STATE OF MINNESOTA
IN COURT OF APPEALS
A11-208

Nicky Buff,
Relator,

vs.

Leone Enterprises, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 19, 2011
Affirmed
Peterson, Judge

Department of Employment and Economic Development
File No. 26085534-3

Maurice W. O'Brien, Miller O'Brien, Minneapolis, Minnesota (for relator)

Leone Enterprises, Inc., Anoka, Minnesota (respondent employer)

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

Considered and decided by Kalitowski, Presiding Judge; Peterson, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

PETERSON, Judge

Relator challenges the decision by an unemployment-law judge (ULJ) that he is ineligible to receive unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Relator Nicky Buff worked for respondent Leone Enterprises, Inc., from January 2002 through September 3, 2010. The employer provides janitorial services for a number of different buildings, and relator worked as an area supervisor, supervising 35 to 40 employees who worked at different buildings.

Employees were required to clock in by telephone when they reached their buildings. When an employee was more than 10 or 15 minutes late, an automatically generated text message would be sent to the employee's area supervisor and to Hugh Reichert, the employer's operations manager. An area supervisor who received a message about a late employee was required to try to determine the employee's status, first by checking the computer system, in case the employee checked in but did so incorrectly, and then by calling and, if necessary, going to the building, in case the employee was there but had forgotten to check in. The area supervisor was required to call Reichert to report on the employee's status within one hour after receiving a message about a late employee. It was important for Reichert to be notified about the employee's status so that a substitute employee could be sent to the building, if necessary.

The employer submitted documentation showing that relator failed to call Reichert within one hour of receiving a message about a late employee three times in 2003, twice in 2004, once in 2009, and five times in 2010. Jerry Leone, the owner of Leone Enterprises, Inc., testified that relator failed to call in within one hour 50 or 60 times. Reichert testified that he reminded relator "countless times" that relator must call in within one hour after receiving a report of a late employee.

Relator testified that he sometimes failed to call within one hour because he was working with customers. Relator admitted that Reichert was angry about that and that Reichert emphasized the importance of calling within one hour. Relator testified that sometimes he did not call on time because he was dealing with other problems and that calling on time was not always his highest priority because most of his employees had worked for him for five to seven years and, although they might sometimes clock in incorrectly or arrive late, he could count on them to do their jobs well and not let him down. Relator admitted that he once failed to call on time because his phone was low on power, despite instructions to have his phone on and at full power at all times.

Relator filed a claim for unemployment benefits with respondent Department of Employment and Economic Development. A department adjudicator determined that relator had not committed employment misconduct and, therefore, was eligible for unemployment benefits. The employer appealed to a ULJ. Following an evidentiary hearing, the ULJ determined that relator is ineligible for unemployment benefits because he was discharged for misconduct. Relator filed a request for reconsideration, and the ULJ affirmed the initial decision. This certiorari appeal followed.

D E C I S I O N

This court reviews a ULJ's decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence in view of the record as a whole or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2010). This court views factual findings in the light most favorable to the decision and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Whether an employee committed misconduct is a mixed question of fact and law. *Stagg v. Vintage Place*, 796 N.W.2d 312, 315 (Minn. 2010). Whether the employee committed a particular act is a fact question, which we review in the light most favorable to the decision and will affirm if supported by substantial evidence. *Skarhus*, 721 N.W.2d at 344. Whether an employee's act constitutes employment misconduct is a question of law, which we review de novo. *Stagg*, 796 N.W.2d at 315.

A person who is discharged because of employment misconduct is ineligible to receive 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). 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).

Citing Reichert's testimony that he believed that relator's failure to call within one hour was due to a lack of organizational skills, rather than being intentional, and that Reichert believed that relator cared about his work and tried to be conscientious, relator argues that the conduct for which he was discharged was due to inefficiency, inadvertence, poor performance due to inability, mistake of judgment, or simple unsatisfactory performance. But the ULJ found that "[relator's] continued failure to make one simple phone call was fully supported by facts and admitted by [relator]. [Relator's] repeated failure to call Reichert within an hour of receiving a text message was [employment misconduct]."

The ULJ explained:

> [Relator] intentionally did not return the phone calls. He chose to do something else, be it participate in a prolonged conversation with another customer, or track down the employee without informing Reichert. No judgment was required here. [Relator] was expected to call every time he received a text message. This is not simple unsatisfactory conduct. This was a repeated pattern of refusing to do what his employer asked of him. [Relator] cannot have reasonably believed that his employer did not consider this phone call a priority. He was warned several times that his job could be in jeopardy if he failed to make the phone call. [Relator] testified that he did not call within an hour on some occasions because he was fixing something else for another customer. It is not credible that he did not have time to look at his phone for an entire hour, especially after he had been warned five times that he needed to.

Relator's testimony about having other priorities and counting on his employees to get the job done is substantial evidence that supports the ULJ's finding that relator intentionally did not call within one hour of receiving a message about a late employee.

Relator argues that the employer's testimony that it could sometimes be the correct judgment call to fail to call within an hour because a supervisor was engaged with a customer shows that relator's conduct was at worst a good-faith error in judgment. But this argument takes Jerry Leone's testimony out of context. Leone testified:

> Q: Mr. Leone, is it an acceptable excuse that he was talking to another customer and that's why he didn't call within the hour?
> A: If I truly believed that, maybe that would be an excuse. I don't believe that all, all 50 or 60 times he did this, he was correct.
> Q: Mr. Leone, in your experience, have you talked to customers who were angry or upset?
> . . . .
> A: Yes.
> Q: Okay. Have you ever had one of those conversations last more than an hour?
> A: No, Judge, it's janitorial. It's just not that tough.
> Q: And so, if a customer was upset about something that hadn't been cleaned correctly and then you went out and fixed it, would that take more than an hour?
> A: No.
> Q: On average. I know they're all different.
> A: Just minutes. The conversations take just minutes. And they, all they care is that they notified you and then you say, yes, you notified me and I'm going to take care of it and then you basically make eye contact with them, you know what, it's taken care of. They don't want to talk about it. They've got other business to do.
> Q: And so, would that, how long would you say on average the whole conversation between you and the customer would take?
> A: Just minutes. But I, I just was going to say, but I do believe that was one of our, one of the things that we were kind of upset with [relator], because I think [relator] could turn it into a 20 minute to a half-hour conversation. And I don't think that would, that's not right and that's not good to do and he shouldn't be doing it and that's what we were trying to get him not to do.

In the order denying reconsideration, the ULJ found:

> On this point, the employer credibly testified that no conversation about cleaning or other janitorial problems would take an hour. Even if [relator] wanted to fix a customer's complaint, there is nothing in the record to suggest he could not have told the customer that he needed to call the office, and then fix the customer's complaint.

Relator argues that even accepting the employer's testimony, he had a 97% success rate in returning calls within an hour, "a number that seems inconsistent with intention[al], negligent or indifferent conduct." But relator continued to fail to call within an hour after repeated warnings by the employer about the importance of doing so and after Reichert became angry when relator failed to call within an hour because relator had been engaged with a customer. Even a single incident of deliberately choosing a course of action adverse to the employer can constitute misconduct. *Colburn v. Pine Portage Madden Bros., Inc.*, 346 N.W.2d 159, 160-61 (Minn. 1984). Relator's failure to call Reichert within one hour after an employee failed to clock in was intentional conduct on the job that seriously violated a standard of behavior that the employer had the right to reasonably expect of relator.

Affirmed.