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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2046**

Robert J. Bradley,
Relator,

vs.

Harvest, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 20, 2013
Affirmed
Connolly, Judge**

Department of Employment and Economic Development
File No. 29904375-3

Robert J. Bradley, Minneapolis, Minnesota (pro se relator)

Harvest, Inc., Wayzata, Minnesota (respondent)

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

Considered and decided by Stoneburner, Presiding Judge; Worke, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that he was ineligible for unemployment benefits because he had been discharged for employment misconduct for breach of his duty of loyalty and for insubordination when, following dissolution proceedings between his parents who jointly owned the business, he took his mother's side, diverted employer funds to his own use, and deleted data from his employer's laptop. Relator argues that: (1) he was terminated from employment by his father solely because of the dissolution between his parents and he did not engage in employment misconduct; and (2) he always followed his mother's directions while he was employed, before and after the dissolution proceedings. Because the record substantially supports the ULJ's determination that relator was terminated for employment misconduct, we affirm.

FACTS

Respondent Harvest Inc. was formed in 1992 by relator Robert Bradley's parents, Thomas and Deborah Bradley. Harvest Inc. does business as Nature's Harvest, a floral and garden center gift shop. Thomas and Deborah Bradley formed a second company, Harvest Goods, in 2002. Harvest Goods is a wholesale company that sells décor at tradeshow and online. Relator began working for Harvest Inc. on December 9, 1998.

Thomas and Deborah Bradley each own 50% of both Harvest Inc. and Harvest Goods. Thomas serves as the president and CEO of the companies, while Deborah is the vice-president, treasurer, and CFO. The companies' bylaws state that the president and

CEO shall have “general supervision over the affairs of the corporation and over the other officers.” The bylaws also state that the companies’ funds are to be withdrawn only upon the check or order of the CFO and must be countersigned by the CEO.

In November 2011, Thomas and Deborah separated, and Deborah moved out of the couple’s home. Thomas filed for divorce in December 2011. The couple’s separation was acrimonious, and they fought over control and operation of the businesses. Their three sons, including relator, became involved in these business disputes.

On December 30, 2011, relator and his brother opened bank accounts at Wells Fargo under the names Harvest Inc. and Harvest Goods, with their mother’s authorization. On January 6, 2012, relator transferred funds from one of these accounts to his personal account. Deborah told relator to transfer these funds to cover a paycheck that had been issued to him but was returned due to insufficient funds. Thomas was unaware of the existence of these accounts until he received a debit card from Wells Fargo in January 2012.

Due to their pending divorce, Thomas and Deborah agreed not to work at the store at the same time. Instead, Deborah was to work between 1 a.m. and 1 p.m. on even days and between 1 p.m. and 1 a.m. on odd days, while Thomas worked the opposite schedule. Relator began working at Nature’s Harvest only while Deborah was at the store. Beginning in January 2012, Thomas sent relator multiple e-mails requesting him to work while Thomas was scheduled, but relator chose to work only while Deborah was scheduled.

During the course of his employment, relator received a laptop computer from Thomas and Deborah because his job required significant work during nonstandard business hours. He used the laptop for personal and professional purposes. During February and March 2012, Thomas sent relator multiple e-mails requesting that relator return the laptop. Relator instead gave the laptop to Deborah, who returned it to Thomas in late March 2012. Before returning the laptop, relator attempted to erase the computer's hard-drive.

Thomas had a computer technology analyst perform a forensic examination of the computer. The analyst found that relator's personal use of the laptop had been extensive. Thomas also suspected that relator was overstating the hours he worked, and the forensic examination revealed inconsistencies in relator's reported hours, such as hours where the laptop had not been used but relator had reported working from home.

On June 8, 2012, Thomas discharged relator for assisting in diverting company funds, repeated acts of insubordination, and timecard discrepancies. Relator applied for unemployment benefits with respondent, the Minnesota Department of Employment and Economic Development (DEED). DEED issued a determination that relator was ineligible for benefits because he had been discharged for employment misconduct. Relator appealed the determination, and a ULJ conducted a de novo hearing in which relator and Thomas, representing Harvest Inc., participated and were represented by legal counsel. The ULJ concluded that relator was discharged because of employment misconduct. Relator filed a request for reconsideration and submitted new evidence to the ULJ. But the ULJ concluded that relator had not shown good cause for not having

previously submitted the evidence, and even if he had submitted the evidence, the result would be the same. Therefore, the ULJ affirmed his decision. This certiorari appeal follows.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2012).

An employee who is discharged for 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) (2010). “[C]onduct an average reasonable employee would have engaged in under the circumstances” and “good faith errors in judgment if judgment was required” are not considered employment misconduct. *Id.*, subd. 6(b)(4), (6) (2010). The misconduct definitions set out in the statute are exclusive and “no other definition applies.” *Id.*, subd. 6(e) (2010).

“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 a particular act constitutes employment misconduct is a question of law, which we review de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). But whether the employee committed the particular act 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).

The ULJ concluded that relator’s “insubordination and inaccurate time reports were serious violations of the standards of behavior his employer had the right to reasonably expect of him and demonstrated a substantial lack of concern for his employment.” Relator does not deny many of his actions in this case. He admits that he opened the Wells Fargo bank accounts without Thomas’s knowledge, that he erased his laptop’s hard-drive, and that he refused many of Thomas’s directives. He argues, however, that the laptop was a personal gift that he could use for personal reasons, he was unable to take direction from Thomas because he was not allowed to work during Thomas’s hours, and he did not falsify his hours, which were approved by Deborah.

First, relator acknowledges opening a bank account without Thomas’s knowledge and diverting company funds to that account. Respondent argues that he did so at Deborah’s direction, that he had always taken direction from Deborah throughout his employment, and that it was reasonable for him to continue to do so. While relator

opened the account under Deborah's direction, this act was done with Deborah's, and not the company's, best interests in mind. "[E]mployees owe a duty of loyalty to their employers." *Marn v. Fairview Pharmacy Servs., LLC*, 756 N.W.2d 117, 121 (Minn. App. 1987). Relator owed a duty of loyalty to Harvest Inc., and not just to Deborah. Opening a secret account at her behest was not "conduct an average reasonable employee would have engaged in under the circumstances." Minn. Stat. § 268.095, subd. 6(b)(4). Rather, it was "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." *Id.*, subd. 6 (a)(1).

Next, relator ignored e-mail requests Thomas sent to him in January 2012 requesting that relator work at the store during Thomas's hours. Refusing to carry out the reasonable requests of an employer is employment misconduct. *Schmidgall*, 644 N.W.2d at 806. Relator's refusal to work hours requested by the company CEO is an intentional violation of the standards of behavior an employer has the right to reasonably expect and demonstrated a substantial lack of concern for his employment.

Relator argues that he did not ignore requests by Thomas that he work during Thomas's hours. He submits incident reports from the Wayzata Police Department showing that Thomas called the police to have relator removed from the business's premises during Thomas's work hours. But relator did not include this documentation at the original evidentiary hearing.¹ Moreover, the ULJ considered this information when

¹ Relator also includes documentation and an argument relating to back-pay that he is owed and a pending case with the Minnesota Department of Labor. But this evidence was not raised at the original hearing and has no bearing on whether relator was terminated for employment misconduct.

relator requested reconsideration. The ULJ affirmed his decision and did not order a new hearing based on these new assertions, finding that the police report was not inconsistent with the finding that relator refused requests by Thomas to work at Nature's Harvest after January 1. This is because the incident reports were issued in April and June of 2012 and do not prove that Thomas did not previously want relator to work during Thomas's scheduled hours. Moreover, the documentation submitted by relator shows that it was at a settlement conference on March 28, 2012, that the parties agreed that relator would work only during Deborah's scheduled hours.

Finally, relator had timecard discrepancies and used his work computer for personal use. Relator argues that the laptop was a personal gift from his parents, that he erased the hard-drive to prevent Thomas from seeing personal files, and that he worked all of the hours submitted. Where, as here, the ULJ's misconduct determination rests on disputed evidence and credibility is central to the ULJ's decision, the ULJ is required to make credibility findings and "must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2012). "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus*, 721 N.W.2d at 345. The ULJ found relator's testimony on these issues was not credible:

Testimony that [Thomas] and [Deborah] gave [relator] the laptop computer four years ago in appreciation for his services and authorized personal use, as well as his attempt to explain the inconsistencies in hours he reported that he was working and gaps in the computers use, were contrived and not credible.

The ULJ also found that, "[t]he testimony from [Thomas] was believable, corroborated by reliable documentation and presented a more likely sequence of events." Because the

ULJ set out his reasons for crediting the employer's testimony, and because the record supports the findings, we must defer to his credibility determinations and factual findings.

Affirmed.