these proceedings and expressed its position during the evidentiary hearing. (Minnesota Valley also had a chance to submit an appellate brief but did not file one.)

Second, Minnesota Valley's withdrawal is not relevant to the ULJ's eligibility determination. DEED is the administrator of unemployment benefits and "has the responsibility for the proper payment of unemployment benefits *regardless* of the level of interest or participation by an applicant or an employer in any determination or appeal."

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work release while incarcerated, employer told employee she could work while she served her sentence, therefore, substantial evidence did not show employee lacked substantial concern for employment).

Minn. Stat. § 268.069, subd. 2 (2018) (emphasis added). Therefore, the withdrawal of Minnesota Valley's objection, while noted, is irrelevant to Leuze's eligibility for benefits.

B. Minnesota Valley's discipline policy

Leuze contends that the ULJ erred by not considering that Minnesota Valley has hired many workers with criminal backgrounds and has reprimanded other employees with attendance problems related to substance abuse and criminal charges. DEED argues that, under Minnesota caselaw, an employer's failure to follow its own discipline practice or policy is immaterial to whether an employee has committed misconduct.

We agree with DEED. An employer's selective enforcement of workplace policies does not provide an employee with a defense to allegations of employment misconduct. *See Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986) (stating that employer's alleged selective enforcement of workplace rules is not a defense to employee misconduct), *review denied* (Minn. Aug. 20, 1986); *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986) (explaining violation of workplace rules by other employees is not a defense to employment misconduct). Similarly, "whether an employer follows the procedures in its employee manual says nothing about whether *the employee* has violated the employer's standards of behavior." *Stagg*, 796 N.W.2d at 316 (emphasis added). And, an employer's "failure to discipline other employees for [similar conduct] is irrelevant." *Wilson v. Comfort Bus Co., Inc.*, 491 N.W.2d 908, 912 (Minn. App. 1992), *review denied* (Minn. Jan. 15, 1993); *see also Dean*, 381 N.W.2d at 83.

Leuze points out that Minnesota Valley has a "progressive" discipline policy for employees struggling with chemical dependency and contends that Minnesota Valley did

not give him a warning or second chance. Eischens's testimony supports Leuze's point about the discipline policy, which is not mentioned in the ULJ's written decision. Even so, we conclude that the ULJ did not err because this evidence is irrelevant to whether *Leuze committed misconduct* by violating Minnesota Valley's reasonable expectation that he report to work as scheduled. *See Stagg*, 796 N.W.2d at 316; *Sivertson*, 390 N.W.2d at 871; *Dean*, 381 N.W.2d at 83. Because Minnesota Valley's discretionary application of its own workplace policies is irrelevant to Leuze's eligibility for benefits, his second argument is unavailing.

C. Chemical-dependency exception

In his brief to this court, Leuze states that he "has never denied his addiction to drugs while he was employed at [Minnesota Valley], nor did he deny it in his unemployment hearing." We understand Leuze to claim that a statutory exception covers his alleged employment misconduct. Minnesota Statutes section 268.095, subdivision 6(b)(9) (2018), provides that an employee's conduct is not employment misconduct if it "was a consequence of the [employee's] chemical dependency, *unless* the [employee] was previously diagnosed chemically dependent or had treatment for chemical dependency, *and since that diagnosis or treatment has failed to make consistent efforts to control the chemical dependency*." (Emphasis added.)

As discussed above, the ULJ found that Leuze is chemically dependent on methamphetamine, had completed treatment, and had attended support group meetings "from time to time." The ULJ also found that Leuze relapsed before the events leading to his discharge and that his arrest "was a consequence of chemical dependency." And the

ULJ found that Leuze "did not go to any" support group meetings after his relapse "and did not try to do anything else that would help him stop using methamphetamine." The ULJ concluded that because Leuze "stopped trying to get help with his chemical dependency after September 2018, his conduct does not fall within the chemical-dependency exception."

Substantial evidence supports the ULJ's findings that Leuze completed chemical-dependency treatment and maintained sobriety for a period, but he relapsed in early fall 2018 after a doctor prescribed opiates following a medical procedure. Leuze testified that he stopped attending support group meetings before the medical procedure. There is no other evidence in the record about Leuze trying to control his chemical dependency after his 2018 relapse.

Based on this record, we conclude that substantial evidence supports the ULJ's finding that Leuze failed to make consistent efforts to control his chemical dependency. *Cf. Kalberg v. Park & Recreation Bd. of Minneapolis*, 563 N.W.2d 275, 277 (Minn. App. 1997) (applying chemical-dependency exception to relator who maintained consistent participation in treatment despite absences from work). Thus, the ULJ correctly determined that the chemical-dependency exception to ineligibility does not apply to Leuze.

In sum, after considering Leuze's arguments and the record evidence, we conclude that substantial evidence and applicable law support the ULJ's determination that Leuze committed employment misconduct and is therefore ineligible for unemployment benefits. Therefore, we affirm in part.

II. The ULJ erred in determining that Leuze committed aggravated misconduct.

Leuze argues that missing two days of work is not aggravated misconduct. DEED disagrees and asserts that "[t]he ULJ correctly determined that Leuze's conduct was aggravated employment misconduct." DEED argues that Leuze possessed and used methamphetamine, which amounted to "a gross misdemeanor or felony," and that his conduct had a "significant adverse effect" on Minnesota Valley because he missed two shifts as a result of his arrest.

Aggravated employment misconduct is "any act, on the job or off the job, that would amount to a gross misdemeanor or felony if the act substantially interfered with the employment or had a significant adverse effect on the employment." Minn. Stat. § 268.095, subd. 6a(a)(1) (2018).[3] Here, the ULJ found that Leuze's drug possession and use "had a significant adverse effect" on his employment because it "predictably" led to "his arrest and incarceration" and "caus[ed] him to miss several work shifts."

We agree with the ULJ that law enforcement arrested Leuze on a probation-violation warrant for his use of methamphetamine and that possession of methamphetamine amounts to at least gross-misdemeanor-level conduct. *See* Minn. Stat. § 152.025, subds. 2, 4 (2018) (providing that possession of controlled substances is a crime subject to gross-misdemeanor or felony penalties, depending on amount and criminal

[3] A ULJ's determination that an employee has committed aggravated employment misconduct carries an added penalty from that given for employment misconduct: "[I]f the applicant was discharged from employment because of aggravated employment misconduct, wage credits from that employment are canceled and cannot be used for purposes of a benefit account." Minn. Stat. § 268.095, subd. 10(c) (2018); *see also* Minn. Stat. § 268.07, subd. 2 (2018).

history). And we agree with the ULJ that Leuze's conduct caused his two-day absence from work and that Leuze's absence from work may have had a significant adverse effect on Minnesota Valley.

Yet we find the ULJ's reasoning problematic. In order "[t]o disqualify a person from receiving benefits, the [aggravated] misconduct must be *the cause* of the discharge." *Hansen v. C.W. Mears, Inc.*, 486 N.W.2d 776, 780 (Minn. App. 1992) (emphasis added), *review denied* (Minn. July 16, 1992). In other words, an applicant is ineligible for unemployment benefits only if "the applicant was discharged *because of* aggravated employment misconduct." Minn. Stat. § 268.095, subd. 4(2) (2018) (emphasis added).

Here, the ULJ found that Minnesota Valley discharged Leuze because he was absent from work. Larson testified that Minnesota Valley discharged Leuze because of his absences, and did not know why Leuze was in jail. And there is no evidence in the record to suggest that Minnesota Valley was privy to any information about Leuze's incarceration. Thus, the record evidence shows that Minnesota Valley discharged Leuze because he was absent, *not* because he committed conduct amounting to a gross misdemeanor. Because the ULJ's aggravated-misconduct determination fails to adhere to the statutory definition of aggravated employment misconduct, *see* Minn. Stat. § 268.095, subd. 6a(a)(1), we reverse the ULJ's decision in part.

Affirmed in part and reversed in part.