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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1355**

Rita Rickabaugh,  
Respondent,

vs.

Quality Bicycle Products (Corp),  
Relator,  
Department of Employment and Economic Development,  
Respondent.

**Filed June 8, 2010  
Affirmed  
Stauber, Judge**

Department of Employment and Economic Development  
File No. 22076397-3

Rita Rickabaugh, Burnsville, Minnesota (pro se respondent employee)

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

## UNPUBLISHED OPINION

**STAUBER**, Judge

Relator employer challenges the decision by the unemployment-law judge (ULJ) that respondent employee was not discharged for employment misconduct because the evidence did not show that respondent's Internet usage was excessive in violation of relator's policy. Relator argues that (1) the ULJ erred because the ULJ addressed whether respondent's use was "excessive," rather than whether it violated relator's reasonable policy prohibiting anything but incidental or emergency use of the Internet for personal reasons during work hours; (2) relator presented substantial evidence showing that respondent had violated the Internet policy; and (3) the ULJ's factual findings were not supported by the record. We affirm.

### FACTS

Relator Quality Bicycle Products, Inc. (QBP) is a wholesale bicycle-parts distributor. QBP has a written policy in its employee handbook that provides: "[P]ersonal [Internet] use during working hours is expected to be limited to incidental use or emergency situations. Excessive time spent on such personal activities during working hours will subject an employee to disciplinary action." The purposes supporting QBP's Internet policy were to (1) minimize employee time spent on the Internet doing non-work-related activities during working hours and (2) maximize website efficiency for customers accessing QBP's website since customers accessing the website could experience slower website response if too many employees were on the Internet.

In August 2004, respondent Rita Rickabaugh began working for QBP as a production artist in the marketing department. Rickabaugh's duties included uploading documents to a printing-company website. This task was completed about once per month, and required Rickabaugh to access the Internet. Like all employees, Rickabaugh received a copy of QBP's Internet policy when she began her employment at QBP, and she signed an acknowledgment indicating that she had received the policy.

In 2007, Rickabaugh was warned that she was spending excessive amounts of time on the Internet during work hours. Rickabaugh and her husband subsequently purchased Internet access for their home which, according to Rickabaugh, reduced her need to use the Internet at work. In December 2008, all QBP employees received an e-mail reminding them of the Internet policy and informing them that excessive use of the Internet could result in disciplinary action, including termination. Two months later, in February 2009, QBP received complaints from four of Rickabaugh's coworkers that Rickabaugh was using the Internet for personal reasons at times when she should have been working.

Based on the complaints, QBP ordered an Internet-usage report. The report, which compiled information from February 2009 showed that Rickabaugh's computer had 62,199 requests during that month. The report also showed that Rickabaugh's Internet usage was concentrated during the middle part of the day and that Rickabaugh's computer was accessing the Internet even at times when she was not at work, such as evenings and weekends. Internet-usage reports for two of Rickabaugh's coworkers with

similar job duties logged 13,493 and 20,516 requests respectively for the same time period.

On February 23, 2009, QBP discharged Rickabaugh for excessive Internet use. Rickabaugh subsequently established a benefit account with respondent Department of Employment and Economic Development (department), and applied for benefits. A department adjudicator initially determined that Rickabaugh was eligible for unemployment benefits because she was not discharged by QBP for employment misconduct. QBP appealed that determination and a de novo hearing was held on the matter.

At the hearing, QBP's systems administrator Greg Sampson explained that a "request" is not an individual visit to a website because each website visited may generate numerous requests. Sampson also explained that a website with graphics and changing content generates far more requests than a website that is text-only and does not change or update its content. Thus, Sampson acknowledged that the Internet-usage report did not (1) show how much time Rickabaugh spent on the Internet; (2) show how many websites she visited each day; or (3) identify most of the websites Rickabaugh visited.

Rickabaugh testified that she used the Internet for work-related purposes, such as visiting an online dictionary and other various websites related to QBP products. Rickabaugh also testified that she used the Internet for personal reasons during her breaks, which included two 15-minute breaks and a half-hour lunch break. Rickabaugh further explained that she had downloaded a program that continuously communicated

with the Internet, displaying family photographs that Rickabaugh stored on the Internet as her computer screensaver.

The ULJ found that there “is not sufficient information to conclude that Rickabaugh’s usage was excessive” and therefore concluded that Rickabaugh was eligible for benefits because she was discharged for reasons other than employment misconduct. QBP filed a request for reconsideration with the ULJ, who affirmed. This certiorari appeal followed.

## D E C I S I O N

This court may reverse or modify the decision of a ULJ if the substantial rights of the petitioner may have been prejudiced because the ULJ’s findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4)–(5) (2008). Substantial evidence means “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Employees discharged for misconduct are ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (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 an employee committed the alleged act is a fact question. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court defers to the ULJ’s

credibility determinations and findings of fact. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But whether a particular act constitutes employment misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

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, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Minn. Stat. § 268.095, subd. 6(a) (2008).

Here, the ULJ found that “[a]t first glance, the number of requests coming from Rickabaugh’s computer appears excessive.” But the ULJ went on to find that “[w]hen looked at in consideration with other factors, there is not sufficient information to conclude that Rickabaugh’s usage was excessive.” These factors included:

(1) Rickabaugh’s testimony that she did not use the Internet for personal purposes while at work, other than when she was on her breaks, which was acceptable; (2) Rickabaugh’s testimony that she used the Internet for “reasonable” work-related reasons; (3) evidence that there were “close to 900 requests from Rickabaugh’s computer during non-working

hours,” meaning “that those requests were also likely being made during working hours;” and (4) the diminished reliability of QBP’s report when considering the evidence presented. Thus, the ULJ concluded that Rickabaugh was entitled to benefits because the “preponderance of the evidence . . . does not show that Rickabaugh’s Internet use was excessive or displayed clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee.”

QBP argues that the ULJ used the wrong standard in determining whether Rickabaugh violated its Internet-usage policy. QBP argues that because its policy states that anything more than “incidental or emergency” use of the Internet for personal reasons during work hours is prohibited, Rickabaugh’s use of the Internet did not have to be “excessive” in order to constitute employment misconduct. We disagree. QBP’s policy specifically states that “[*e*]xcessive time spent on [the Internet] during working hours will subject an employee to disciplinary action.” (Emphasis added.) Moreover, the e-mail sent out in December 2008, reminding employees of QBP’s Internet policy specifically states that “[p]eople that use the Internet *excessively* are being paid for time that they are not working.” (Emphasis added.) Because QBP’s policy specifically contemplates “excessive” Internet use, the ULJ did not err in using the proper standard in deciding whether Rickabaugh engaged in employment misconduct.

QBP also contends that the ULJ’s decision is not supported by substantial evidence in light of the entire record. But the record reflects that even though QBP’s Internet-usage report revealed that Rickabaugh’s computer had far more internet requests than the computers of similarly situated employees, evidence was presented suggesting

that the Internet-usage report was not completely reliable in evaluating Rickabaugh's conduct. For example, QBP's systems administrator acknowledged that the Internet-usage report did not (1) show how much time Rickabaugh spent on the Internet; (2) show how many websites Rickabaugh visited each day; or (3) identify most of the websites Rickabaugh visited. The report also showed that Rickabaugh's computer was consistently accessing the Internet at times when Rickabaugh was not at work. As the ULJ found, a logical inference from this information is that Rickabaugh's computer was accessing the Internet at times when Rickabaugh was at work, even though Rickabaugh may not have actually been using the Internet. A reasonable explanation for this Internet usage was provided at the hearing when Rickabaugh admitted that she had downloaded a screensaver program from the Internet that continuously downloaded Rickabaugh's pictures onto her work computer. Moreover, Rickabaugh testified that she did access the Internet for work-related purposes, but that she did not use the Internet for personal reasons except for during her breaks, which was allowed. If believed, this testimony would support the conclusion that Rickabaugh did not engage in excessive Internet use. The ULJ found Rickabaugh's testimony to be credible, and found QBP's Internet-usage reports to be unreliable. Therefore, although we may have weighed the evidence differently, there is substantial evidence in the record to support the ULJ's decision. *See Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (stating that this court defers to the ULJ's determinations regarding witness credibility and conflicting evidence).

QBP further argues that the ULJ erred by giving credence to much of Rickabaugh's testimony. QBP contends that in light of the inconsistencies in Rickabaugh's testimony, and the apparent "coaching" done by Rickabaugh's husband during the hearing, there was no legitimate basis for the ULJ to find Rickabaugh credible. But, again, QBP's systems administrator admitted that the Internet-usage report was not necessarily reflective of Rickabaugh's Internet usage, and Rickabaugh provided reasonable explanations for the data contained in the report. Moreover, the ULJ was aware of Rickabaugh's husband's presence at the hearing, as well as the inconsistencies in Rickabaugh's testimony, and the ULJ apparently did not find these factors to be material to Rickabaugh's credibility. Therefore, the ULJ did not err in concluding that Rickabaugh was discharged for reasons other than employment misconduct.

**Affirmed.**