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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-802**

Roger W. Laudenbach,
Relator,

vs.

Electrolux Home Products, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 6, 2012
Affirmed
Minge, Judge**

Department of Employment and Economic Development
File No. 26754036-3

Carol Lewis, St. Cloud, Minnesota (for relator)

Electrolux Home Products, Inc., Columbus, Ohio (respondent employer)

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

Considered and decided by Larkin, Presiding Judge; Klaphake, Judge; and Minge,
Judge.

UNPUBLISHED OPINION

MINGE, Judge

Relator challenges the findings of an unemployment law judge (ULJ) that he was discharged for employment misconduct and not eligible for unemployment benefits. We conclude that the ULJ did not err in finding that relator's actions constituted employment misconduct and that any error in finding a violation of the employer's harassment policy was not prejudicial. We affirm.

FACTS

Relator Roger Laudenbach worked for respondent-employer Electrolux Home Products, Inc. from March 1992 until December 2010. Annually, Electrolux distributes to its employees a harassment policy, stating that sexual harassment is "any inappropriate behavior, which, because of an individual's gender, has the effect of creating a hostile, intimidating, or otherwise unpleasant work environment." In August 2009, a female coworker of Laudenbach complained that he made inappropriate comments to her. Laudenbach admitted that he made inappropriate comments, and, as a consequence, Electrolux briefly suspended his employment. As a condition of being reinstated, Laudenbach signed a "Final Warning" stating that he would "read and abide by the Company's Harassment Policy" and that his employment would be immediately terminated "[s]hould [he] ever again demonstrate such conduct."

On December 9, 2010, one of Laudenbach's coworkers reported that Laudenbach intentionally tapped a female coworker's buttocks with an empty cardboard box. The female coworker reluctantly verified the incident and stated that it appeared Laudenbach

intentionally tapped her. Laudenbach denied the incident but admitted that he had accidentally tapped a different female coworker on her buttocks. That coworker verified that she is “touched quite often on the butt, thigh, [and] rib area” by coworkers emptying boxes but didn’t “think anything of it because it happens quite often regardless of who’s working there.” During the ensuing investigation by Electrolux, a third female coworker reported that Laudenbach intentionally tapped her buttocks.

Electrolux concluded that Laudenbach had violated their harassment policy and terminated his employment. Laudenbach applied for unemployment benefits, but respondent Department of Employment and Economic Development (DEED) determined that Laudenbach had committed employment misconduct and was ineligible for benefits. Laudenbach appealed the ineligibility determination for consideration by a ULJ. After an evidentiary hearing, the ULJ found that Laudenbach failed to adhere to his employer’s harassment policy and that such failure constituted employment misconduct, rendering him ineligible to receive unemployment benefits. On reconsideration, the ULJ affirmed this decision. This certiorari appeal follows.

D E C I S I O N

The issue on appeal is whether the ULJ erred in concluding that Laudenbach’s conduct constituted employment misconduct. This court may reverse, remand, or modify the decision of a ULJ if “the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision” are affected by an error of law or unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d) (2010). Substantial evidence is defined as “(1) such relevant evidence as a reasonable

mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; [or] (4) more than any evidence.” *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Employment misconduct includes “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) (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 a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* This court reviews the ULJ’s 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).

Laudenbach argues that the record does not contain substantial evidence that he violated the Electrolux harassment policy.¹ But, even assuming Laudenbach is correct that his conduct did not constitute a violation of the harassment policy, the record still

¹ For support, Laudenbach cites to definitions of sexual harassment contained within the Minnesota Human Rights Act, Minn. Stat. §§ 363A.01–.43 (2010), and various United States and Minnesota Supreme Court decisions. However, it is immaterial whether Laudenbach’s conduct would constitute sexual harassment under the Minnesota Human Rights Act or federal law; rather, assuming the harassment policy is relevant, the definition contained within Electrolux’s policy controls.

contains substantial evidence that Laudenbach made inappropriate comments in 2009 and intentionally tapped two female coworkers on their buttocks in 2010. The coworker who reported the 2010 incident signed a written statement that he observed Laudenbach “tap [a female coworker] on the butt with an empty cardboard box & thought it was inappropriate and told . . . my supervisor.” The female coworker signed a written statement that Laudenbach “came up behind me and hit a cardboard box on my butt.” At the evidentiary hearing, an Electrolux representative testified that the female coworker “was reluctant to come forward, but when she did come forward she stated that [Laudenbach] did it intentionally.” The Electrolux representative also testified that the other female coworker who came forward with a report “told me that she thought [Laudenbach’s conduct] was intentional.” Although Laudenbach testified that his conduct was accidental, the ULJ determined that the Electrolux representative’s testimony was more credible than Laudenbach’s testimony. We defer to the ULJ’s credibility determinations.

The ULJ determined that such conduct was inappropriate and that Electrolux had a legitimate interest in preventing such conduct in its factory. An employer has the right to expect that its employees will treat other employees professionally and with respect, and that they will refrain from touching other employees in an inappropriate manner. Male employees tapping female employees on the buttocks is clearly inappropriate. Thus, Laudenbach’s conduct was a serious violation of the standards of behavior Electrolux had a right to reasonably expect of its employees. Moreover, because of Laudenbach’s previous warning regarding the harassment policy, his behavior demonstrated a

substantial lack of concern for his employment. Electrolux warned Laudenbach that further harassment misconduct would result in immediate termination from employment. When Laudenbach intentionally tapped his female coworkers on the buttocks, he engaged in inappropriate behavior and took a significant risk that his coworkers would feel intimidated or threatened in the workplace.

Therefore, without reaching the question of whether Laudenbach's conduct was a violation of the Electrolux harassment policy, his behavior still constituted employment misconduct. Because this court will not reverse or modify a ULJ's decision unless an error is prejudicial and because any ULJ mistake regarding the harassment policy does not affect our misconduct conclusion, we affirm the ULJ's ineligibility determination.

Affirmed.

Dated: