STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0135

Michael Loud,
Relator,

vs.

Transit Team, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed November 25, 2013
Affirmed
Hooten, Judge

Department of Employment and Economic Development
File No. 30257015-3

Peter B. Knapp, James Ortmann, Certified Student Attorney, St. Paul, Minnesota (for relator)

Transit Team, Inc., Minneapolis, Minnesota (respondent employer)

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

Considered and decided by Hooten, Presiding Judge; Halbrooks, Judge; and Stauber, Judge.

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

HOOTEN, Judge

Relator, who was discharged from employment as a road supervisor for using a Metro Mobility vehicle in a manner prohibited by his employer's contract with the Metropolitan Council, challenges the conclusion of an unemployment law judge (ULJ) that he was discharged for employment misconduct and therefore was ineligible for unemployment benefits. Because the record substantially sustains the ULJ's finding that relator's conduct amounted to a serious violation of the standards of behavior that his employer had the right to reasonably expect, we affirm.

FACTS

Relator Michael Loud began employment for respondent Transit Team, Inc. (Transit Team) in January 2001 and worked full-time as a road supervisor until his discharge on September 24, 2012. Pursuant to contract, Transit Team operates the Metro Mobility program for the west half of the Minneapolis/St. Paul metropolitan area for the Metropolitan Council. Transit Team's contract with the Metropolitan Council constitutes 90% of its business. The Metropolitan Council owns Metro Mobility vehicles and leases these vehicles to Transit Team for an amount that "is nothing in comparison to the value of the vehicles." Thus, a provision of the Transit Team handbook entitled "Company Vehicles" provides that "Metro Mobility vehicles are . . . never [used] for any personal errands of any kind. We do not own the Metro Mobility vehicles; therefore, any unauthorized use of a Metro Mobility vehicle . . . can result in a $5,000 fine to the Company and is grounds for immediate termination." A separate provision of the

handbook entitled "Use of Company Property and Facilities" establishes that "[u]se of [company assets, including vehicles,] for personal business is strongly discouraged." This provision also states that "[i]nappropriate use of company property or assets will be considered theft" and that "[v]iolation of this policy will result in disciplinary action up to and including termination of employment."

Another provision of the handbook provides that drivers are permitted to travel "up to three miles from their last drop-off or three miles near their next pick-up to take their lunch break." This provision, entitled "Excessive Driving During Breaks," provides:

> Drivers that have gaps in their manifest for lunch or gaps caused by routing, number of rides or cancellations shall be limited to an additional three miles beyond what would normally occur between the last passenger drop-off prior to the gap in the manifest and the next passenger pick-up following the gap in the manifest.

Drivers may return to the Transit Team base to eat lunch, but only if the base is within three miles of their last drop-off location or within three miles of their next pick-up location.

On the morning of September 24, 2012, the Metropolitan Council's operations manager sent Michael Richter, Transit Team president, an e-mail alerting him to an anonymous e-mail received by the Metropolitan Council from a transit worker explaining that a road supervisor and driver manipulated a particular route on August 30, 2012, so the driver could stop at a restaurant in St. Paul and bring food back to the Transit Team

base. Richter explained that the Metropolitan Council ultimately imposed upon Transit Team a $5,000 fine.

Richter checked Transit Team's demand routing software program that tracks all routes and breaks and discovered that relator took "a large break" on August 30. Manifest documents evidencing relator's scheduled rides for August 30 list a ride at 11:14 a.m. and at noon. Notations on the manifest for this time period state that both rides "were transferred in some fashion or another." When Richter checked the software listing actual rides, he discovered that relator dropped a passenger off at a location in Roseville at 11:37 a.m., and that a dispatcher who did not normally handle relator's routes canceled the noon ride and transferred the earlier scheduled ride for 11:14 a.m. to a different driver. His next pick-up location was scheduled for 1:11 p.m. on Como Avenue in St. Paul near the State Fairgrounds.

Richter noticed that the vehicle logged 20 miles during this unaccounted two-hour period near lunch. Richter also noted that the location of relator's last drop-off prior to lunch was nine miles from the restaurant at issue, which itself is about 20 miles from the Transit Team base in Minneapolis. Relator conceded that the distance between the restaurant and the base is ten miles and that the distance between his last drop-off before lunch and the restaurant is four-and-a-half to five miles.

Richter called relator into his office on September 24 and told him about the anonymous e-mail and the allegation. According to Richter, relator admitted the allegations after being shown the computer records from the date in question and stated that it was not the first time this happened. Richter testified that other drivers "have gone

to this particular restaurant to get wings for other people, but they're not on the clock" and they use private vehicles. Richter terminated relator's employment at this meeting.

Relator testified that he did not believe he violated company policy on August 30 because he went to the restaurant, which was within three miles of his next pick-up location on Como Avenue, to get lunch for himself. However, he admitted that he picked up food at the restaurant and drove back to the base rather than eat in the vehicle. He also testified that, during his meeting with Richter on September 24, he did not specifically recall what occurred on August 30 and felt as though he did not "violate[] the policy to the extent that he was gonna terminate me." Relator explained that after his last drop-off prior to lunch, he had an open window because of the cancellation and went to the restaurant because there was a special on chicken wings. He told the dispatcher that he would buy him lunch and thereafter "drove it over to the base and we ate lunch together in the break room" because he had an extended window with no rides. According to relator, many drivers return to the base to eat lunch.

Relator was determined to be ineligible for unemployment benefits because of his failure to comply with company policy regarding vehicle use. Relator appealed the determination and a phone hearing was held on October 30, 2012. The ULJ concluded that relator was discharged because of employment misconduct and found that relator dropped off a passenger at a location in Roseville shortly before noon on August 30, drove five miles to the restaurant to pick up lunch for himself and the dispatcher, and drove ten miles back to the base in Minneapolis. The ULJ then noted that relator's next pick-up location was about seven miles away from the base. Given the three-mile policy

regarding driving Metro Mobility vehicles to lunch, as well as the contents of the anonymous e-mail and Richter's investigation into relator's whereabouts during this period, the ULJ concluded that relator "intentionally violated the policy when he drove a total of 20 miles from his last drop-off" to the restaurant, the base, and his next pick-up location, which "was a serious violation of the standards of behavior his employer had the right to expect." The ULJ specifically credited Richter's testimony over relator's explanations.

Relator requested reconsideration, and the ULJ affirmed the prior order, noting that relator's request for reconsideration did not dispute the finding that he drove from his last drop-off location to the restaurant, and then from the restaurant to base, a distance "well beyond three miles." This certiorari appeal follows.

D E C I S I O N

I.

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 conclusion, decision, findings, or inferences 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).

Relator argues that his conduct on August 30 did not rise to the level of employment misconduct. "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 disqualifying misconduct is a question of law subject to de novo review. *Id.* Whether an employee has committed a particular act is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court reviews a ULJ's findings in the light most favorable to the decision and gives deference to the ULJ's credibility determinations. *Id.* "In doing so, we will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id.*

"An applicant who was discharged from employment by an employer is ineligible for all unemployment benefits . . . only if . . . the applicant was discharged because of employment misconduct as defined in subdivision 6 . . . ." Minn. Stat. § 268.095, subd. 4(1) (2012). "Employment misconduct means any intentional, negligent, or indifferent 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)(1) (2012). "As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall*, 644 N.W.2d at 804.

We conclude that the record substantially sustains the ULJ's findings regarding relator's conduct on August 30 and that this conduct amounted to a serious violation of the standards of behavior that Transit Team had the right to reasonably expect of relator. First, while Richter and relator surmised inconsistent distances between the location of relator's drop-off in Roseville and the restaurant, and also between the restaurant and the

Transit Team base, there is no evidence that either distance was compliant with the three-mile policy. The ULJ, after receiving the addresses of all locations at issue, reasonably found that relator drove five miles from his last morning drop-off to the restaurant to pick up lunch, drove ten miles back to the base in Minneapolis, and then drove to his next pick-up about seven miles from base. This totals 22 miles, which substantially corresponds to the unaccounted mileage noted on the relevant manifest record. More importantly, Richter's findings, along with relator's admission on September 24, largely corresponded to the content of the anonymous e-mail received by the Metropolitan Counsel and eventually forwarded to Richter.

The record also establishes that relator's conduct was intentional and highly adverse to Transit Team. "A single incident can constitute misconduct when an employee deliberately chooses a course of conduct that is adverse to the employer." *Id.* at 806. The ULJ received uncontroverted evidence that Transit Team received a $5,000 fine pursuant to its contract with the Metropolitan Counsel because of relator's conduct, and Richter made clear that relator's behavior could "raise doubt in the mind" of the Metropolitan Council about whether Transit Team was abiding by the contract. The record also supports the ULJ's finding that relator intentionally violated Transit Team policy. Relator's explanation that he did not think his conduct violated policy by driving back to the base for lunch is unreasonable in that it contradicts the language of the three-mile policy.

Relator argues that by returning to the base to eat lunch, he engaged in the conduct of an average, reasonable employee because he testified that other drivers return to the

base to eat lunch. But the conduct of other employees is not directly relevant to considering whether relator engaged in employment misconduct on August 30. *See Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986) ("The sole question before this court is whether Sivertson's violation of Sims' rules constituted misconduct. Whether or not other employees violated those same rules and were disciplined or discharged is not relevant here."), *review denied* (Minn. Aug. 20, 1986). Richter agreed that drivers return to the base to eat lunch, but only if doing so complies with the three-mile policy. Also, the misconduct at issue was not merely relator's violation of Transit Team policy. It also implicated relator's apparent scheme with the dispatcher to reorganize relator's schedule so relator could bring lunch back to the base. Relator disputes this characterization of the record, but the ULJ found that Richter received notice of the anonymous e-mail on September 24, "investigated the claims of the email," and discovered that relator's schedule was altered so relator could bring lunch back to the base. These findings are substantially supported by the record given the details of how relator's schedule was altered by the dispatcher who did not normally work on relator's routes.

Relator also argues that Transit Team acquiesced to his conduct and that his conduct "was the sort an average reasonable employee would have engaged in under the circumstances." Relator cites this court's opinion in *Worthington Tractor Salvage, Inc. v. Miller*, which concluded that an employee, who lived four hours from his place of employment and never relocated despite numerous requests to do so, did not commit employment misconduct due to the employer's "acquiescence and granting of

extensions" to relocate during several years of employment. 346 N.W.2d 168, 170–71 (Minn. App. 1984).

The current matter is distinguishable because there is no evidence that Transit Team acquiesced in, or was even aware of, instances similar to relator's conduct on August 30. Relator highlights his supposed admission to Richter on September 24 that this was not the first time he engaged in such conduct, as well as Richter's testimony that he reviews driver's manifests "on a daily basis" and reviews instances when drivers have extended breaks around lunch. Aside from this diligence, there is no evidence that Richter knew of any ongoing violation of the personal-use policy or the three-mile policy.

Moreover, when recounting relator's admission on September 24 that his conduct on August 30 "wouldn't have been the first time," Richter added that he "didn't get into details with [relator]." Richter also explained that it was possible that if he were in one of Transit Team's own vehicles as a road supervisor, "he may have gotten lunch and brought it back to base," but such use of company-owned vehicles, rather than Metro Mobility vehicles supplied by the Metropolitan Council, would not violate the strict policy governing use of Metro Mobility vehicles during scheduled routes. The ULJ did not find that Transit Team knew of or acquiesced to relator's conduct, and there is little evidence that would support such a determination. Given this substantial evidence, the ULJ did not err by concluding that relator was discharged for employment misconduct.

II.

Relator also argues that he is entitled to unemployment benefits because the misconduct found by the ULJ was different from the reason given for his discharge. He

notes the text of section 268.095, subdivision 4(1), which provides that a discharged applicant is ineligible for unemployment benefits only if he or she "was discharged because of employment misconduct." This court has observed that a prior version of the statute, Minn. Stat. § 268.09, subd. 1(2) (1984), which provided that a person is not entitled to unemployment benefits if he or she was "discharged for misconduct," "suggest[ed] that an employer who alleges employee misconduct must prove that such conduct was in fact the cause of the employee's dismissal." *Harringer v. AA Portable Truck & Trailer Repair, Inc.*, 379 N.W.2d 222, 224 (Minn. App. 1985) (footnote omitted).

Relator cites this court's unpublished opinion in *Luckett v. Centerline Charter Corp.*, No. A11-251, 2011 WL 4435507 (Minn. App. Sept. 26, 2011). In *Luckett*, the ULJ found that an employee was discharged from her position as a bus driver for employment misconduct in providing diluted urine samples and failing to disclose a speeding ticket and injury in her job application. 2011 WL 4435507, at *2. After reviewing the record and the ULJ's order, this court concluded that the failure to disclose the injury and speeding ticket did not amount to employment misconduct, and that the record did not support the finding that the diluted samples served as a basis for the employee's discharge. *Id.* at *4–6. As such, the diluted samples did not disqualify the employee from benefits. *Id.* at *4. Instead, the record established that the employee's discharge resulted from conduct separate from the ticket and nondisclosures. *Id.* at *3–4. Relator argues that the current matter is analogous because he was discharged for

violating the personal-use policy addressing company vehicles and not the three-mile policy that served as the basis for the ULJ's decision.

Aside from the fact that *Luckett* is unpublished and has no precedential value, this argument is unavailing on its merits. *Luckett* concluded that the *conduct* cited by the ULJ as the basis for the discharge at issue was different from that which actually resulted in the discharge. *Id.* at *4–6. Here, relator attempts to draw a distinction between separate *policies*, the personal-use policy and the three-mile policy, not separate conduct. The only conduct relevant to his discharge was his decision to conspire with the dispatcher to bring lunch back to the base on August 30 and, in furtherance of such plan, use the Metro Mobility vehicle to drive a prohibited distance. The record appears to establish that relator was discharged for violating Transit Team policy in general, the important point being that relator's conduct implicated both policies. The ULJ recounted facts relevant to relator's violation of the three-mile policy, and relator concedes that "the ULJ found that Richter fired [relator] for breaching Transit Team's personal-use policy." The two policies are not mutually exclusive as advocated by relator, and respondent reasonably observes that the three-mile policy "is a specific exception . . . to the general personal use prohibition." Stated differently, the facts relevant to relator's violation of the three-mile policy served as the manner in which he violated the personal-use policy. This is a more reasonable interpretation of the record and the ULJ's decision.

Relator also asserts that, unlike the personal-use policy, the three-mile policy does not provide for automatic termination upon violation. But the fact that the three-mile policy does not specifically provide that a driver is subject to termination for its violation

does not reasonably imply that such a violation cannot serve as a basis for a finding of employment misconduct. Employment misconduct is conduct amounting to "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)(1), which may be established by "refusing to abide by an employer's reasonable policies and requests," *Schmidgall*, 644 N.W.2d at 804. Regardless of which policy was violated, there is substantial evidence in the record that supports the ULJ's finding of employment misconduct. We affirm the ULJ's denial of relator's claim for unemployment benefits.

Affirmed.