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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0160**

Marty L. Oldenburg,
Relator,

vs.

BFI Waste Systems of North America Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 26, 2008
Affirmed
Poritsky, Judge***

Department of Employment and Economic Development
File No. 12795 06

Marty L. Oldenburg, 222 South Meridian Street, Belle Plaine, MN 56011 (pro se relator)

BFI Waster System of North America Inc., 9813 Flying Cloud Drive, Eden Prairie, MN
55347 (respondent)

Lee B. Nelson, Katrina I. Gulstad, E2000 First National Bank Building, 332 Minnesota
Street, St. Paul, MN 55101 (for respondent Department of Employment and Economic
Development)

Considered and decided by Willis, Presiding Judge; Wright, Judge; and Poritsky,
Judge.

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

UNPUBLISHED OPINION

PORITSKY, Judge

Relator Marty L. Oldenburg was fired for employment misconduct. He challenges the determination of an Unemployment Law Judge (ULJ) that he was disqualified from receiving unemployment benefits. We affirm.

FACTS

Oldenburg began working for respondent BFI Waste Systems of North America Inc. (BFI) as a garbage-disposal driver in February 2002. While working in July 2006, Oldenburg drove a BFI truck into a pothole, damaging the truck. He called his supervisor and said that he could not get the truck out of reverse, but did not say anything about hitting a pothole or damaging the truck. When Oldenburg returned to the BFI garage after finishing his route, he indicated on a daily federal Department of Transportation (DOT) Vehicle Condition Report that the truck was having problems shifting out of reverse gear. Because he had had an accident, BFI's company policy required that Oldenburg also complete an incident report before going home, but he did not do so.

Approximately 30 minutes later, Oldenburg's supervisor saw that the truck's wheel well, front axle, and mud flap were visibly damaged and that Oldenburg had not recorded the damage on the required incident report. After reviewing Oldenburg's personnel file, which noted several previous occasions on which Oldenburg had not followed company policies and had damaged company property or customer property, the supervisor decided to fire Oldenburg.

Oldenburg filed a claim for unemployment benefits, and an adjudicator from the respondent Department of Employment and Economic Development (DEED) determined that he was not disqualified from receiving benefits. BFI appealed this determination to a ULJ for a de novo hearing. The ULJ ruled that Oldenburg was disqualified from receiving benefits. On Oldenburg's request for reconsideration, the ULJ affirmed his earlier decision. This certiorari appeal follows.

D E C I S I O N

On certiorari appeal this court may affirm the ULJ's decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights "may have been prejudiced because the findings, inferences, conclusion, or decision are . . . affected by . . . error of law" or "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d) (2006). Whether an employee committed 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). Findings of fact are reviewed in the light most favorable to the ULJ's decision and will be upheld if supported by substantial evidence. *Id.*; Minn. Stat. § 268.105, subd. 7(d)(5). But whether an act constitutes disqualifying misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). "Employment misconduct" is:

[A]ny intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.

Id., subd. 6(a).

The ULJ found that Oldenburg was involved in an accident in July 2006; although required by company policy to file a report, he failed to do so. Oldenburg essentially argues that the single incident of his failure to report driving into a pothole should not disqualify him from unemployment benefits because he was not aware that driving into the pothole was considered an accident or that it had caused any damage to the truck other than the shifting problem, which he reported on the DOT form. DEED asserts that the July 2006 incident and Oldenburg's history, taken together, constitute employment misconduct.

Ordinarily, Oldenburg's "single incident" argument might be persuasive. *See id.* (stating that "a single incident that does not have a significant adverse impact on the employer" is not disqualifying misconduct). But here, the ULJ also found that Oldenburg had engaged in "repeated incidents of negligence," which "support[] a finding of employment misconduct." These incidents included other instances of failing to follow company policy and damaging company property and customer property. An employee's behavior may be considered as a whole in determining his qualification for unemployment benefits. *Drellack v. Inter-County Cmty. Council, Inc.*, 366 N.W.2d 671, 674 (Minn. App. 1985).

The ULJ's findings regarding the prior incidents are supported by the testimony at the hearing and the documents in Oldenburg's personnel file. And the ULJ's conclusion that a series of negligent acts can constitute employment misconduct is legally correct. See *Markel v. City of Circle Pines*, 465 N.W.2d 408, 411 (Minn. App. 1991) (distinguishing "a series of negligent . . . acts" from "mere incidents of inadvertence or negligence") (quotation omitted), *aff'd* 479 N.W.2d 382 (Minn. 1992).

Moreover, the record indicates that on several of the occasions in which Oldenburg disregarded company policies his actions resulted in substantial damage to the property of BFI or its customers. An employee commits disqualifying misconduct when his failure to follow company policy has a "significant adverse impact on the employer." *Skarhus*, 721 N.W.2d at 344.

Because the findings of the ULJ are supported by substantial evidence in the record, and because the ULJ's legal conclusions are correct, we affirm.

Affirmed.