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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0284**

Ryan Goebel,
Relator,

vs.

Casey's General Store, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed October 15, 2012
Affirmed
Harten, Judge***

Department of Employment and Economic Development
File No. 28323840-5

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Casey's General Store, Inc., St. Louis, Missouri (respondent)

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Considered and decided by Hudson, Presiding Judge; Stauber, Judge; and Harten,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HARTEN, Judge

Relator challenges the decision of the unemployment law judge (ULJ) that relator's failure to disclose three prior criminal convictions when asked to do so on his job application violated the standard of behavior his employer had a right to expect, and that relator was therefore discharged for misconduct and was ineligible for unemployment benefits. Because failure to disclose criminal convictions when asked by a prospective employer to do so is misconduct within the meaning of Minn. Stat. § 268.095, subd. 6(a) (2010), we affirm.

FACTS

In 1996, relator Ryan Goebel was convicted of misdemeanor theft; in 1997, he was convicted of gross misdemeanor check forgery and of fifth-degree criminal sexual conduct. In April 2011, he filled out an application at respondent Casey's General Store (Casey's) for work as a part-time pizza cook. Relator answered "No" to the application question asking if he had "ever been convicted of a crime other than a routine traffic violation."

In May 2011, relator began work as a part-time cook. In July 2011, relator's store manager was informed of relator's convictions and discharged him for giving false information on his job application.

When relator applied for unemployment benefits, respondent Minnesota Department of Employment and Economic Development (DEED) determined that he was ineligible. Relator appealed. During the telephone hearing, relator's attorney argued that

relator's falsification of his job application was not material to his job as a pizza cook, and therefore was not employment misconduct. The ULJ determined that Casey's representative was more credible than relator, that relator had intentionally falsified his employment application, and that the falsification was misconduct because it violated Casey's reasonable expectation that relator had honestly completed the application.

In requesting reconsideration, relator asserted that no claim or evidence showed that relator's falsification of his application was material to his job. The ULJ set aside the previous decision and scheduled a second telephone evidentiary hearing to obtain "[f]urther testimony . . . from [Casey's] regarding whether [relator's] misrepresentation of his criminal convictions was material to his employment." Following that hearing, the ULJ issued a second opinion affirming the first decision and adding two additional reasons for the decision. First, Casey's representative had credibly testified that she did not know whether the convictions relator had failed to disclose would have disqualified him from employment but, if he had revealed them, she would have asked Casey's corporate office about hiring him. Second, relator's failure to disclose was serious because it affected Casey's ability to trust relator in such matters as reporting his work hours and handling inventory.

Relator again requested reconsideration, asserting that Casey's representative's testimony was untruthful. Because the first ULJ was no longer employed by DEED, another ULJ issued an order stating that he had reviewed and agreed with the credibility findings of the first ULJ and affirmed the previous opinion. Relator sought certiorari

review, claiming that submitting false information on an employment application is not employment misconduct within the meaning of Minn. Stat. § 269.095, subd. 6(a).¹

DECISION

Whether a particular act constitutes employment misconduct is a question of law, which this court reviews de novo. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. 1 Oct. 2008).

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)(1)-(2). This statute has been construed in regard to misrepresentations during the hiring process:

[A] material misrepresentation during the hiring process . . . [fits] within the statutory definition of employment misconduct. Intentionally misrepresenting a fact that is material to employment shows a substantial lack of concern for the employment. A person making a material misrepresentation during the hiring process is therefore ineligible for unemployment benefits if he or she is later discharged because of the misrepresentation.

Santillana v. Cent. Minn. Council on Aging, 791 N.W.2d 303, 307 (Minn. App. 2010)
(citation omitted).

¹ We agree with the parties that a third ULJ, who issued an opinion in response to relator’s request for reconsideration, lacked jurisdiction over the matter because by that time relator had petitioned for and been granted certiorari by this court.

Relator argues that his failure to disclose his convictions was not material to his employment. It is true that relator's theft, check forgery, and criminal sexual conduct were not related to cooking pizza. But "material to employment" does not mean only competence at the task performed: an employer is responsible for the employee's behavior in the workplace, even when that behavior is only tangential to the employee's duties. Thus, tangential behavior can also violate the standards of behavior an employer has a right to reasonably expect and be employment misconduct.

Casey's representative was questioned about relator's tangential behavior in the workplace:

Q. Did [relator] also have access to the cash register . . .
[?]

A. Every employee punches in and punche[s] out on our cash register. So technically yes, he would have access to the register.

Q. . . . [D]id he have any access to the money that was in the cash register[?]

A. If he hit the no sale button, sure.

....

Q. Did [relator] have access to the employer's inventory during his time there [?]

....

A. Yes.

Q. Was there anything of value that he had access to[?]

A. Anything in the store. Cigarettes, food [H]e had full access to anything in the store.

- Q. And other than taking orders did he have any other interaction with customers in the store[?]
- A. He could chat with any customer he wanted really. . . . if he was walking out on the floor or something he could interact with any customer we had.
- Q. As a cook was he ever required to fulfill any duties that brought him out onto the floor[?]
- A. Burnishing the floors at night, and . . . hav[ing] access to the freezer and the coolers out there to restock the food in the kitchen. . . . [Cooks are] out on the floor quite a bit actually because our freezer is all the way in the back of the store so they've got to walk all the way through the store to access their frozen food.

This testimony supports the ULJ's finding that:

The preponderance of the evidence shows that [relator's] violation was serious because it affected [the employer's] ability to trust [relator. Relator's] misrepresentation had a negative impact on the employer. It would be reasonable for an employer to no longer trust [relator] with such things as handling inventory, correctly reporting work hours and other duties related to his employment.

Relator's theft, check forgery, and criminal sexual conduct may have been immaterial to his performance as a pizza cook, but they were not immaterial to his behavior as an employee with access to cash and inventory and contact with customers. Employment misconduct is not limited to faulty performance of a task or to the on-the-job activity; it includes "any conduct, on the job or off the job[,] that displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee" Minn. Stat. § 268.095, subd. 6(a). Casey's had a right, arguably even a duty, to discover if prospective employees had a history of dishonest or

inappropriate behavior. Thus, honesty in filling out a job application was a standard of behavior Casey's had the right to reasonably expect, and relator violated that standard.

The ULJ's determination that relator's misrepresentation had a negative impact on Casey's reflects the holding in *Santillana*. *Santillana* concerned an employee of the Central Minnesota Council on Aging (CMCA), who said that she left her previous employer because she wanted part-time work; in reality, she was discharged because she had been charged with theft from a vulnerable adult, a crime of which she was subsequently convicted. 719 N.W.2d at 305. The employee argued that this misrepresentation was not material. *Id.* at 307. We rejected that argument: "Given relator's job duties [including use of a database of confidential client information] and CMCA's legitimate concerns about continuing to employ her after discovering her conviction, it is unlikely that CMCA would have hired relator had she disclosed the real reason for her separation from [the previous employer]. This indicates materiality." *Id.* at 308.

Here, relator lied by stating that he had no prior convictions when in fact he had three. Dishonesty, like the theft in *Santillana*, could have influenced Casey's not to hire him, which "indicates materiality." *Id.* Alternatively, relator's dishonesty could have led Casey's not to trust him in connection with other matters, which would also indicate materiality. *See Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (employee's theft of food with a minimal dollar value had a "significant adverse impact" on employer because employer could no longer entrust employee to handle money and account for sales).

