STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0301

Robert J. Kambeitz,
Relator,

vs.

Carley Foundry, Inc.,
Respondent,

Department of Employment and
Economic Development,
Respondent.

Filed October 7, 2013
Affirmed
Cleary, Judge

Department of Employment and
Economic Development
File No. 30142601-5

Robert J. Kambeitz, St. Paul, Minnesota (pro se relator)

Carley Foundry, Inc., Blaine, Minnesota (respondent)

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

Considered and decided by Cleary, Presiding Judge; Connolly, Judge; and Hooten, Judge.

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

CLEARY, Judge

Relator brings a certiorari appeal from an unemployment-law judge (ULJ) decision that he is ineligible for unemployment benefits. On appeal, relator argues the ULJ erred in holding that he was discharged for employment misconduct after he intentionally misused company property resulting in significant damage; was given a last-chance written warning by his employer; and subsequently violated company policy by calling a coworker a derogatory name based on the coworker's country of origin. We affirm.

FACTS

Relator Robert J. Kambeitz (Kambeitz) worked for respondent Carley Foundry, Inc. (Carley) from October 13, 2003, until he was terminated from his position on August 23, 2012. The circumstances of Kambeitz's termination relate to two incidents in the months prior to his termination. The first incident occurred on May 21, 2012, when Kambeitz was operating a machine called the "Big Joe" (the machine) to empty a sand hopper. The machine had previously failed to work properly for Kambeitz. In the past, when the machine failed to work, Kambeitz would move the machine's handle up and down or side to side to make the machine operate again. On May 21, the machine again failed to properly work, and Kambeitz used this same technique and did not call for assistance. As a result of his frustration with the machine not working, Kambeitz used more force than he had used in the past to move the handle and broke the handle off the

machine. The incident was reported, and the machine was inoperable for about one week.

In response to the May 21 incident, Kambeitz was given a last-chance written warning. The written warning stated that any future violation of company policy would result in immediate termination. According to Carley, the May 21 incident was grounds for immediate termination.

The second incident occurred on August 21, 2012, when Kambeitz and fellow employees were doing their morning stretches. While stretching, Kambeitz called one of his coworkers a "goddamn stubborn Mexican." Earlier in the day when Kambeitz was attempting to clock in manually instead of through use of the computer, the same coworker had stated, "Come on Rob, you don't have to clock in that way." Kambeitz considered his coworker's comment to be "heckling." This was not the first time Kambeitz called his coworker a "stubborn Mexican." The coworker reported what Kambeitz had said to his department supervisor that day.

After investigating this second incident, Carley terminated Kambeitz for violating the company harassment policy pursuant to the earlier last-chance written warning. Carley's harassment policy prohibits "any unwelcome behavior that is offensive, abusive, threatening, intimidating, humiliating or degrading to another individual." Prohibited harassment may be based on protected class status and may also be based on "other offensive behavior that impairs morale, and interferes with work effectiveness, including jokes and teasing."

On August 24, 2012, Kambeitz applied for unemployment benefits and was initially determined to be eligible. Carley subsequently appealed the initial eligibility determination. After an evidentiary hearing, the ULJ determined Kambeitz was discharged for employment misconduct and was thus ineligible to receive unemployment benefits. Kambeitz then requested reconsideration, and a second ULJ affirmed the decision. This certiorari appeal follows.

D E C I S I O N

Kambeitz argues that the ULJ erred by holding he was discharged for employment misconduct and is thus ineligible for unemployment benefits.[1] An employee discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Whether an employee committed employment misconduct presents a mixed question of law and fact. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether an employee committed a specific act is a question of fact. *Id.* The ULJ's factual findings are viewed in the light most favorable to the decision, giving deference to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Factual findings are not disturbed when the evidence substantially sustains them. *Id.*

[1] In briefing, Kambeitz refrains from addressing his damaging use of Carley's equipment as grounds for establishing employment misconduct and only addresses the validity of the ULJ's findings regarding racial harassment. However, considering that Kambeitz's conduct in the earlier incident was the basis for Carley giving Kambeitz a last-chance warning, and given the ULJ's apparent reliance on both the earlier incident of property damage and the later alleged racial harassment, we address both incidents in our de novo review.

However, whether an act committed by the employee constitutes employment misconduct is a question of law, which is reviewed de novo. *Id.*

Employment misconduct is defined as "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) (2012). Conversely, employment misconduct is not conduct resulting from inefficiency or inadvertence, simple unsatisfactory conduct, conduct an average reasonable employee would have engaged in under the circumstances, conduct resulting from the employee's inability, or a good faith error in judgment. *Id.*, subd. 6(b) (2012). "A single incident can constitute misconduct when an employee deliberately chooses a course of conduct that is adverse to the employer." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002).

Damaging company equipment

The ULJ found that Kambeitz intentionally misused Carley's company property, causing it to be inoperable for a week. Additionally, the ULJ determined that Kambeitz misused company property out of frustration while simultaneously choosing to forego calling for assistance to solve the problem. Kambeitz does not dispute that he intentionally misused the machine, resulting in significant damage. An employer has the right to reasonably expect that employees will not improperly use company property. Here, Kambeitz intentionally misused company property, causing it to be damaged and inoperable for a substantial period of time. Kambeitz's actions demonstrate a serious

violation of the standards of behavior an employer has the right to reasonably expect of an employee and therefore constitute employment misconduct.

Racial harassment

Kambeitz argues the ULJ incorrectly concluded that his derogatory comment to a fellow employee was disqualifying employment misconduct. "As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Id.*

The ULJ based her determination of ineligibility in part on her finding that Kambeitz called a coworker a "goddamn stubborn Mexican." The ULJ also found that, although Kambeitz claims he did not intend his comment to be offensive, it is more likely the comment was indeed meant to be offensive, considering it was made after perceived "heckling." Additionally, the ULJ determined the comment was inherently derogatory.

After Kambeitz damaged company property, Carley issued a last-chance written warning stipulating that Kambeitz would be terminated if he violated any company policy within the next two years. Carley's company policies and procedures contain a harassment policy prohibiting behavior that is offensive, abusive, threatening, intimidating, humiliating, or degrading to another individual based on race. Kambeitz's comment to his coworker likely violated Carley's harassment policy, considering that the ULJ determined Kambeitz meant to be offensive and that the comment, regardless of Kambeitz's intent, was inherently derogatory. It is also significant that, instead of a third party reporting the conduct, the employee at whom Kambeitz directed his derogatory comment reported the comment to Carley, which would appear to indicate that the

employee perceived the comment as offensive and/or degrading. Because an employee's refusal to abide by reasonable employer policies amounts to disqualifying misconduct, Kambeitz's derogatory comment to another employee in violation of the company harassment policy constitutes employment misconduct.

On appeal, Kambeitz argues that he had previously exchanged similar comments with the employee at whom he directed this comment and that both Kambeitz and the fellow employee used similar language toward each other in the past. Kambeitz also urges this court to consider his assertion that he and the employee had previously worked well together. Neither of these claims resulted in factual findings by the ULJ. Although Kambeitz testified as to these assertions during the evidentiary hearing, the ULJ found that Carley's testimony was credible because it described a more plausible chain of events, based on independent investigation. The ULJ's factual findings are viewed in the light most favorable to the decision, giving deference to the ULJ's credibility determinations, and are not disturbed when the evidence substantially sustains them. *Skarhus*, 721 N.W.2d at 344. Additionally, it does not appear that the testimony offered by Kambeitz, even if true, would significantly alter the analysis of the violation of Carley's harassment policy in this instance. Kambeitz's use of derogatory language, regardless of his claims as to past interactions, was reported by the employee to Carley on this specific occasion.

Kambeitz also argues this court should consider that only one incident of harassment was reported. This characterization is misleading, as Kambeitz's harassment

policy violation was the final straw in a last-chance warning issued based on destruction of company property.[2]

The ULJ correctly determined that Kambeitz was discharged for employment misconduct as defined in the unemployment-insurance law and is thus ineligible for unemployment benefits.

Affirmed.

[2] Kambeitz's petition for writ of certiorari states that he believes his personnel file containing minutes of his disciplinary meeting would help his case. This is the only mention of this issue in Kambeitz's brief. Kambeitz does not offer any arguments in support of his belief and does not mention this issue anywhere else. However, this issue was raised when Kambeitz asked the ULJ for reconsideration. The ULJ adequately dispensed with this issue by pointing out that Kambeitz never requested assistance from the ULJ in getting a copy of these records and that he failed to offer any evidence that the personnel file would have information that would support a reversal of the original decision.