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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1564**

David Lang,
Respondent,

vs.

City of Ortonville,
Relator,

Department of Employment and Economic Development,
Respondent.

**Filed June 27, 2011
Affirmed
Shumaker, Judge**

Department of Employment and Economic Development
File No. 24563855-3

Kevin Stroup, Stoneberg, Giles & Stroup, P.A., Marshall, Minnesota (for respondent
Lang)

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(for relator)

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Development, St. Paul, Minnesota (for respondent department)

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

UNPUBLISHED OPINION

SHUMAKER, Judge

Relator challenges the unemployment-law judge's (ULJ) finding that respondent is eligible for unemployment-compensation benefits. Because the ULJ was correct in concluding respondent did not commit employment misconduct, we affirm.

FACTS

Relator City of Ortonville employed respondent David Lang as city administrator (chief executive administrative officer) from April 30, 2007, until the city discharged him on January 25, 2010. One of the reasons for Lang's discharge stems from two work-related injuries he sustained. In March 2009, he fell on ice and suffered neck injuries requiring him to be absent from work for chiropractic treatments. In October 2009, Lang tripped, caught his hand in a file-cabinet drawer handle, fell to the floor, and broke a finger. This injury required surgery and three days' absence from work.

Lang received and endorsed over to the city a workers' compensation check for \$83.09 for the injury to his finger. He also took three days of sick leave and expected the city to divide his \$31.87-per-hour wage into the \$83.09 he received so as to credit him with two-and-a-fraction hours of sick leave. This was in accordance with a policy outlined by the League of Minnesota Cities (LMC). But Lang never received any credit, and so he spoke with the city's deputy clerk, Judy Roberts, who indicated that he would not receive credit. Lang gave Roberts a copy of an article from the LMC outlining its policy, but none of the sick leave he took was ever credited back to him. As a result, the

city benefitted twice – first, from Lang’s workers’ compensation check; and second, for the sick leave for which he did not receive credit.

When Lang received a workers’ compensation check of \$2,658.99 for his neck injury, he kept the check instead of endorsing it to the city. He did so because he intended to clarify with the city council the city’s position on reimbursement. He took sick leave and left the check at work without cashing it. Realizing that the city council was soon to be replaced by new members, Lang intended to wait until the change of leadership before broaching the issue. But before Lang had an opportunity to present his question to the council, the council discharged him. He then endorsed the check to the city.

The city council discharged Lang for malfeasance and gross misconduct, contending that he should not have claimed sick leave for his injury-related absences but should have signed over the workers’ compensation check and continued to receive his regular pay. The city council also cited Lang’s personal use of his work laptop as a reason for discharge. On appeal, the city argues that Lang’s failure to reimburse the city for his wife’s attendance at work banquets was also a reason for discharge.

Lang applied for unemployment-compensation benefits through the Minnesota Department of Employment and Economic Development (DEED). A DEED administrator initially deemed him eligible for benefits. The city appealed, and a de novo evidentiary hearing was held before a ULJ. The ULJ concluded Lang was not discharged for failing to reimburse the city for his wife’s attendance at work banquets but only for the personal use of his work computer and his failure to endorse his workers’

compensation check to the city. The ULJ also concluded that Lang's "infrequent use" of the laptop and his retention of the check were not serious violations of the city's reasonable expectations and were thus not employment misconduct. The city requested reconsideration. The ULJ affirmed on reconsideration, and the city appealed to this court.

DECISION

Standard of Review

This court may affirm, remand for further proceeding, reverse, or modify the decision of the ULJ if the relator's substantial rights were prejudiced because the decision was based on unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (2010). "Whether an employee committed employment misconduct is a mixed question of fact and law." *Skarhus v. Davanni's*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether the employee committed a particular act is a question of fact, but whether the employee's acts constitute employment misconduct is a question of law. *Id.*

This court reviews the ULJ's factual findings "in the light most favorable to the decision." *Id.* This court will not disturb the ULJ's factual findings when the evidence substantially sustains them. *Id.* However, this court "will exercise its own independent judgment in analyzing whether an applicant is entitled to unemployment benefits as a matter of law." *Irvine v. St. John's Lutheran Church of Mound*, 779 N.W.2d 101, 103 (Minn. App. 2010).

An employee who commits misconduct is ineligible for unemployment-compensation benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). 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.” *Id.*, subd. 6(a) (2010).

Workers’ Compensation Check

The city contends that Lang’s retention of his workers’ compensation check was employment misconduct. The ULJ disagreed, finding that Lang had not cashed the check and had made efforts to determine what to do with it before eventually signing it over to the city. This issue is entirely one of credibility. This court gives deference to the ULJ’s credibility determinations. *Skarhus*, 721 N.W.2d at 344.

Lang testified that he kept the check because the city had not credited his sick leave after his first injury and had thus been compensated twice for the sick time he took. He testified that he questioned Judy Roberts about this, and she told him the city had never done that before. He testified that he intended to question the new city council about the matter once the new members took over, and that he neither cashed the check nor took it from his office, informing Roberts and another city employee that the check was in his office. He testified that he was unaware of any city policy requiring him to sign the check over within a certain period of time. He testified he received the check approximately two to three months before he was discharged and signed it over when he knew he would be discharged.

In response, the city cites to a letter Lang wrote to the ULJ prior to the evidentiary hearing as evidence that Lang never intended to clarify the issue with the city council but instead intended to keep the check and cash it later. But Lang's letter merely expresses confusion over the reimbursement process. He had previously signed over a workers' compensation check in accordance with the LMC's policy and had not been reimbursed. He testified that he was unaware of any other policy or practice by the city regarding reimbursement. In its brief, the city acknowledges that its practice is different from its policy of paying an employee "the difference between the amount received from Workers' Compensation and his[] salary." Whether Lang was to follow the city's practice or its policy is unclear, and the ULJ found Lang's allegation of confusion credible, a determination to which we now defer.

Misuse of City Funds

The city contends that Lang improperly used city funds to pay for his wife's attendance at four work banquets. The ULJ found that this was not a reason for his discharge. This court reviews the ULJ's factual findings "in the light most favorable to the decision" and will not disturb them when the evidence substantially sustains them. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moore Assocs., LLC v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996).

There is substantial evidence to support the ULJ's finding that Lang was not discharged for misusing city funds to pay for his wife's attendance at work banquets. DEED found no evidence that the city raised this issue with Lang prior to March 2010,

which was two months after he was discharged. Lang testified that the city did not cite this as a reason for his discharge. The city council meeting notes from the date of Lang's discharge do not cite this as a reason for his discharge. Neither the city's attorney nor the council member who testified at the unemployment hearing could confirm that this was a reason for Lang's discharge.

Personal Use of Work Computer

The city contends that Lang's personal use of his work computer was employment misconduct. The ULJ concluded that this was not a serious violation of the standards of behavior the city had a right to expect of Lang. *See* Minn. Stat. § 268.095, subd. 6(a) (stating employment misconduct includes negligent conduct that displays "(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").

The only evidence of Lang's personal computer usage is his own testimony in which he admitted that he periodically used his work laptop to check personal e-mail. The city presented no evidence of the particulars so as to show that it was excessive or dissimilar to the usage of other employees, or was a serious offense in some specific way. Neither of the city's witnesses at the hearing provided evidence to rebut Lang's testimony that he only minimally used his work computer for anything other than work. The evidence supports the ULJ's conclusion that Lang did not commit employment misconduct.

Affirmed.