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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1034**

Mark A. Chase,
Relator,

vs.

FedEx Kinko's Office and Print Services Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 2, 2009
Affirmed
Schellhas, Judge**

Department of Employment and Economic Development
Agency File No. 20196565-3

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55101 (for respondent Department of Employment and Economic Development)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and
Kalitowski, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Relator appeals from an unemployment-law judge's determination that he is ineligible to receive unemployment benefits, pursuant to Minn. Stat. § 268.095, subd. 4(1) (2008), because he was discharged for misconduct. We affirm.

FACTS

Pro se relator Mark A. Chase was discharged from an assistant-manager position with respondent FedEx Kinko's Office and Print Services Inc. (FedEx Kinko's) in Rochester because of relator's conduct towards a subordinate employee after receiving several warnings regarding similar and other types of conduct. In its first warning to relator, FedEx Kinko's informed relator that he had: (1) inappropriately discussed individual team-member performance with other team members; (2) inappropriately discussed the center manager, Ken Frerks, and the other assistant manager with other team members; (3) intimidated subordinate team members; and (4) engaged in inappropriate physical contact with a team member. After issuing the first written warning, Frerks sent relator an e-mail directing him to limit his lunches to half-hour periods. Relator replied by e-mail, agreeing to limit his lunch periods. FedEx Kinko's subsequently sent relator a final warning, informing him that he had not limited his lunch periods and sometimes failed to punch out for lunch.

On October 9, 2007, relator was involved in an incident with a subordinate team member, Briann Pectorious. In a written incident report, Pectorious claimed that relator had an excessive reaction to a mistake she made and that he harassed her about the

mistake for the rest of her shift. Relator's conduct included interrupting Pestorious while she was with a customer and following her into a back area of the store.

On October 22, 2007, FedEx Kinko's terminated relator for "violation of FedEx Kinko[']s standards of conduct." In its termination statement, FedEx Kinko's cited "obscene, abusive, intimidating, disruptive, derogatory, stalking or threatening language/behavior with customers, team members or non-team members while at work."

Relator requested unemployment benefits and respondent Department of Employment and Economic Development (DEED) issued a determination of ineligibility for unemployment benefits on the ground that relator was discharged for employment misconduct. Relator appealed and an unemployment-law judge (ULJ) held two telephone hearings.

Pestorious testified consistently with her written statement, and she added a few details, including that: (1) relator had paper in his hand and was "kind of shaking it in my face and kind of babbling on about why did you do this and we need to fix this"; (2) relator was "pretty close" to yelling, and Pestorious had a few customers ask her what the problem was; and (3) two customers commented to Pestorious about relator's behavior and others stared. Over FedEx Kinko's objection, the ULJ allowed relator to challenge Pestorious's credibility with evidence that Pestorious had forged customer signatures. Pestorious denied forging signatures. Another team member, David Martin, testified that he witnessed the incident between relator and Pestorious, saw relator approach Pestorious four to five times, and relator appeared "aggressive, agitated, kind of finicky maybe" and had "kind of rapid movement." Deb Becker, a FedEx Kinko's

human resources generalist, verified Pestorius's and Martin's version of the incident between relator and Pestorius. Becker testified that she reviewed a FedEx Kinko's CD that purportedly contained video footage from the store that showed relator's conduct toward Pestorius. The original CD was lost. Relator testified that he did not act in an aggressive and intimidating manner toward Pestorius. Relator also submitted a document entitled, "Waiver – On-duty Meal Periods," which contains relator's signature, no supervisor signature, and states that the relator and FedEx Kinko's agree that "the nature of the team member's work prevents the team member from being relieved of all duty during a scheduled meal period" and that the "team member shall work an on-the-job meal period that shall be paid for by the company as hours worked." Relator's manager testified that relator might have believed he had freedom with respect to breaks until spring 2007, when relator received a write-up and his job duties changed, requiring him to work primarily inside the store.

The ULJ determined that relator was discharged for employment misconduct and was ineligible to receive unemployment benefits. The ULJ found that relator's discharge was for aggressive and intimidating conduct after he had been given warnings about similar and other types of conduct. In reaching his determination of ineligibility, the ULJ addressed the differences in the testimony offered, noting that Pestorius's account of relator's conduct was corroborated by Martin's testimony and that "[t]he testimony of Pestorius¹ and Martin is preferred to the testimony given by [relator]." The ULJ

¹ The spelling of Pestorius's name varies throughout the record. "Pestorius" is the spelling given by Pestorius at the second hearing.

concluded that relator's incident with Pestorious was sufficient to support a determination that he engaged in employment misconduct. The ULJ observed that the fact that relator was on a final written warning should have caused him to be more careful in his dealings with others, even if he was completely innocent of any of the wrongdoing alleged in the earlier written warnings. Finally, the ULJ noted that relator believed that he was "always right and all others were always wrong" and concluded that "[t]he body of evidence dispels that notion." Relator sought reconsideration and the ULJ affirmed. This appeal follows.

D E C I S I O N

In reviewing the decision of the ULJ,

The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may 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); *see Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007) (applying this standard).

An applicant who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment

misconduct is any conduct, on or off the job, that is intentional, negligent, or indifferent, which (1) displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) displays clearly a substantial lack of concern for the employment. *Id.*, subd. 6(a) (2008). “Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits 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). “Whether a particular act constitutes disqualifying misconduct is a question of law, which this court reviews de novo.” *Schmidgall*, 644 N.W.2d at 804.

Relator argues that he did not behave in an unprofessional or aggressive manner in the incident with Pestorious; thus, the question on appeal is whether the ULJ’s findings as to relator’s conduct in the incident are in error. “We view the ULJ’s factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ. In doing so, we will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Skarhus*, 721 N.W.2d at 344. (citations omitted).

The ULJ found that relator engaged in threatening and aggressive behavior towards subordinate employees. The testimony of Pestorious, Martin, and Becker constitutes substantial evidence in support of the ULJ’s findings, and the findings therefore will not be disturbed. Additional deference to the findings is also warranted because they are based in part on the ULJ’s credibility determinations. *Id.* Finally, relator’s conduct constitutes employment misconduct under the law because employment

misconduct includes disrespectful behavior toward subordinates and disruptive behavior. *See Booher v. Transport Clearings of Twin Cities, Inc.*, 260 N.W.2d 181, 183 (Minn. 1977) (concluding that misconduct occurred where employee did not follow directions of supervisor to cease actions that were causing dissention and disruption in an office); *see also Feia v. St. Cloud State College*, 309 Minn. 564, 564, 244 N.W.2d 635, 636 (1976) (concluding that disruptive behavior that continued after warnings amounts to misconduct).

Relator also argues that: (1) FedEx Kinko's violated policies by failing to investigate relator's appeal of his first written warning; (2) FedEx Kinko's manager made contradictory assertions regarding meal-break warnings; (3) Becker's testimony as to the surveillance video's contents contradicts the testimony of Pestorious and Martin; (4) Pestorious's written statement contradicts the testimony of both Pestorious and Martin; (5) relator has greater credibility than FedEx Kinko's witnesses; (6) the ULJ failed to receive documents showing that Frerks, as well as Pestorious, forged a customer signature; and (7) the ULJ failed to explain his credibility determinations. These arguments are not availing.

Relator's argument that FedEx Kinko's should have investigated the appeal of relator's first written warning, and that if the investigation had occurred, relator might not have been terminated, fails because it does not address the relevant issue before the ULJ—whether relator should receive unemployment benefits, not whether he should have been terminated. *See Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981) (“Here the issue is not whether the employees should have been terminated. We are only

considering whether, now that both are terminated, there should be unemployment compensation . . .”).

Relator’s argument that his manager made inconsistent statements regarding meal-break violations also fails because it does not address the relevant issue before the ULJ. The ULJ based his decision on relator’s conduct during the incident with Pestorious. The meal-break argument addresses the validity of relator’s warnings, which goes to whether relator should have been terminated, not whether relator committed employment misconduct making him ineligible to receive unemployment benefits after his termination.

Relator’s argument regarding Becker’s testimony fails to demonstrate that the ULJ’s findings were not supported by substantial evidence. The inconsistencies that relator emphasizes in Becker’s, Pestorious’s, and Martin’s testimony and Pestorious’s written statement are slight and fail to undermine their credibility. Finally, the ULJ’s decision rested in part on his credibility determinations, to which this court defers.

The differences in the witnesses’ testimony do not demonstrate contradiction or inconsistency that undermines the ULJ’s reliance on the testimony. Relator’s argument that his credibility was greater than the witnesses relied upon by respondent-company fails because this court defers to the ULJ’s credibility determinations. *Skarhus*, 721 N.W.2d at 344.

Relator’s argument that the ULJ failed to receive documents allegedly showing that Frerks, the center manager, forged a customer signature fail because the ULJ never rejected the documents. Although relator could have sent them in ahead of the hearing,

he failed to do so. At the hearing, relator referred to the documents but never asked to submit them.

Relator finally argues that the ULJ failed to explain his credibility determinations, citing Minn. Stat. § 268.105, subd. 1(c) (2008), which requires that a ULJ set out the reason for crediting or discrediting testimony when witness credibility has a significant effect on the outcome of a decision. Relator argues that FedEx Kinko's credibility should have been damaged by the loss of the video surveillance and argues again that the company violated its policy in failing to investigate the appeal of his first warning. The ULJ adequately explained his credibility determinations, noting that relator believed he was always right and others were always wrong and that Pectorious's testimony was corroborated. The ULJ found that the evidence contradicted relator's assertion, and we defer to the credibility determinations made by the ULJ. *Skarhus*, 721 N.W.2d at 344.

Affirmed.