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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0377**

Dean Berghoff,
Respondent,

vs.

Plantron, Inc. - Farmer Seed & Nursery, Co.,
Relator,

Department of Employment and Economic Development,
Respondent.

**Filed March 4, 2013
Reversed
Collins, Judge***

Department of Employment and Economic Development
File No. 28650035-4

Dean Berghoff, Faribault, Minnesota (pro se respondent)

John A. Hamer, Faribault, Minnesota (for relator)

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

Considered and decided by Halbrooks, 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UNPUBLISHED OPINION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-employer challenges the determination of the unemployment law judge (ULJ) that respondent-employee is eligible for unemployment benefits because his discharge was for reasons other than employment misconduct. Because respondent-employee's offensive intoxicated after-hours phone calls to a subordinate coworker constituted employment misconduct, we reverse.

FACTS

On October 3, 2011, relator Plantron Inc. - Farmer Seed & Nursery Co. discharged respondent-employee Dean Berghoff, citing various instances of sexual harassment and obscenity. Berghoff began his employment with Plantron in February 2002 and signed the "Farmer Seed & Nursery Rules And Guidelines." These rules included an obscenity policy stating in underlined and capitalized text that "obscene language or gestures will not be tolerated." At the time of his discharge Berghoff was a distribution manager responsible for enforcing the policy in the workplace.

On September 6, 2011, Berghoff's subordinate coworker T.H. reported to Plantron that Berghoff called her at home the previous evening while he was intoxicated. According to T.H., Berghoff was slurring his words and she could not clearly understand him. T.H. requested that Berghoff not call her if he was intoxicated. Greg Mews, a Plantron supervisor, directed Berghoff not to repeat his behavior and stated that he would document the incident.

Between September 21 and 23, two incidents occurred at Plantron that involved Berghoff. In the first, another employee commented that a seed machine “suck[ed],” to which Berghoff responded, “well you haven’t tried me yet.” The second incident occurred when the same employee, on a separate occasion, referred to the seed machine as a piece of junk. Berghoff responded by stating: “You can touch my junk if you want,” as he swiveled or thrust his hips toward the employee. Mews observed the second incident and told Berghoff to “clean it up” because his conduct was “disgusting.”

On September 28, after work hours, Berghoff again telephoned T.H. at her home while he was intoxicated. T.H. arrived at work the next morning in tears and reported to Plantron that Berghoff called her a “slut, and a whore.” Mews sent Berghoff home and later suspended him, pending a company decision on his future. On October 3, Plantron discharged Berghoff.

Berghoff applied for unemployment benefits. Plantron informed the Minnesota Department of Employment and Economic Development (DEED) that Berghoff’s discharge was due to “harassment of employees” in violation of policies regarding “harassment, obscene language or gestures.” DEED concluded that Berghoff’s discharge was due to employment misconduct, rendering him ineligible for benefits, and denied his application for benefits. Berghoff appealed.

On December 2, 2011, a ULJ conducted a telephonic hearing. Berghoff denied placing phone calls to T.H. while intoxicated, especially as alleged on the evening of September 28. Berghoff admitted the reported workplace incidents but contended that his coworkers understood his actions were done in a joking and nonoffensive manner. To

support his contention, Berghoff described regular informal meetings when Plantron employees exchanged jokes, many of which were sexual in nature. Mews attended these informal meetings. Berghoff's written submissions to the ULJ were consistent with his contention that no one took offense to his actions and that many employees engaged in similar, arguably offensive, behavior in the workplace. T.V., a seasonal employee at Plantron, corroborated Berghoff's testimony. T.V. testified that a number of Plantron employees engaged in obscene conduct in the workplace and that the employees seemed to understand that the obscenity was done in a joking manner. Based on the record before the ULJ, Berghoff argued that Plantron did not enforce its obscenity policy and did not have a specific sexual harassment policy.

The ULJ found that while there was truth in the testimony of each hearing participant, "only [T.V.'s] testimony was credible as a whole." The ULJ determined that Berghoff's discharge was for reasons "other than employment misconduct," stating that "Plantron did not have the right to reasonably expect that Berghoff would not make sexually charged comments, gestures, or jokes. The preponderance of the evidence shows it was common within the workplace and because the employer clearly was not enforcing any sexual harassment policy." The ULJ reversed Berghoff's ineligibility for unemployment benefits. Plantron requested reconsideration. The ULJ affirmed, and this certiorari appeal followed.¹

¹ DEED submitted a letter in lieu of a brief to this court, urging reversal.

DECISION

On certiorari appeal, we review the decision of a ULJ to determine whether the substantial rights of a 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) (2012).

Plantron challenges the ULJ’s determination that Berghoff is eligible for unemployment benefits because his discharge was for reasons other than employment misconduct. Determining whether an employee engaged in conduct disqualifying the employee from receiving unemployment benefits presents a mixed question of law and fact. Whether conduct constitutes employment misconduct is reviewed *de novo*. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). A ULJ’s factual findings are reviewed in the light most favorable to the decision and will not be disturbed on appeal if there is evidence that substantially sustains those findings. *Id.*; *see also* Minn. Stat. § 268.105, subd. 7(d)(5).

Employment misconduct includes “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a)

(2012). A knowing violation of an employer's directives, policies, or procedures constitutes employment misconduct because it demonstrates a willful disregard of the employer's interests. *Schmidgall*, 644 N.W.2d at 806-07. An employee discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012).

Plantron alleges Berghoff violated its obscenity policy on various occasions, both at and away from the workplace, and that Berghoff's actions constituted employment misconduct. In support of his decision, the ULJ reasoned that "Plantron did not have the right to reasonably expect that Berghoff would not make sexually charged comments, gestures, or jokes. The preponderance of the evidence shows it was common within the workplace and because the employer clearly was not enforcing any sexual harassment policy." Substantial evidence supports the conclusion that Plantron's stated obscenity policy was not enforced and, as the ULJ found, "Mews never made any serious attempts to address or prevent the sexually charged workplace."

But Berghoff was also discharged for making unwelcomed and offensive intoxicated after-hours phone calls to a subordinate Plantron employee. The ULJ found that, "[o]n September 6, 2011, [T.H.] told Berghoff not to call her while he was intoxicated anymore. On September 28, 2011, Berghoff called [T.H.] after work while intoxicated. During the conversation, he called [T.H.] a slut, ho-bag, and whore." However, the ULJ discounted the phone calls as "not a serious violation of the employer's reasonable expectations because Berghoff was friends with [T.H.] and the two had a friendship that involved talking about inappropriate things." The record is

inconclusive regarding the level of Berghoff and T.H.'s friendship, and the ULJ's finding that their relationship was such as to include discussing inappropriate things after-hours on the telephone is not supported by substantial evidence. The implication that T.H. welcomed such phone calls runs counter to the evidence; indeed, the phone calls were objectively upsetting to T.H.

It is undisputed that Mews directed Berghoff, following the September 5 phone calls, not to again call T.H. after-hours while he was intoxicated. We have previously held that an employee's refusal to follow a reasonable employer request, which does not impose an unreasonable burden on the employee, constitutes employment misconduct. *Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985). The directive to cease intoxicated after-hours phone calls was not unreasonably burdensome.

In its letter to this court, DEED observed that, "by all accounts, Plantron has never condoned or encouraged supervisors to make intoxicated after-hours calls to subordinates, nor to use such calls to upset subordinates by calling them humiliating names." DEED concluded that, "[e]ven an employer that accepts generally lewd behavior at work can reasonably expect that its employees will not drink to excess, call their subordinates on the telephone outside of work hours, and degrade them." We agree. Berghoff's violation of this reasonable expectation constitutes employment misconduct for which he was duly discharged. *See* Minn. Stat. § 268.095, subd. 6(a)(1), (2) (2012) (employment misconduct includes intentional or indifferent conduct, even off the job, that displays a serious violation of standards the employer has the right to reasonably expect of the employee or a substantial lack of concern for the employment).

Berghoff's employment misconduct renders him ineligible for unemployment benefits. *See* Minn. Stat. § 268.095, subd. 4(1) (employee discharged for employment misconduct is ineligible for benefits).²

Reversed.

² We note that Berghoff has not claimed unemployment benefits since December 2011 and is not liable to repay any benefits he received pursuant to the ULJ's initial determination. *See* Minn. Stat. § 268.105, subd. 3a(c) (2012). However, this case is not moot. A determination regarding the propriety of Berghoff's claimed benefits has a direct impact on computing Plantron's future unemployment tax rate. *See* Minn. Stat. § 268.047, subd. 3 (2012).