STATE OF MINNESOTA
IN COURT OF APPEALS
A10-975

Brian Burgeson,
Relator,

vs.

West Publishing Corp.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 26, 2011
Reversed
Collins, Judge[*]

Department of Employment and Economic Development
File No. 23703709-3

Brian Burgeson, Burnsville, Minnesota (pro se relator)

Susan E. Ellingstad, Lockridge Grindal Nauen, P.L.L.P., Minneapolis, Minnesota (for 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 Worke, Presiding Judge; Kalitowski, Judge; and Collins, Judge.

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

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

COLLINS, Judge

On appeal from a decision of the unemployment law judge (ULJ) ruling relator ineligible for unemployment benefits, relator argues that the ULJ (1) erred by concluding that he was discharged for employment misconduct, because the conduct for which he was discharged was not prohibited by his employer, and (2) failed to conduct a fair and impartial hearing. We reverse.

FACTS

Relator Brian Burgeson began working as a "Large Law Firm sales representative" for respondent West Publishing Corporation (West) in September 2003. Under Matthew Specht's management, Burgeson had been trained that he had complete discretion in granting order-price discounts of up to 20% to customers. Sales representatives often granted such discounts to customers in order to keep the total order price under $2,000. The $2,000 "threshold" was important because West had a policy requiring customers placing orders priced at more than $2,000 to sign a written contract. There was no written policy governing the discounts and, in practice, sales representatives were not required to obtain management approval before granting a discount.

In January 2009, Eric Gleason replaced Specht as manager. According to Gleason, the policy with respect to discounts did not change when he took over. Gleason explained that the policy authorized sales representatives to grant discounts of up to 20%

to their customers, but only when the customer specifically requested a discount or, in some other way, objected to the price.

On October 12, 2009, Burgeson received a written warning regarding "splitting orders." A West internal quality control assessment found that Burgeson had a high volume of orders that were split to keep them under $2,000, as well as processing standing orders as new orders. The warning specified that Burgeson could not split an order or enter a renewal order as a new order "to avoid the need for a customer signed contract."

Three days later, an order was placed with Burgeson by Ann O'Callahan, an employee of one of his best customers. Burgeson routinely granted discounts to this customer and on this occasion O'Callahan did not ask for a discount or complain about pricing. Nonetheless, when Burgeson processed the order, he told O'Callahan that "I'll give you a little discount there to get that under $2,000." Burgeson then discounted the order specifically to "reduce the order beneath $2,000" so he "wouldn't have to send out a contract, which [this customer] did not like."

About an hour later, O'Callahan called back and placed another order. Burgeson then consulted Gleason to alert him that O'Callahan had placed two separate orders and that Burgeson had not split orders. Gleason looked up the sales records and found that Burgeson had discounted O'Callahan's first order. When questioned, Burgeson admitted that O'Callahan had not requested the discount.

On October 26, 2009, Burgeson was discharged for initiating the discount to avoid the contract requirement without having received a customer concern about pricing. An

adjudicator for respondent Department of Employment and Economic Development determined that Burgeson was eligible for unemployment benefits because he was discharged for reasons other than employment misconduct. West appealed that determination and, following a de novo hearing, the ULJ concluded that Burgeson was discharged for employment misconduct and therefore ineligible for benefits. Burgeson filed a request for reconsideration with the ULJ, who affirmed. This certiorari appeal followed.

D E C I S I O N

On certiorari appeal, this court reviews the ULJ's decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are affected by error of law 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). "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.

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). Employment misconduct is not "inefficiency or inadvertence," "simple unsatisfactory conduct," "poor performance because of inability or incapacity," or "good faith errors in judgment if judgment was required." *Id.*, subd. 6(b) (Supp. 2009).

Here, the ULJ found that Burgeson signed a written warning on October 12, 2009, and that "[w]hatever Burgeson's understanding was of the employer's policy prior to that warning, that October 12, 2009 warning informed Burgeson that he could no longer engage in conduct for the purpose of circumventing the $2,000 contract threshold." The ULJ also found that three days after the warning, Burgeson engaged in similar conduct "for the purpose of avoiding the need for a customer signed contract." Thus, the ULJ concluded that "Burgeson's conduct amounts to employment misconduct," rendering him ineligible for unemployment benefits.

Burgeson argues that the focus of the October 12 letter was conduct completely separate and distinct from the conduct for which he was discharged. Specifically, Burgeson asserts that the conduct for which he received the warning was for "splitting orders," which he admitted was prohibited. But, as Burgeson contends, he was discharged because he granted an order-price discount to a customer when the customer had not requested it. According to Burgeson, West had no policy prohibiting the conduct for which he was discharged and, in fact, West's sales representatives commonly engaged in such practice. Thus, Burgeson argues that because West did not prohibit the conduct

for which he was discharged, the ULJ erred in concluding that he was discharged for employment misconduct. We agree.

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.* (emphasis added). But a good-faith misunderstanding of rules or policies does not constitute misconduct. *Tuckerman Optical Corp. v. Thoeny*, 407 N.W.2d 491, 493 (Minn. App. 1987).

Here, the record shows that Burgeson was discharged because he provided a discount to a customer in order to keep the total order price under the $2,000 threshold without the customer having requested a discount or disputed the price. Burgeson was not discharged for splitting orders or processing order renewals as new orders, which were the stated reasons for the October 12 warning letter. The October 12 letter does not expressly prohibit the discount practice engaged in by Burgeson. Moreover, the record indicates that there was confusion regarding West's policy pertaining to this practice: West contended that it had a policy prohibiting Burgeson's conduct and that he was aware of the policy; Burgeson testified that no policy prohibiting the conduct for which he was discharged existed, and that West's sales representatives routinely granted customers discretionary discounts. The previous manager, Specht, gave Burgeson complete discretion, and Gleason testified that the discount policy did not change, although he also testified that the policy applied only when the customer requested a

discount or objected to the price. It is undisputed that West's purported policy was not in writing. We conclude that Burgeson's conduct stemmed from no more than a good-faith misunderstanding of West's policy, which is not employment misconduct. *See Tuckerman Optical*, 407 N.W.2d at 493. It is also undisputed that the customer here was routinely granted discounts, accounting for the lack of a request on this occasion. Therefore, on this record, we hold that the ULJ erred in concluding that Burgeson was discharged for employment misconduct.

Because the ULJ erred in concluding that Burgeson was discharged for employment misconduct, we need not address his claim that the ULJ failed to conduct a fair and impartial hearing.

Reversed.