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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0499**

Donald G. Russell,
Relator,

vs.

US Federal Employees,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 28, 2009
Affirmed
Collins, Judge***

Department of Employment and Economic Development
File No. 53163-4

Donald G. Russell, 6631 East River Road, Fridley, MN 55432 (pro se relator)

US Federal Employees, In Care Of: Mr. James Donovan, Department of the Treasury,
Office of Chief Counsel Legal, 4050 Alpha road, 14th Floor, Dallas, TX 75224
(respondent)

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MN 55101 (for respondent department)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and
Collins, 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UNPUBLISHED OPINION

COLLINS, Judge

Relator challenges the decision of the unemployment law judge (ULJ) that relator is ineligible to receive unemployment benefits because he engaged in employment misconduct, arguing that (1) relator did not commit employment misconduct; (2) the employer's actions interfered with relator's freedom of speech; and (3) relator's conduct was protected by the Whistleblower Protection Act. We affirm.

FACTS

Donald Russell was employed by US Federal Employees, Internal Revenue Service (IRS) for approximately 21 years as an engineer in the corporate income tax division. His job was to assess the legitimacy of research costs claimed by corporations as tax deductions. Russell became suspicious that election fraud had occurred during the 2000 presidential election. Using IRS resources such as office equipment, materials, and facilities during his working time, Russell began to draft and distribute correspondence regarding election fraud to several elected officials, news reporters, the Florida Supreme Court, and the United States Supreme Court. He also came to believe that there was election fraud during the 2004 election and continued to generate correspondence regarding his concerns using IRS resources.

As early as 2004 or 2005, Russell's supervisor orally directed Russell to cease using IRS resources for personal use to communicate about election issues because it was disruptive. Russell was given a written warning in May 2005. In September 2006, Russell was given a second written warning advising him to cease using government

resources for personal use. In April 2007, Russell received a five-day suspension for continuing to use IRS resources for personal use during his normal work hours. But Russell persisted in drafting and distributing e-mails and letters using IRS resources. An investigation of Russell's activities revealed that Russell used his IRS title to bolster his credibility, and some of his correspondence bore the official IRS seal and identified him as an IRS employee.

The IRS notified Russell of its intent to remove him from service for (1) failing to follow his supervisor's directions; (2) using his position as an IRS employee in a capacity other than for official purposes; and (3) demonstrating a lack of candor. A hearing regarding the proposed termination was held before a field specialists director. Thereafter, the field specialists director found that Russell's supervisor had appropriately required Russell to focus on his job duties during the business day and to cease using government resources for unrelated purposes. Russell indicated that he would not cease this activity until the election issues were resolved. Russell was discharged in July 2007, after the field specialists director found that discharge was necessary "because the Service must be able to rely on its employees to conscientiously perform the duties of their positions and respond readily to the direction of their supervisors."

The Department of Employment and Economic Development (DEED) adjudicator found that Russell was discharged for employment misconduct and, therefore, held that he is ineligible to receive unemployment benefits. Russell, appealed, and after an evidentiary hearing, the ULJ also found that Russell was discharged for employment

misconduct. That decision was affirmed on Russell's request for reconsideration. This certiorari appeal followed.

DECISION

When reviewing the decision of an ULJ, this court 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 findings, inferences, conclusion, or decision 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) (2008).

An applicant who was discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). 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.” Minn. Stat. § 268.095, subd. 6(a) (2008).

Whether an employee has committed employment 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 viewed in

the light most favorable to the ULJ's decision and are upheld if they are supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5); *Skarhus*, 721 N.W.2d at 344. Whether the employee's act constitutes disqualifying misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804; *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. App. 2007).

Russell was repeatedly directed by his supervisor to cease his personal correspondence during working hours and use of IRS resources to produce and distribute these political communications. Russell not only continued to do so, but he also used his IRS title in at least two communications, used an IRS cover sheet to fax a letter from an IRS fax machine, and sent multiple e-mails using his IRS e-mail address, thus identifying himself as an IRS employee. Russell also advised his supervisor that he would report time spent on the election issues during work hours as leave time, but he failed to do so. Failure to follow an employer's reasonable request constitutes employment misconduct.

Russell contends that his actions were protected by the Whistleblower Protection Act. The whistleblower statute protects federal employees from wrongful discharge as retaliation for making certain disclosures. 5 U.S.C. § 2302(b) (2006). Russell is appealing an unemployment benefits decision. Thus, the question is not whether he was discharged for making a protected disclosure but rather whether he committed employment misconduct as defined by Minn. Stat. § 268.095, subd. 6(a).

Russell next argues that the IRS violated his First Amendment free speech rights. “[A] state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.” *Connick v. Myers*, 461 U.S.

138, 142, 103 S. Ct. 1684, 1687 (1983). But the IRS did not condition Russell's employment on the content of his speech. There is no evidence supporting Russell's contention that the IRS attempted to curtail Russell's ability to work on election issues during his nonworking hours or use personal resources, or that Russell was punished for his beliefs about the 2000 or 2004 elections. Rather, the record contains substantial evidence of specific acts of employment misconduct that support the conclusion that Russell was discharged for disregarding his employer's reasonable directions with an intent to continue to do so.

Russell also argues that the ULJ should have ordered an evidentiary hearing to consider additional evidence in the form of an executive order and a copy of one of Russell's letters.

In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing

The unemployment law judge must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

Minn. Stat. § 268.105, subd. 2(c) (2008). This court will defer to the ULJ's decision to deny a request for an additional evidentiary hearing. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007). Here, the ULJ denied the request for an

additional hearing because the ULJ determined that Russell committed employment misconduct by using IRS resources for nonwork-related activities. It appears that the purpose of the executive order excerpt would have been to establish why Russell felt justified in reporting election fraud, but Russell was not discharged for reporting fraud. Rather, Russell was discharged for utilizing IRS resources to do so. Likewise, the content of Russell's letter was of no significance to the ULJ. Indeed, production of the letter may have had an adverse impact, as the testimony demonstrated that it had been produced and distributed by Russell's use of IRS resources. It is unreasonable to believe that admission of this evidence would have altered the ULJ's decision.

Finally, Russell contends that the ULJ is required to make credibility findings under Minn. Stat. § 268.105, subd. 1(c), but failed to do 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 unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2008). Credibility findings contribute to the parties' understanding and acceptance of the decision, facilitate appellate review, and eliminate all risk of reversal stemming from their absence—and we emphatically encourage fact-finders to express them. Here, however, the credibility of competing witnesses was not central to the ULJ's decision. It is beyond dispute that Russell utilized IRS resources, his working time, and his IRS status to create and distribute nonwork-related communications, as he freely admitted.

The record of Russell's persistent misuse of IRS resources, his working time, and his IRS status, coupled with Russell's intentional disregard of his supervisor's directives

to cease doing so, amply supports the ULJ's determination that Russell engaged in employment misconduct and renders him ineligible to receive unemployment benefits.

Affirmed.