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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-179**

Michael Poole,
Relator,

vs.

Tri-Valley Opportunity Council, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 26, 2011
Affirmed
Schellhas, Judge**

Department of Employment and Economic Development
File No. 26208471-3

Michael Poole, Crookston, Minnesota (pro se relator)

Tri-Valley Opportunity Council Inc., c/o TALX UCM Services Inc., St. Louis, Missouri
(Respondent)

Lee B. Nelson, Amy R. Lawler, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent Department of Employment and
Economic Development)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Respondent Tri-Valley Opportunity Council Inc. employed relator Michael Poole as a bus driver from July 3, 2008, until October 1, 2010. In November 2009, Poole's supervisor, Michael Frisch, saw Poole with a dog on a bus. Frisch warned Poole that the dog must be in a cage if it were on a bus. But Poole, who described the dog as the "bus mascot," frequently let the dog out of the cage while on the bus.

On October 1, 2010, Poole met with Sheri Christiansen, the compensation and employment specialist, and Cindi Peach, the community services director, regarding multiple complaints about Poole's conduct. During the meeting, Poole admitted to having the dog on a bus, to entering customer's homes, to texting while driving, to bringing an unauthorized individual to the bus garage, and to giving out his personal cell-phone number so people could call him directly rather than the Tri-Valley dispatcher. Tri-Valley discharged Poole for violating multiple company policies.

Respondent Department of Employment and Economic Development (DEED) determined that Poole is ineligible for unemployment benefits because he was discharged for employment misconduct. Poole appealed and a ULJ held an evidentiary hearing. Following the evidentiary hearing, the ULJ issued findings of fact and a decision that

Poole is ineligible for unemployment benefits because he was discharged for employment misconduct. The ULJ stated that Poole’s multiple policy violations constituted “a serious violation of the standard behavior that Tri-Valley had the right to [expect] of its bus drivers” and, therefore, constituted employment misconduct. Poole requested reconsideration, and the ULJ affirmed its decision.

This certiorari appeal follows.

D E C I S I O N

On certiorari appeal, this court reviews the ULJ’s decision to determine if the substantial rights of the relator may have been prejudiced because the findings, conclusion, or decision are “made upon unlawful procedure,” affected by error of law, or “unsupported by substantial evidence.” Minn. Stat. § 268.105, subd. 7(d)(3)–(5) (2010). Poole argues that the hearing before the ULJ was unfair and that his actions did not constitute misconduct.

Fairness of the Hearing

The ULJ conducts the hearing “as an evidence gathering inquiry” and “must ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b) (2010). “The judge must exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing.” Minn. R. 3310.2921 (2011).

Poole argues that the “ULJ rushed the hearing” and “did not allow many of [his] comments and responses.” But nothing in the record indicates that the ULJ rushed the hearing or prevented Poole from responding. The ULJ heard testimony from eight witnesses, including Poole. Both the employer and Poole were given an opportunity to

question each witness. And after Poole testified, the ULJ asked him if there was anything else he wanted to say, to which Poole responded no. The ULJ only prevented Poole from commenting when he spoke out of turn. The record reflects that the ULJ conducted a fair hearing. Poole's argument lacks merit.

Employment Misconduct

Poole argues that the incidents do not constitute misconduct. "Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee" Minn. Stat. § 268.095, subd. 6(a)(1) (2010). But "conduct an average reasonable employee would have engaged in under the circumstances" and "good faith errors in judgment if judgment was required" do not constitute misconduct. *Id.*, subd. 6(b)(4), (6) (2010). "As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). An employee who is discharged for misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010).

"In unemployment benefit cases, the appellate court is to review the ULJ's factual findings in the light most favorable to the decision and should not disturb those findings as long as there is evidence in the record that reasonably tends to sustain them." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Id.* (quotation omitted). "Whether the employee

committed a particular act is a question of fact.” *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 822 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010). “Determining whether a particular act constitutes disqualifying misconduct is a question of law that we review de novo.” *Stagg*, 796 N.W.2d at 315.

Tri-Valley has five written policies that are relevant to this case. First, drivers are prohibited from texting while driving. Second, with the exception of service animals, all animals are required to be in a cage while on the bus. Third, Tri-Valley provides “curb to curb service,” meaning drivers can assist passengers on and off the bus and carry groceries on and off the bus, but drivers are not permitted to assist passengers up to their home or go inside the home. Fourth, drivers are not allowed to bring unauthorized individuals to the bus garage. Fifth, all calls are required to go through Tri-Valley’s dispatch service to coordinate bus routes. The written policies are provided to drivers during training.

The ULJ determined that Poole was discharged for employment misconduct because he violated Tri-Valley’s policies. Specifically, Poole “was texting while driving, br[ought] his dog on the bus without a cage after being instructed not to, and assist[ed] riders into their homes.”

Poole testified that he “answered text while [he] was driving.” On appeal, Poole argues that he uses the term “driving” and “working” interchangeably, so when he admitted that he texted while driving, he meant that he texted while working, not while driving down the road. The record clearly indicates that the employer alleged that Poole texted while driving down the road. And the record clearly indicates that Poole

understood that he was accused of texting while driving, not simply texting during working hours. When explaining why he texted while driving, Poole stated, “[W]ell okay I’m driving, do you want me to pull over, nobody asked me to pull over.” The record reflects that Poole violated company policy by texting while driving.

Poole argues that he helped Tri-Valley’s image by letting his dog out of the cage because customers wanted to see the dog. Poole’s supervisor warned him that the dog needed to be in a cage while on the bus. Despite the employer’s explicit instructions, Poole frequently allowed the dog to roam free on the bus. Poole’s belief that he was benefiting the company does not justify ignoring specific instructions from his supervisor. *See Soussi v. Blue & White Serv. Corp.*, 498 N.W.2d 316, 317–18 (Minn. App. 1993) (stating that president, who was “strictly instructed that board approval was required before entering into any company contract . . . was in no position to substitute his judgment for that of the board” and “[a]ny ‘good faith’ belief that the contract would benefit the company is irrelevant”).

Poole argues that assisting passengers by carrying their things to the door and holding the door open was conduct an average reasonable employee would do under the circumstances. Poole assisted customers to their home and entered their home in violation of company policy. When confronted by his superiors, Poole stated that he knew it was against policy but he was going to “do it anyway because I’m a nice guy.” Blatantly disregarding a reasonable company policy intended to limit company liability is not conduct an average reasonable employee would do under the circumstances.

Poole also violated two other policies when he brought an unauthorized individual to the bus garage and gave his personal cell-phone number to people so that they could call him directly rather than call the Tri-Valley dispatcher.

Poole's multiple policy violations constituted a serious violation of the standards of behavior Tri-Valley has the right to reasonably expect of its employees. The ULJ therefore did not err by concluding that Poole is ineligible for unemployment benefits because he was discharged for employment misconduct.

Affirmed.