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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2309

Charles Payson,
Respondent,

vs.

Foreign Affairs of Duluth, Inc.,
Relator,

Department of Employment and Economic Development,
Respondent.

Filed September 10, 2012
Affirmed
Hooten, Judge

Department of Employment and Economic Development
File No. 28497903-3

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Charles Payson, Maple, Wisconsin (pro se respondent)

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Considered and decided by Wright, Presiding Judge; Worke, Judge; and Hooten, Judge.

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

HOOTEN, Judge

Relator employer challenges the determination of an unemployment-law judge (ULJ) that respondent employee did not commit employment misconduct and was eligible for unemployment benefits after his discharge from employment. We affirm.

FACTS

Respondent Charles Payson worked as an automotive technician for Foreign Affairs of Duluth, Inc. from June 6, 2006, until August 26, 2011. He worked between 30 and 40 hours per week and earned $20 per hour at the time of his discharge. Jeffrey Hofslund, relator's owner, claimed that the employee was discharged from his position for failing to perform accurate work on vehicles and that such failure constituted employment misconduct which made the employee ineligible for unemployment benefits.

The employee received his first warning about "negligent work" on July 12, 2011, after servicing a valve-cover gasket on an Audi automobile. Hofslund discovered that the fuel injection wiring harness had been pinched under the valve cover, causing the fuel injectors to short out, damaging an oxygen sensor, and filling the crankcase with fuel. Upon discovery of this problem, Hofslund informed the employee that he needed to "stop using his cell phone so much" and that "his frequent interruptions were affecting his work quality." Hofslund told the employee that, because this was his "first real major incident concerning this kind of problem," it would not be a problem if there were no further incidents.

Hofslund cited several other incidents which were indicative of the employee's deficient performance. On July 15, 2011, the employee overfilled the transmission fluid on a customer's Mercedes-Benz automobile, causing a large puddle of oil to spill on the customer's driveway. On July 29, 2011, the employee performed a brake repair, after which the caliper fell off because he failed to secure or replace the bolts. On August 26, 2011, a Volvo automobile that the employee serviced in April 2011 had to be towed to the shop because he failed to secure the vehicle's angle gear case fill level plug, causing it to fall off of the gear case. Hofslund specifically reminded the employee to tighten the fill plug and was assured by the employee that this would be done. However, the employee interrupted his work on the Volvo to answer his cell phone and assured Hofslund that he would complete the work while still on his call. The employee was discharged for poor work performance the same day that the Volvo was towed to the shop.

After the employee's discharge, Hofslund discovered several other incidents which occurred before July 12, 2011, when the employee failed to properly service various vehicles. For instance, Hofslund explained that the employee improperly secured a rear wheel bearing, failed to check a headlight and license plate light, injected too little air into tires, and improperly installed new parking brake cables.

In addition to these instances of poor work performance, there were numerous instances when the employee was given a repair order listing various items for completion but would move on to the next job before completing all the listed items. Hofslund stated that he did not believe that the employee was performing his job

to the best of his ability, that the employee was often distracted by his phone and other personal business, and that the employee had informed the shop's bookkeeper that "he really didn't want to be here." Finally, Hofslund stated that the employee had provided him with a few years of good work but that his performance had declined over time.

The employee explained the incidents of deficient work that resulted in his discharge. While he did not specifically recall working with the Volvo, he explained that his usual practice when working on an angle gear was to hold a wrench in his hand while checking the fluid and then to immediately tighten the plug before marking the job as complete on the work order. He explained that the oil ring seal may have broken in half during tightening, or that he may have been interrupted during the job. He also explained that he did not usually answer his phone when working on a vehicle.

With respect to the brake job from July 29, 2011, the employee did not know what happened to the caliper but acknowledged that it somehow got loose or fell off. He offered to replace the parts with his own money. The employee testified that he was frequently interrupted while working on vehicles in order to complete other jobs, and that he would leave his wrench hanging on the bolt of a vehicle in order to remind himself to finish a job. He did not remember if he was interrupted in such a manner on July 29, 2011.

The employee denied adding too much transmission fluid to the Mercedes-Benz on July 15, 2011, and stated that he properly secured the bolts on the transmission pan with a digital torque wrench. He did not recall working on the Audi on July 12, 2011, with the pinched fuel injection wiring. However, the employee stated that he later

learned that these wires are condensed into a wire loom and that they may have come loose from the loom, making them more susceptible to be pinched by the valve cover.

With respect to failing to complete all items on a work order, the employee conceded that this occurred "several times." He explained that this also happened to other technicians because they would either not receive a work order or would receive an order after they had already started working on a vehicle pursuant to Hofslund's verbal instructions. This caused certain items to be overlooked, especially when the work orders contained many items or when items were added mid-way through work on a vehicle. The employee admitted that he may have inadvertently overlooked some items on work orders, but testified that he never did so purposefully. The employee further explained his poor performance by stating that he was still learning how to work with foreign vehicles and was unable to obtain answers from relator about work-related concerns.

The ULJ found the employee's testimony "more credible because it was more detailed and certain" and concluded that the employee performed his job to the best of his ability prior to his discharge. The ULJ found that, while relator may have had legitimate business reasons to discharge the employee, the employee did not commit "employment misconduct" under Minn. Stat. § 268.095, subds. 4(1), 6(a) (2010). The ULJ affirmed the decision upon relator's request for reconsideration. This appeal follows.

D E C I S I O N

This court may affirm, remand, reverse, or modify the decision of a ULJ if a party's substantial rights have been prejudiced because the decision is not supported by

substantial evidence, is arbitrary or capricious, derives from improper procedure, or is affected by error of law. Minn. Stat. § 268.105, subd. 7(d) (2010).

An applicant who was discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1). Employment misconduct is "any intentional, negligent, or indifferent conduct" that displays "a serious violation of the standards of behavior the employer has the right to reasonably expect," or "a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a). However, misconduct does not include conduct that was a consequence of inefficiency, inadvertence, inability or incapacity, or "simple unsatisfactory conduct." *Id.*, subd. 6(b). This definition "is exclusive and no other definition applies." *Id.*, subd. 6(e).

"'Whether an employee committed employment misconduct is a mixed question of fact and law.'" *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 822 (Minn. App. 2010) (quoting *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006), *review denied* (Minn. Sept. 29, 2010)). "Whether the employee committed a particular act is a question of fact." *Id.* (quotation omitted). "Factual findings are reviewed in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ, and will not be disturbed when the evidence substantially sustains them." *Id.* "But whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo." *Id.* (quotation omitted). "When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the

unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c).

Relator argues that the ULJ erred in determining that the employee's work performance resulting in his discharge did not constitute employment misconduct. In support of its claim, relator cites numerous cases where employee misconduct results in an employee's ineligibility for unemployment benefits. *See, e.g.*, *Lawrence*, 785 N.W.2d at 823 (employee discharged due to nonwork related loss of license necessary for the performance of his job duties); *Marn v. Fairview Pharmacy Serv. LLC*, 756 N.W.2d 117, 121–22 (Minn. App. 2008) (employee discharged for attempting to interfere with the employer's contract), *review denied* (Minn. Dec. 16, 2008); *Frank v. Heartland Auto. Serv., Inc.*, 743 N.W.2d 626, 630 (Minn. App. 2008) (employee charged a customer for a repair service that he knew had not been provided); *Skarhus*, 721 N.W.2d at 344 (employee discharged for stealing food); *Barstow v. Honeywell, Inc.*, 396 N.W.2d 714–16 (Minn. App. 1986) (employee committed employment misconduct through an overall pattern of conduct, including leaving work without punching out, unexcused tardiness, absences from work, neglecting to perform a weld check, and leaving his work area to engage in extended nonwork-related conversation with another employee). However, all of these cases are distinguishable from the current factual situation in that the employee's actions resulting in his discharge, aside from a few personal interruptions, were directly related to the quality of the performance of his immediate job responsibilities.

Relator also argues that a finding of employment misconduct can be based upon instances of an employee failing to comply with an employer's directives. *See, e.g.*,

Schmidgall v. FilmTec Corp., 644 N.W.2d 801, 804–06 (Minn. 2002) (employee's refusal to abide by an employer's reasonable policies and requests may constitute disqualifying misconduct); *McGowan v. Exec. Express Transp. Enter., Inc.*, 420 N.W.2d 592, 596 (Minn. App. 1988) (holding that a failure to perform task incidental to employee's duties, but found to be reasonably delegated by employer and in the best interests of employer, constituted misconduct); *Bibeau v. Resistance Tech., Inc.*, 411 N.W.2d 29, 31–32 (Minn. App. 1987) (affirming finding of employment misconduct in light of finding that relator deliberately chose not to obey her employer's instructions to perform quality assurance checks); *Woodward v. Interstate Office Sys.*, 379 N.W.2d 177, 180 (Minn. App. 1985) (affirming finding of employment misconduct in light of finding that discharged employee had failed to respond to memoranda as directed by employer).

Unlike the cases cited by relator, the ULJ concluded that the employee was discharged because of inadvertence or unsatisfactory conduct relating to his poor work performance when servicing vehicles brought to relator's shop for repair. The ULJ concluded that the employee credibly testified that he remained committed to his job, a determination that is supported by the plausible explanations about his deficient repair jobs and the excuse that the poor performance could occur because of work-related interruptions. The ULJ also found credible employee's claims that his cell phone use did not interfere with his employment. *See Bray v. Dogs & Cats Ltd. (1997)*, 679 N.W.2d 182, 185 (Minn. App. 2004) (concluding that employee's job performance did not constitute employment misconduct because employee attempted to be a good employee but was unable to perform her duties to the satisfaction of the employer).

Finally, relator contends that the employee's deficient work performance constituted employment misconduct in light of the severe and possibly dangerous consequences of his mistakes. However, in determining whether an employee has committed misconduct, "the focus of the inquiry is the employee's conduct." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 316 (Minn. 2011). The consequences of deficient job performance may be relevant if the record supported a finding that the employee's poor work performance was intentional, negligent or indifferent and that the employee was cognizant of the possible results of such conduct.

Because the ULJ found that the employee credibly explained his poor work performance and there is substantial evidence in the record that supports this finding, the ULJ did not err in concluding that the employee did not commit employment misconduct.

Affirmed.