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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1268

Marcus P. Geissler,
Relator,

vs.

Independent School District #2154,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 29, 2008
Affirmed
Harten, Judge[*]

Department of Employment and Economic Development
Agency File No. 5525 07

Marcus P. Geissler, 5222 Avondale Street, Duluth, MN 55804 (pro se relator)

Independent School District #2154, 801 Jones Street, Eveleth, MN 55734 (respondent)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101-1351 (for respondent Department of Employment and Economic Development)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Harten, Judge.

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

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

HARTEN, Judge

In this certiorari appeal, relator Marcus P. Geissler challenges the decision of a Department of Employment and Economic Development (DEED) unemployment law judge (ULJ) affirming his earlier decision finding that relator was discharged for employment misconduct and is thereby disqualified from receiving unemployment benefits. We affirm.

FACTS

Relator was employed as a junior- and senior-high mathematics teacher by Independent School District # 2154, Eveleth-Gilbert (District), from 1994 until his discharge 16 March 2007.

On 30 August 2006, relator signed an "Employee Technology Resource Agreement Form" regarding his acceptance and understanding of the District's "Technology Resource Acceptable Use Policy." In relevant part, the policy stated that "[u]sers will not use the District's Technology Resources to access, review, upload, download, store, print, post, or distribute pornographic, obscene or sexually explicit or sexually suggestive material." Relator participated in a school-sponsored workshop reviewing this technology policy. Moreover, each time appellant logged onto his school computer he had to click "OK" on the welcome screen. The welcome screen stated: "By pressing OK and continuing to logon you here by [sic] agree to and accept the Computer and Internet Usage Policy established by the Eveleth-Gilbert School District ISD2154."

On 1 March 2007, several students reported to a school counselor that they had observed relator viewing pornography on his computer during math class. This allegation led to an investigation by a District IT employee, supervised by the school principal and the district superintendent. The IT employee filtered the computer records by account to determine what websites relator's account had been viewing. During the first day of his investigation, the IT employee determined that relator's account had spent approximately 21 hours of computer time over the approximately five-week period between 17 January 2007 and 28 February 2007 loading different pornographic websites on his school computer. Additionally, the IT employee printed pictures from the activity during this limited time period on these sites. These pictures, viewed during working hours, filled 6.25 inches of computer paper. The pictures were "harder core pornography, fully undressed females either individually or with additional females fully undressed in various sexual poses. And there were also fully disrobed females and males in various sexual poses." On 7 March 2007, relator was suspended with pay.

After the IT investigation was completed, the District claimed to have evidence that between January 2006 and March 2007 relator had visited approximately 200,000 pornographic websites. On 16 March, when the administration's investigation concluded, relator was suspended without pay and effectively discharged.

The District superintendent stated that relator's discharge was based on:

> 1. Immoral conduct and insubordination;
> 2. Conduct unbecoming a teacher;
> 3. Willful neglect of his teaching duties and responsibilities because, instead of performing his teaching duties, he was spending considerable amounts

of his work time in the private pursuit and viewing of pornographic material on School District computers;

4. Conduct unbecoming a teacher which has, and continues to, impair his educational effectiveness;
5. Other good and sufficient grounds for termination including, his failure to comply with professional and ethical duties and obligations, which go to his unfitness to perform his duties as a teacher with the School District.

On 26 March, relator applied for unemployment benefits. Relator did not deny the charged misconduct; rather, relator explained that "I did not know I could get fired for this. I thought I would get reprimanded or lose my computer privileges." On 3 April, a DEED adjudicator determined that, because relator had been discharged for employment misconduct, relator was disqualified from receiving unemployment benefits. On 9 April, relator appealed the adjudicator's determination, stating, "I have not been fired. I want to withdraw my application." But when contacted by DEED, relator stated that he wanted to proceed with the hearing as scheduled. On 26 April, a telephonic hearing was held before a ULJ. The ULJ attempted to contact relator for the hearing, but was unsuccessful. The hearing proceeded without relator's participation. The ULJ determined that relator was disqualified from receiving unemployment benefits because he had been discharged for employment misconduct.

On 14 May, relator filed a request for reconsideration. Relator stated that "my circumstances have changed and I have resigned and not been fired. Also, I did not receive any pay from the district since 4-15-07. So it is now 30 days. I believe it does not matter how we seperatd [sic] by law. I still have rights to unemployment benefits."

On 14 June, the ULJ affirmed his original determination that relator was disqualified from receiving unemployment benefits because he was discharged for employment misconduct. Further, the ULJ rejected relator's argument that he was entitled to benefits because he had resigned, rather than having been discharged. And, the ULJ noted that even if relator's argument was credited, he still was not entitled to receive unemployment benefits because the only applicable exception entitling relator to benefits would be if he quit for a "good reason caused by [his] employer." The ULJ determined that relator did not quit for a good reason caused by the employer.

This certiorari appeal follows.

D E C I S I O N

1. Employment Misconduct

Appellant argues that he is qualified to receive unemployment benefits. We disagree. 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 "any 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) (2006). But "a single incident that does not have a significant adverse impact on the employer" does not constitute employment misconduct. *Id.*

A challenge to the determination that an employee committed employment misconduct presents a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644

N.W.2d 801, 804 (Minn. 2002). Whether the employee's act itself constitutes employment misconduct is a question of law that we review de novo, but whether the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether an individual quit his employment or was discharged is also a question of fact. *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006). We view the ULJ's factual findings in a light most favorable to the decision, and we defer to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ULJ's factual findings will not be disturbed when substantially sustained by the evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2006).

Relator did not deny misconduct when he applied for unemployment benefits. In response to the survey question, "Explain why you [used technology inappropriately], or why you let the incident happen," relator answered, "I don't know." In response to the question, "If you knew you could be fired/suspended for this type of incident, explain how you knew," relator answered, "I did not know I could get fired for this. I thought I would get reprimanded or lose my computer privileges."

Relator did not participate in the hearing. Nor did he deny that he committed acts constituting misconduct in his appeal from the DEED adjudicator's determination or in his request for reconsideration of the ULJ's decision. The ULJ did not have to weigh

evidence when he determined that relator had not denied misusing the school district's computer.[1]

Relator's acts constituted employment misconduct because he seriously violated reasonable standards of behavior expected by the District. Minn. Stat. § 268.095, subd. 6(a)(1). The District reasonably expected that teachers not use the school's technology to gain access to pornography. Relator had agreed to the District's policy by a signed acknowledgement, and his assent was reiterated each time he logged onto the school computer. This misconduct was far more than a single incident. The ULJ noted that "[t]he frequency with which [relator] violated the district's policies and the subject matter of the computer use was a serious violation of the standards of behavior the district had the right to reasonably expect of him and displayed a substantial lack of concern for his employment."[2]

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[1] In his appellate brief, relator denies for the first time that he misused his computer privileges. But this court will generally not consider matters raised for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). To consider this argument would necessarily involve our making a credibility determination, which is beyond our judicial role.

[2] Relator argues that his discharge was motivated by his union involvement. But there was no evidence offered to support this theory. Relator claims that other employees (he did not specify their union involvement) had also viewed pornography on their school computers without receiving discipline. But even if an employer fails to enforce its rules uniformly, this does not excuse relator's misconduct. *Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986), *review denied* (Minn. 20 Aug. 1986). Relator also argues that his good work record should be considered. But the statute does not excuse the misconduct of a "good" employee.

We conclude that the ULJ's determination that relator was discharged for employment misconduct is sustained by the evidence and that relator's acts constituted misconduct as a matter of law.[3]

2. Employment Termination

Relator argued in his appeal from the DEED adjudicator's determination and his request for reconsideration of the ULJ's determination that he was entitled to unemployment benefits because had not been fired, but instead had resigned his position.

A "discharge" occurs "when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity." Minn. Stat. § 268.095, subd. 5(a) (2006). And "any agreement between an applicant and an employer shall not be binding on the commissioner in determining an applicant's entitlement." Minn. Stat. § 268.069, subd. 2 (2006).

On 7 March, the District informed relator by letter that they intended to terminate and discharge him "effective *immediately*." The ULJ noted that after receiving this letter, relator and the school district agreed that relator would "voluntarily resign" if paid $10,000. The ULJ, who is not bound by this settlement, determined that relator was discharged the day relator was placed on unpaid leave: 16 March 2007. After receiving a letter detailing imminent termination, a reasonable employee would believe he would not be permitted to continue to work for the employer. Viewed in the light most

[3] Relator did not raise on appeal the issue of whether he had good cause for missing the hearing, and thus was entitled to another evidentiary hearing. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed on appeal are waived).

favorable to the decision, the ULJ's determination that the discharge effectively occurred when relator was taken off the District's payroll (eight days after receiving the District's letter of intent) is substantially sustained by the evidence.[4]

Affirmed.

[4] Moreover, we note that even if appellant had not been discharged, he was not qualified to receive unemployment benefits. *See* Minn. Stat. § 268.095, subd. 3(d) (2006) (stating that an employee who quit his employment due to his own misconduct is not entitled to unemployment benefits).