STATE OF MINNESOTA
IN COURT OF APPEALS
A11-109

David Kleinschmidt,
Relator,

vs.

City of Lewiston,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 15, 2011
Affirmed
Connolly, Judge

Department of Employment and Economic Development
File No. 24765858-6

David P. Jendrzejek, Moss & Barnett, A Professional Association, Minneapolis, Minnesota (for relator)

Jennifer A. Gumbel, Springer & Gumbel, P.A., Preston, Minnesota (for respondent)

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

Considered and decided by Wright, Presiding Judge; Shumaker, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible to receive unemployment benefits because he was discharged for employment misconduct. Because substantial evidence in the record shows that relator committed employment misconduct by providing misleading and evasive information to his employer, we affirm.

FACTS

The City of Lewiston employed relator David Kleinschmidt as the chief of police from September 2008 to March 5, 2010. In February 2008, Kleinschmidt began his employment with the city as an interim police officer and was subsequently promoted to full-time officer. He then became interim chief of police in September 2008 until he was promoted to permanent chief of police in November 2008. Kleinschmidt submitted three different resumes when applying for these positions.

In two of his resumes, Kleinschmidt listed Premiere Security, including duties performed for the company, under his work experience. Premiere is owned by Daniel Walker, the city's interim chief of police who interviewed Kleinschmidt for the interim police officer position in February 2008. Walker and Kleinschmidt first became acquainted when they both worked as police officers for the Wabasha Police Department several years before Kleinschmidt became employed with the city. In 2007, Walker asked Kleinschmidt if he would be willing to be placed on a roster of employees for Premiere to call in case of emergencies. Kleinschmidt agreed, but was never called to

perform any services and therefore never worked at Premiere. In October 2009, the city terminated Walker's employment and held a post-termination hearing at which Kleinschmidt testified.

At the hearing, the following dialogue between the city attorney and Kleinschmidt took place:

> Q: Did you know Dan Walker before coming on the police force?
> A: I know of him by what people said about him on the street.
> Q: Did you know each other personally?
> A: I have never been a neighbor to him.
> Q: Have you ever worked for him at his company?
> A: Never.
> Q: Did you know him prior to coming to Lewiston?
> A: I knew who he was because of his security company. Everybody around here knows him for that.

The city later found out that Kleinschmidt had listed Premiere on his resume under his work experience and that Kleinschmidt had known Walker before his employment with the city. Based on the discrepancies between Kleinschmidt's testimony at Walker's post-termination hearing and the information it subsequently became aware of, the city terminated Kleinschmidt's employment finding that "[he] was not truthful, honest and candid" which "negatively impacts [his] abilities to perform official police officer functions and seriously diminishes the [city's] confidence in [his] leadership and overall job performance."

Kleinschmidt applied for unemployment benefits with respondent Minnesota Department of Employment and Economic Development (DEED). DEED determined that Kleinschmidt was ineligible for benefits and Kleinschmidt appealed the

determination to a ULJ. Following an evidentiary hearing, the ULJ issued a decision concluding that Kleinschmidt was eligible for benefits. The city requested that the ULJ reconsider the decision. The ULJ ordered an additional evidentiary hearing and issued a decision reversing her prior decision, concluding that Kleinschmidt was discharged for employment misconduct and was therefore ineligible for benefits. Kleinschmidt requested that the ULJ reconsider the decision, and the ULJ issued an order affirming the decision. This certiorari appeal followed.

D E C I S I O N

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. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). "Whether the employee committed a particular act is a question of fact." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We view the ULJ's findings of fact in the light most favorable to the decision and defer to the ULJ's credibility determinations, and we will not disturb factual findings if they are supported by substantial evidence. *Id.* But whether an employee's act constitutes employment misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). "Employment misconduct means 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). Employment misconduct does not include inefficiency or inadvertence, simple unsatisfactory conduct, poor performance because of inability or incapacity, or good-faith errors in judgment. *Id.*, subd. 6(b)(2)-(3), (5)-(6) (2010). This definition of employment misconduct "is exclusive and no other definition applies." *Id.*, subd. 6(e) (2010).

As a general rule, an employee's "knowing violation of an employer's policies, rules, or reasonable requests constitutes misconduct." *Montgomery v. F&M Marquette Nat'l Bank*, 384 N.W.2d 602, 604 (Minn. App. 1986), *review denied* (Minn. June 13, 1986). "Dishonesty that is connected with employment may constitute misconduct." *Baron v. Lens Crafters, Inc.*, 514 N.W.2d 305, 307-08 (Minn. App. 1994) (explaining that employee who falsely claimed to have trained store managers committed employment misconduct). "Even a single incident can be misconduct if it represents a sufficient enough disregard for the employer's expectations." *Blau v. Masters Rest. Assocs.*, 345 N.W.2d 791, 794 (Minn. App. 1984); *see Frank v. Heartland Auto. Servs., Inc.*, 743 N.W.2d 626, 630-31 (Minn. App. 2008) (holding that even a single act of dishonest conduct can constitute employment misconduct because employer has the right to rely on integrity of employees).

The ULJ explained the misconduct determination as follows:

> The [ULJ] finds that the answers that Kleinschmidt provided during Walker's post-termination hearing in October of 2009 were both evasive and misleading. The facts show that Kleinschmidt had become acquainted with Walker several years prior to coming to Lewiston because the two of them worked together for the Wabasha Police Department. The two were well enough acquainted that Walker contacted Kleinschmidt to serve as an on-call security officer for Walker's private security company. The [ULJ] finds that Kleinschmidt's lack of candor and unwillingness to be forthcoming when questioned by the city council was a serious violation of the standards of behavior the City of Lewiston had a right to reasonably expect. Such behavior would diminish trust and call into question Kleinschmidt's abilities to perform the duties necessary as the chief-of-police. This is employment misconduct.

Kleinschmidt presents three arguments in support of his claim that his conduct was not employment misconduct. First, he argues that the answers he provided at the post-termination hearing were not false or dishonest and were a good-faith error in judgment. This argument is unpersuasive because substantial evidence in the record supports the ULJ's finding that the answers were evasive and misleading, and therefore dishonest. Kleinschmidt testified that he had "never" worked for Premiere even though he listed Premiere on his resume. Under Premiere, his resume states, "Perform security for businesses, check doors, walk around and make sure everything is safe, report problems to supervisor." This indicates that Kleinschmidt did in fact work for Premiere and supports the ULJ's finding that his answer was misleading and evasive. Kleinschmidt's answers about only knowing "of" Walker "by what people said about him on the street" and "because of his security company" were similarly evasive and misleading in light of

the fact that Kleinschmidt, several years before his employment with the city, worked with Walker in the Wabasha Police Department and was asked by Walker in 2007 to join a roster of on-call employees for Premiere. Furthermore, there is no evidence to suggest that Kleinschmidt's answers were a good-faith error in judgment.

Second, Kleinschmidt argues that "[w]hether or not [his] answer to the City Attorney's question was true or false, it is clear that it was not material to [his] position as Chief of Police." Kleinschmidt's attempt to trivialize the seriousness of misleading and evasive communications by a chief of police to the city that employs him is unconvincing because even Kleinschmidt agreed with the city attorney at the evidentiary hearing that honesty and forthcoming in his dealings with his employer is very important to his position. Thus, substantial evidence in the record shows that any misleading or evasive answers by Kleinschmidt to the city would constitute unreasonable conduct in light of the duties and conduct that is expected of the chief of police and would be material to his position. Because Kleinschmidt provided misleading and evasive answers to the city, his conduct was unreasonable and material to his position.

Finally, Kleinschmidt argues that the ULJ erred as a matter of law when she failed to consider that his conduct was a single incident. "If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct." Minn. Stat. § 268.095, subd. 6(d) (2010). Whether an employee's actions constitute employment misconduct is a question of law which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804. Kleinschmidt's evasive and misleading answers to the

city represented a serious disregard for his employer's expectations of the chief of police, who the city "had to be able to take [the word of] over other individuals." Consequently, the fact that Kleinschmidt's conduct was a single incident does not mean that it does not rise to the level of misconduct. *See Blau*, 345 N.W.2d at 794 ("Even a single incident can be misconduct if it represents a sufficient enough disregard for the employer's expectations."). Under these circumstances, Kleinschmidt's conduct constituted employment misconduct.

Affirmed.