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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2327**

Albert L. Bushman,
Relator,

vs.

K Mart Corporation,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 9, 2013
Reversed
Stoneburner, Judge**

Department of Employment and Economic Development
File No. 30069953-3

Albert L. Bushman, Grand Rapids, Minnesota (pro se relator)

K Mart Corporation, c/o TALX UCM Services, Inc., St. Louis, Missouri (respondent employer)

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

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and

Bjorkman, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that his employment was terminated for employment misconduct, making him ineligible for unemployment benefits. Because we conclude that relator's conduct did not constitute employment misconduct as defined in Minn. Stat. § 268.095, subd. 6 (2012), we reverse.

FACTS

Relator Albert Bushman was employed as general manager of a K Mart Corporation store. In 2011, Bushman's store earned an award of about \$1,200 from an award program that had been in effect for approximately two years. In late December 2011 or early January 2012, Bushman's district manager reminded all general managers that award funds not used by the end of the fiscal year (January 28) had to be returned to the corporation. At that time, Bushman's store had remaining award funds in the amount of \$380.

On January 1, 2012, K Mart issued updated guidelines applicable to 2012 award funds. The record does not include a copy of prior guidelines or any evidence of what, if any, changes were made in the 2012 guidelines. The 2012 guidelines state, in relevant part, that store managers should "make every effort to spend [the funds] for the equal benefit of all/most team members"; that store managers must get prior approval for the expenditures from a district manager; that "misuse, non-use or fraudulent use [of the

funds] will result in disciplinary action, up to and including termination”; and that funds “cannot be used to give cash awards [] including [K Mart] gift cards to team members”¹

Before the end of the fiscal year, Bushman, without the knowledge or permission of his district manager, directed a subordinate to put the balance of the award funds on a K Mart gift card (also referred to as a cash card) and to put the card under the tray in the office safe. At Bushman’s direction, the card was later used on several occasions to help the store meet daily donation goals established for each store in K Mart’s participation in a fundraising program for the March of Dimes charity. K Mart’s witnesses testified that K Mart expected that money for the charity would be solicited only from customers.

K Mart’s loss-prevention manager investigated and concluded that Bushman’s use of the award funds violated K Mart’s ethics policy.² K Mart terminated Bushman’s employment for this violation.

Bushman applied for unemployment benefits with the Minnesota Department of Employment and Economic Development (DEED). DEED initially found him eligible for benefits, and K Mart appealed. After a de novo hearing, the ULJ concluded that Bushman was discharged for employment misconduct and was therefore ineligible for benefits. Bushman requested reconsideration, and the ULJ affirmed. This appeal by writ of certiorari followed.

¹ But the policy allows store managers to give “items” to team members as long as the value of the item does not exceed \$25.

² K Mart did not produce a copy of the ethics policy and K Mart’s witnesses did not know the wording of the specific policy Bushman allegedly violated, but they testified that Bushman was not terminated for any other policy or rule violation.

DECISION

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). “But whether the act committed by the employee constitutes employment misconduct is a question of law, which [this court] review[s] de novo.” *Id.* “This court views the ULJ’s factual findings in the light most favorable to the decision [and] gives deference to the credibility determinations made by the ULJ. As a result, this court will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citations omitted), *review denied* (Minn. Oct. 1, 2008).

“Employment misconduct means any intentional, negligent, or indifferent conduct . . . 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)(1), (2) (2012).

The ULJ found that Bushman violated K Mart’s award-program guidelines in several respects:

He did not consult with the [district manager] . . . He intentionally put the money on a Kmart gift card rather than return the money to Kmart as instructed by the Guidelines. He . . . failed to show that the team members approved his giving the money to the March of Dimes. . . . Bushman intentionally failed to comply with the policy that the money was to be distributed to the benefit of the team members. He

used the funds for a purpose other than as provided in the policy. Instead he chose to donate the money to meet goals set for fundraising which benefited Bushman. He either negligently failed to supervise or oversee the assistant managers and human resource leads in the handling and distribution of the money from the Kmart card.

The record plainly supports the finding that Bushman did not get the district manager's approval to put the funds on a K Mart gift card or to use the funds to meet the store's charity-giving goals. The record does not as plainly support a finding that the purchase of the gift card for future use of the funds violated the guidelines or that using the money to meet the store's charity-giving goals violated the guidelines, but we defer to the ULJ's factual findings. Nonetheless, we conclude that the facts found by the ULJ do not support the conclusion that Bushman's conduct constituted a serious violation of K Mart's standards of behavior or show a substantial lack of concern for his employment.

The record does not establish that K Mart clearly identified to general managers some of the policies that Bushman was found to have violated. Although the district manager testified that it was K Mart's "clear expectation" that donations to the charity were to come from customers only, no written or oral policy to that effect is in evidence, and the guidelines do not specifically prohibit use of the funds for charity. The record also demonstrates that any benefit to Bushman of the store meeting charity-giving goals was minimal.³

³ K Mart's witnesses stated that the benefit to Bushman would have been that he would not have had to train cashiers to request donations from customers, but there is no evidence that Bushman's cashiers were not trained or did not appropriately ask for donations. And the record shows that the only other benefit of the store meeting donation goals involved the store receiving a plaque.

The ULJ did not find that putting the funds on a gift card constituted a violation of K Mart's policies, and we note that there is no evidence of a K Mart policy stating, or even suggesting, that money used to procure a gift card has not been spent. At the hearing, one of K Mart's witnesses characterized procurement of the gift card as a purchase. The ULJ's finding of a violation appears to focus on the timing of the gift-card purchase at the end of the fiscal year to avoid returning the funds to K Mart. Even if such use of the funds violated K Mart's policies, we conclude that this violation does not rise to the level of employment misconduct.

Nor do we conclude that Bushman's one clear violation of the award-program guidelines—his failure to get prior approval from the district manager for use of the funds—supports the ULJ's conclusion that Bushman's employment was terminated for employment misconduct as defined in Minn. Stat. § 268.095, subd. 6(a)(1). Failure to get prior approval is not evidence of misuse of company funds, and the district manager testified that the sole reason for Bushman's termination was violation of K Mart's ethics policy by misuse of company funds. A person may not be disqualified from receiving benefits based on misconduct that was not the basis of the termination of employment. *See Hansen v. C.W. Mears, Inc.*, 486 N.W.2d 776, 780 (Minn. App. 1992) (where employment was terminated based on employer's general feeling that the employee could not be trusted, the employee could not be disqualified from benefits based on alleged misconduct that was not the basis for the termination decision), *review denied* (Minn. July 16, 1992). Additionally, based on the uncontroverted evidence that K Mart had not required strict compliance with the prior-approval guideline in the past, we conclude that

this violation does not show “a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee” or “lack of concern for the employment” that would meet the definition of employment misconduct under Minn. Stat. § 268.095, subd. 6(a)(1), (2).⁴

Because we conclude that Bushman’s conduct does not meet the statutory definition of employment misconduct, we reverse the ULJ’s determination that Bushman is ineligible for unemployment benefits. Because of this decision, Bushman’s procedural arguments are moot.

Reversed.

⁴ K Mart concedes that it knew Bushman had spent more than \$800 of the award funds on an employee holiday party without prior approval from the district manager but that it neither objected to nor disciplined him for this apparent policy violation.