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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1405**

Daniel Ojogwu,
Relator,

vs.

Macy's Retail Holdings, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 6, 2011
Affirmed
Shumaker, Judge**

Department of Employment and Economic Development
File No. 24830975-4

Daniel Ojogwu, St. Paul, Minnesota (pro se relator)

Macy's Retail Holdings, Inc., c/o TALX UCM Services, Inc., St. Louis, Missouri
(respondent employer)

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

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and
Shumaker, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Relator Daniel Ojogwu challenges an unemployment-law judge's (ULJ) determination that he is ineligible for unemployment benefits because he was discharged for misconduct for falsifying his job application. He also contends that the hearing with the ULJ was unfair. Because Ojogwu's failure to disclose an escape-from-custody conviction constituted a misrepresented fact that was material to his employment, and because the ULJ conducted a fair hearing and made appropriate credibility determinations, we affirm.

FACTS

Relator Daniel Ojogwu applied to work at Macy's using an online application form, and one of the questions on the application was "Have you ever been convicted of a crime other than a minor traffic violation?" Ojogwu answered "yes," and further explained that in 1992 he pleaded guilty to having insufficient funds in his checking account. Macy's hired him, and he began his job as a temporary part-time sales associate on November 15, 2008.

On or about December 18, 2008, Macy's ran a standard criminal background check on Ojogwu and found that he had been convicted of escape from custody and fifth-degree assault. On December 20, 2008, a Macy's representative spoke to Ojogwu about the convictions that showed up on the background check. Ojogwu denied the assault conviction, stating that the person listed on the Register of Actions was not him. Ojogwu

admitted that he did not disclose the escape-from-custody conviction on his application, stating that “he thought he didn’t need to because it stemmed from a traffic incident.”

On December 26, 2008, Macy’s human-resource manager told Ojogwu that, because he did not disclose all of his convictions on the application, he had not accurately answered, and thus he could not continue to work at Macy’s. During this conversation, Ojogwu indicated that he did not disclose the escape-from-custody conviction because “he felt that it was old, that it was 16 years ago, and that he hadn’t ever had an issue with any other employer.”

Respondent Minnesota Department of Employment and Economic Development (DEED) initially determined that Ojogwu was eligible to receive unemployment benefits, reasoning that the false information Ojogwu gave on the application was not relevant to the employment. Macy’s appealed, and a telephonic hearing was held by a ULJ.

At the hearing, Ojogwu testified that the escape-from-custody charge occurred when he came late to his shift at the workhouse while serving time for a conviction of driving without insurance. Ojogwu also admitted at the hearing that the fifth-degree assault conviction was in fact his. When the ULJ asked Ojogwu if he indicated on the online application that he had been convicted of escape from custody and fifth-degree assault, Ojogwu responded, “I’m not sure if I did, perhaps because there was not sufficient space to type the information.” Ojogwu testified that he thought it was only important to further explain the insufficient-funds conviction because he thought that was the only one related to the job for which he was applying.

Macy's terminated Ojogwu from employment because it felt that his failure to disclose the additional crimes was an integrity issue. A representative from Macy's testified at the hearing that "one of the basics of [Macy's] company standards is called Integrity Always." The standard is listed in the Macy's associate guidebook, and it means "to be truthful on all records, statements, applications, receipts, reports, etcetera . . . and [that] the commitments and expectations around them are absolute." Macy's had informed Ojogwu that failure to disclose all information on his application was grounds for discharge from employment. The representative also testified that such policy is noted throughout the application and hiring process, and is included in Macy's employment handbook, along with the terms and conditions of employment, "both of which [Ojogwu] signed off on." The representative stated that Macy's concern is that dishonesty on an application could have implications in terms of how the applicant will perform on the job.

The ULJ reversed the eligibility determination. The ULJ found that "the testimony of Macy's witnesses was plausible and logical and supported by credible evidence in the record," whereas "the testimony of Ojogwu was less plausible and less logical." She reasoned that "Ojogwu was not entirely forthcoming and his testimony appeared disingenuous at times," and she therefore gave greater weight to the testimony of Macy's witnesses. The ULJ found that Ojogwu "failed to honestly and accurately report [his convictions] when he was specifically instructed on the application," and that "[t]he testimony shows that Macy's has legitimate business reasons for asking about an employee's criminal history." She determined that Ojogwu's behavior was intentional

and was a serious violation of the standards of behavior Macy's had a right to reasonably expect; therefore, he was discharged for employment misconduct and ineligible for benefits.

Relator filed a writ-of-certiorari appeal to this court.

D E C I S I O N

On certiorari appeal from an unemployment-benefits decision, this court may affirm the ULJ's decision, remand for further proceedings, reverse or modify the decision if the relator's substantial rights were prejudiced because the findings, inferences, conclusion, or decision were affected by error of law, or arbitrary or capricious, or unsupported by substantial evidence in view of the whole record. Minn. Stat. § 268.105, subd. 7(d) (2008).

An employee discharged for misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct is "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." Minn. Stat. § 268.095, subd. 6(a) (Supp. 2009). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed the alleged act is a fact question. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

In determining an employer's standards of behavior, we look to the "employer's policies, rules, or reasonable requests." *Montgomery v. F & M Marquette Nat'l Bank*, 384 N.W.2d 602, 604 (Minn. App. 1986), *review denied* (Minn. June 13, 1986). As a general rule, an employee's knowing violation of an employer's policies, rules, or reasonable requests constitutes employment misconduct. *Id.* An employee who misrepresents facts during the hiring process or on an employment application commits employment misconduct, provided the misrepresentation is material to the position sought. *Santillana v. Cent. Minn. Council on Aging*, 791 N.W.2d 303, 307 (Minn. App. 2010); *Heitman v. Cronstroms Mfg., Inc.*, 401 N.W.2d 425, 428 (Minn. App. 1987).

Misrepresentation

In determining whether Ojogwu committed employment misconduct, we first consider whether he made a misrepresentation on the employment application. Ojogwu argues that he did not misrepresent facts in his application because he answered "yes" when asked on the application whether he had been convicted of a crime, and nowhere on the application does it then ask the applicant to give the details of the crimes for which he was convicted. This argument is without merit. The criminal-conviction question on the application clearly requests that the applicant explain any convictions and indicates that a conviction is not an automatic bar to employment but rather that Macy's will make an informed decision as to whether it should still hire the applicant. Furthermore, Ojogwu appears to have understood the purpose of the question because he provided details to explain his insufficient-funds conviction.

Ojogwu also argues that he did not intend to commit misrepresentation, believing genuinely and in good faith that his escape-from-custody conviction stemmed from a traffic offense and so he did not have to disclose it. *See Tuckerman Optical Corp. v. Thoney*, 407 N.W.2d 491, 493 (Minn. App. 1987) (stating that a good-faith misunderstanding of rules or policies does not constitute misconduct). But Ojogwu also stated that he did not disclose the information because it was old and he did not have enough space on the application, which tends to contradict his position that he believed in good faith that he did not have to disclose his escape-from-custody conviction because it stemmed from a traffic violation. He also failed to disclose the assault conviction, which he admitted was his at the hearing

We conclude that the ULJ did not err in determining that Ojogwu misrepresented his criminal history on the employment application.

Materiality of misrepresentation

The second consideration is whether the misrepresentation was material to Ojogwu's position at Macy's. *See Santillana*, 791 N.W.2d at 308. In *Santillana*, this court held that an applicant committed employment misconduct when she was hired based on her assertion that she left her previous position because she wanted part-time work, when she actually was terminated from her prior position for theft, and was ultimately convicted of a felony. *Id.* at 305-06. This court considered both the nature of fact the applicant had misrepresented during the hiring process (theft from senior citizens) and the duties she was expected to carry out in her position (handling seniors' confidential information), and concluded that the omission was material. *Id.* at 308.

Ojogwu was aware of the honesty and full-disclosure requirements on the hiring application, and such expectations and requirements are “standards of behavior the employer has the right to reasonably expect of the employee.” *See* Minn. Stat. § 268.095, subd. 6(a)(1). He was informed that failure to disclose all information on his application was grounds for discharge from employment, and he “signed off on” the application, the employment handbook, and the terms and conditions of employment, all of which explained Macy’s requirements of honesty and full disclosure. Ojogwu’s failure to disclose the convictions on the application violated Macy’s “Integrity Always” policy and the core values of the company, and Macy’s concluded that Ojogwu’s dishonesty in his application demonstrated a greater possibility that he would not conduct himself honestly in performing his job.

Ojogwu argued to the ULJ that the convictions he omitted were “old and were not relevant to his employment at Macy’s.” But the ULJ determined that

[w]hile those facts may have been considered by Macy’s prior to hiring him had they been disclosed, that is not the relevant issue here. Those issues do not change the fact that [Ojogwu] failed to honestly and accurately report [his convictions] when he was specifically instructed to on the application.

In this conclusion, the ULJ did not err. Ojogwu’s dishonesty was material to the issue of whether he would be hired and it immediately violated Macy’s “Integrity Always” policy.

Finally, Ojogwu argues that he did not receive a fair hearing because the ULJ based her findings on “plausibility and logic rather than factual evidence,” and that “the statement that Macy’s witness’s testimony was supported by credible evidence in the

record is outlandish and bogus.” But this argument appears to attack the ULJ’s credibility determinations, which are the exclusive province of the ULJ and will not be disturbed on appeal. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). The ULJ made the necessary credibility determinations and gave appropriate reasons for her determinations, which are supported by the record. *See* Minn. Stat. § 268.105, subd. 1(c) (Supp. 2009).

Ojogwu also makes some procedural arguments, which he asserts prejudiced his right to a fair hearing and due process: that the ULJ used “leading questions,” and failed to “investigate pertinent fact[s].” Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009), and Minn. R. 3310.2922 state that ULJs are not bound by the rules of evidence that govern civil and criminal cases. The ULJ asked relevant questions at the hearing, allowed each party, including Ojogwu, to ask questions and conduct cross-examination, as well as to give a closing statement. We conclude that the record shows that the ULJ conducted an appropriate hearing.

Affirmed.