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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1703**

Michael R. Fortney,
Relator,

vs.

U S Federal Credit Union,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed September 8, 2009

**Affirmed
Willis, Judge***

Department of Employment and Economic Development
File No. 20913315-4

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Considered and decided by Stoneburner, Presiding Judge; Stauber, Judge; and
Willis, Judge.

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

UNPUBLISHED OPINION

WILLIS, Judge

By writ of certiorari, relator challenges the decision of an unemployment-law judge (ULJ) that relator was discharged for employment misconduct and is, therefore, ineligible to receive unemployment benefits. Because the ULJ's decision is supported by substantial evidence and it is not necessary to remand to the ULJ for additional credibility findings, we affirm.

FACTS

Relator Michael Fortney worked full time for respondent U S Federal Credit Union as a member-services officer from April 2007 through May 22, 2008, when the credit union discharged him for advising a member to submit a false purchase order to obtain a loan.

On May 15, 2007, credit-union member Heidi Noraas contacted Fortney and asked for a loan to purchase a motorcycle that cost \$6,500, plus taxes and fees. Fortney completed a loan application for Noraas and requested approval of a \$6,500 loan from the credit union's underwriting department. The underwriters concluded that Noraas needed to make a 20% down payment on the motorcycle in order to obtain the loan.

Fortney contacted Noraas and "told her that [he] needed a purchase order for at least \$8,000 if [he] was going to give her \$6,500, which would be the 20 percent down." The following Monday, May 19, Fortney was out of the office when two purchase orders were faxed to the credit union from the motorcycle dealership. Although the purchase orders themselves are not in the record, it appears that the first one showed the actual

purchase price of the motorcycle, with no down payment. The second showed a higher purchase price and a down payment of approximately 20%. Because Fortney was on vacation, another member-services officer contacted the dealership regarding the discrepancy between the two purchase orders. The dealership confirmed that Noraas requested the second purchase order but had not actually made a down payment.

When Fortney returned to work the next day, he submitted to the underwriters for loan approval the second purchase order, which reflected the higher purchase price and a down payment. Fortney testified that, because he was out of the office on the day that the purchase orders arrived at the credit union, he was not aware that one purchase order showed a lower purchase price than the other until another employee raised concern about the discrepancy between the two purchase orders with the credit union's branch manager.

Following an investigation, Fortney was discharged from his employment at the credit union. Fortney applied for unemployment benefits. The Department of Employment and Economic Development (DEED) initially determined that Fortney was eligible for benefits, but then amended its decision after concluding that Fortney was discharged for misconduct. Fortney appealed the decision to a ULJ, who concluded that Fortney's instruction to Noraas "to submit a document that he knew to be inaccurate in order to gain approval on her loan application . . . displayed clearly a serious violation of the standards of behavior the Credit Union had a right to reasonably expect" and found Fortney ineligible to receive unemployment benefits because he was discharged for

misconduct. Fortney filed for reconsideration, the ULJ affirmed, and this certiorari appeal follows.

D E C I S I O N

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," "unsupported by substantial evidence in view of the entire record as submitted," or "arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d)(4)-(6) (2008). This court defers to the ULJ's conclusions regarding conflicts in testimony and the inferences to be drawn from testimony. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

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 deference is given to the ULJ's determinations of credibility. *Id.* But whether an employee's act constitutes disqualifying misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

An employee who was discharged for misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). "Employment misconduct" is defined as

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.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, . . . good faith errors in judgment if judgment was required, . . . are not employment misconduct.

Id., subd. 6(a) (2008). As a general rule, an employee commits disqualifying misconduct when he or she refuses to “abide by an employer’s reasonable policies and requests.” *Schmidgall*, 644 N.W.2d at 804. Here, the credit union’s ethics policy states: “Each employee of the Credit Union is expected to show discretion, exercise prudent judgment and maintain personal integrity while performing his/her job. Management will not . . . condone the activities of any employee . . . in performing unlawful or unethical deeds.”

Fortney argues that his actions did not constitute employment misconduct because he did not tell Noraas to submit a false loan application and that he did not violate the credit union’s ethics policy because it “is not specific” and provides “no explicit instruction . . . as to how much leeway customer service representatives have in assisting customers with loan applications.” We disagree. Substantial record evidence supports the ULJ’s finding that Fortney’s conduct was in violation of the credit union’s ethics policy and the standards of behavior that it had a right to reasonably expect of its employees.

Fortney himself acknowledges that “[o]utright dishonesty is precluded by the expectation to ‘maintain personal integrity’” outlined in the ethics policy. And by advising Noraas, as he testified that he did, that “approximately \$8,000 has to be the purchase price of the bike so that [he] could give her \$6,500 and comply with underwriting for a 20 percent difference between the purchase price and the actual loan extension,” instead of advising her to make a down payment as the underwriters concluded was necessary, Fortney’s conduct was dishonest.

Moreover, testimony at the hearing established that it was not Fortney’s responsibility as a member-services officer to decide whether or how members should be approved for loans. The credit union’s vice president of lending testified during the telephone hearing that the credit union’s “loans are [decided] by a team of underwriters,” who may request a down payment by a member in order to mitigate the risk of a particular loan. After Fortney ignored the underwriters’ risk concerns by advising Noraas to make it appear that she had made a down payment without actually doing so, the credit union could no longer trust that Fortney would follow the underwriters’ directives for approving loans. Fortney’s conduct thus displayed a substantial lack of concern for his employment.

Fortney also contends that his actions did not amount to employment misconduct because he made a good-faith error in judgment. *See* Minn. Stat. § 268.095, subd. 6(a) (stating that “[a] good faith error[] in judgment if judgment was required” is not employment misconduct). He argues that on prior occasions, his supervisor instructed him to “make adjustments to loan applications as needed to get them through

underwriting,” and he was merely doing the same thing here. This argument is unavailing. First, no judgment on Fortney’s part was required in making loan-approval decisions; those decisions were made by the underwriting department. Second, the fact that an employer’s policies have been violated by other employees or the fact that an employer selectively enforces its policies is not a defense to a claim of employment misconduct. *Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986) (stating that an employer’s alleged selective enforcement of rules is not a defense to a finding of employee misconduct), *review denied* (Minn. Aug. 20, 1986); *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986) (stating that the violation of an employer’s policies by other employees is not a defense to employment misconduct).

Lastly, Fortney argues that this court should remand his case to the ULJ for additional credibility findings because, although the ULJ implicitly discredited Fortney’s testimony, it failed to make findings with regard to its reasons for doing so. “When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the [ULJ] must set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c) (2008); *see also Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (remanding for credibility findings when credibility was central to misconduct determination and ULJ made no specific credibility findings).

Fortney contends that because he and the assistant branch manager gave conflicting testimony regarding whether Fortney ever was instructed to change a loan application to get approval from the underwriters, credibility findings were crucial to the

ULJ's decision. But a ULJ is required to make credibility findings only "[w]hen the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision." Minn. Stat. § 268.105, subd. 1(c). Here, it was unnecessary for the ULJ to make any dispositive credibility determinations because Fortney acknowledged telling Noraas to submit a purchase order that showed that a down payment had been made rather than directing her to actually make a down payment. Although Fortney characterizes this conduct as something other than advising Noraas to submit false information, his testimony is nonetheless an admission that he disregarded the credit union's business interest in mitigating risk, which was the basis for the underwriters' requirement of a 20% down payment for approval of the loan.

Because the ULJ's findings are supported by substantial evidence and advising a credit-union member to submit false information regarding a down payment is employment misconduct as defined in Minn. Stat. § 268.095, subd. 6(a), the ULJ properly found Fortney ineligible to receive unemployment benefits. Additionally, because the ULJ was not required to make credibility findings, we decline to remand for such findings.

Affirmed.