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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2275**

Kevin H. Jennings,
Relator,

vs.

Menasha Packaging Company LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 26, 2013
Affirmed
Johnson, Chief Judge**

Department of Employment and Economic Development
File No. 30126293-3

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Considered and decided by Rodenberg, Presiding Judge; Johnson, Chief Judge;
and Connolly, Judge.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

Kevin H. Jennings was employed as a forklift operator for the Menasha Packaging Company, which terminated his employment because he failed to report an incident of property damage. An unemployment law judge determined that Jennings engaged in employment misconduct and, thus, is ineligible for unemployment benefits. We affirm.

FACTS

Jennings was a forklift operator for Menasha from August 1984 until August 2012. During the last two years of his employment, he twice was warned after he caused property damage and raised safety concerns. Each time, Menasha informed Jennings that further violations of company policies could lead to his termination. Menasha terminated Jennings's employment after a third incident in August 2012.

The first incident occurred in March 2011, when Jennings backed into a racking system. He bent the legs of a rack, which required it to be replaced at a cost of \$4,000. Jennings violated Menasha policy by not looking backward while he was backing up and by not reporting the incident to his supervisor. Two other employees, Rene Campos and Jose Avodano, saw Jennings strike the rack and reported it to Lee Benson, Menasha's operations manager. When Benson confronted Jennings about the incident, he stated that he did not recall striking the racking system. Menasha warned Jennings that future incidents could lead to disciplinary action, including termination.

The second incident occurred in February 2012, when Jennings almost struck a fellow employee while operating the forklift in an unsafe manner. Menasha issued

Jennings a written warning, which stressed the importance of safety and informed him that further unsafe operation would lead to disciplinary action, including termination.

The third and final incident occurred on August 6, 2012. Jennings was operating a forklift when he struck a stationary conveyor belt with enough force that he moved it 18 inches and sheared the bolts that secured it to the floor. Jennings did not report the incident, which resulted in \$2,000 in damages. Menasha conducted an internal investigation. A maintenance supervisor, Nick Cochrane, disclosed that he witnessed the incident. When he was questioned, Jennings stated that he did not remember hitting the stationary conveyor belt and insisted that he had hit a moveable conveyor belt instead. Jennings was referring to an August 8, 2012 incident in which he struck a moveable conveyor belt but did not cause any damage. In the August 8, 2012 incident, Jennings pushed the conveyor belt back into place with Cochrane's help. Jennings had not previously reported the August 8 incident.

On August 20, 2012, Menasha terminated Jennings' employment because he failed to report the August 6 incident. Menasha did not refer to the August 8 incident in its letter of termination.

Later that month, Jennings applied for unemployment benefits. The department of employment and economic development (DEED) made an initial determination that Jennings is ineligible. Jennings filed an administrative appeal of the initial determination. An unemployment law judge (ULJ) held an evidentiary hearing in September 2012. During the hearing, Jennings admitted striking the stationary conveyor belt but denied that he was aware at the time of the incident that he had struck it. Jennings testified that

he first became aware that he had struck the stationary conveyor belt when he was shown a photograph of the damage.

In October 2012, the ULJ determined that Jennings engaged in employment misconduct and, thus, is ineligible to receive unemployment benefits. Jennings requested reconsideration, and the ULJ affirmed the October 2012 order. Jennings appeals.

D E C I S I O N

Jennings argues that the ULJ erred by determining that he engaged in employment misconduct. This court reviews a ULJ's decision denying benefits to determine whether the findings, inferences, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (2012). The ULJ's factual determinations will be upheld if supported by substantial evidence, but "whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). The definition of employment misconduct includes "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." *Id.*, subd. 6(a) (2012). In determining whether an employee committed employment misconduct, the employee's conduct "must be considered in the context of [his] job responsibilities." *See Frank v.*

Heartland Auto. Servs., Inc., 743 N.W.2d 626, 630 (Minn. App. 2008) (citing *Skarhus*, 721 N.W.2d at 344).

In this case, the ULJ determined that Jennings violated Menasha policy by failing to report an incident of property damage despite previously being warned after prior similar incidents. The ULJ stated that “the preponderance of the evidence shows that Jennings was aware that his forklift struck a conveyor belt and tore it from the floor” and that he knew it was a violation of company policy to not report the incident. The ULJ found Jennings’s testimony to be less credible than the testimony of other witnesses because his testimony was “uncertain and he described a less likely chain of events.”

In denying Jennings’s request for reconsideration, the ULJ reiterated the earlier finding and responded to Jennings’s argument that he had struck a movable conveyor belt, not a stationary conveyor belt. The ULJ stated that Jennings’s argument provided additional justification for a finding of misconduct, for two reasons. First, the ULJ noted the undisputed fact that Jennings had struck a conveyor belt and reasoned that it is irrelevant whether the conveyor belt was stationary or moveable. The ULJ also reasoned, “Even if Jennings failed to report the final incidents because he was unaware that he had an accident, Jennings’[s] conduct was still negligent and a serious violation of the employer’s expectations.

Jennings challenges the ULJ’s decision on two grounds. First, he argues that the evidence does not support the ULJ’s finding that he knew that he had struck the stationary conveyor belt. Specifically, he argues that he was unaware that he had struck

the stationary conveyor belt at the time of the incident and became aware of that fact only when he was shown a photograph of the damage.

First, the evidence developed at the evidentiary hearing supports the ULJ's finding that Jennings knew, at the time of the August 6 incident, that he had struck the stationary conveyor belt. Menasha safety manager Timothy Donnelly testified that Menasha's internal investigation showed that Jennings "realized he hit and somewhat panicked and then just finished his job and went on his way." Furthermore, Jennings's maintenance supervisor, Nick Cochrane, witnessed the incident and later reported it to two supervisors, who testified at the evidentiary hearing about Cochrane's report. Moreover, the ULJ found Jennings to be less credible than Menasha's witnesses. We defer to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344.

Second, Jennings argues that the evidence does not support the ULJ's determination that he committed misconduct. Jennings contends that his conduct was not a serious violation of the standards of behavior Menasha has the right to reasonably expect from its employees. *See* Minn. Stat. § 268.095, subd. 6(a)(1); *Frank*, 743 N.W.2d at 630. "An employer has a right to expect that its employees will abide by reasonable instructions and directions." *Vargas v. Northwest Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004). As a general rule, an employee's refusal "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). "This is particularly true when there are multiple violations of the same rule involving warnings or progressive discipline." *Id.* at 806-07.

The evidence developed at the evidentiary hearing shows that Jennings was terminated for failing to report the August 6 incident despite previously receiving two prior warnings about his forklift operation. Jennings does not dispute that Menasha's policies required him to immediately report any property damage. In fact, he agreed that his supervisor frequently reminded the forklift operators to tell the supervisor about any accidents. As a general rule, an employee's refusal "to abide by an employer's reasonable policies and requests" constitutes disqualifying misconduct. *Schmidgall*, 644 N.W.2d at 804. By striking a stationary conveyor belt and not reporting the incident, Jennings committed a serious violation of the standards of behavior Menasha has the right to reasonably expect from its employees. *See* Minn. Stat. § 268.095, subd. 6(a)(1); *Frank*, 743 N.W.2d at 630. Thus, the ULJ did not err in finding that Jennings committed misconduct.

Jennings argues further that the ULJ changed the basis for misconduct in his ruling on the request for reconsideration. The ULJ's second order does not retract the reasoning of the first order. The ULJ simply responded to Jennings's argument for reconsideration by reasoning that his argument supports, rather than undermines, the prior finding of misconduct. The sum total of the ULJ's orders is that Jennings engaged in misconduct in multiple ways: he knowingly struck a stationary conveyor belt on August 6, he knowingly struck a moveable conveyor belt on August 8, he operated his forklift in a negligent manner on both occasions, and he failed to report either incident to his supervisor. For all those reasons, the record supports the ULJ's conclusion that Jennings engaged in employment misconduct.

In sum, the ULJ did not err by determining that Jennings is ineligible for unemployment benefits because he engaged in employment misconduct.

Affirmed.