STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1252

Timothy S. Brenna,
Relator,

vs.

U.S. Postal Service (FIC 732/Dest 1),
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 30, 2012
Affirmed in part and reversed in part; motion denied
Peterson, Judge

Department of Employment and Economic Development
File No. 27321703-3

Jasper D. Berg, IAJ Law, LLC, Woodbury, Minnesota (for relator)

U.S. Postal Service (FIC 732/Dest 1), St. Louis, Missouri (respondent employer)

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

Considered and decided by Peterson, Presiding Judge; Larkin, 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.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

Relator challenges the decision of an unemployment-law judge that he is ineligible to receive unemployment benefits because he was discharged for employment misconduct and aggravated employment misconduct. We affirm in part and reverse in part and deny respondent Minnesota Department of Employment and Economic Development's motion to strike portions of relator's reply brief.

FACTS

Relator Timothy S. Brenna was employed by respondent U.S. Postal Service (FIC 732/Dest 1) (USPS) as a letter carrier. In December 2010, a customer on Brenna's route complained that Brenna had forged her signature on a certified package and left the package, which was then stolen. On December 16, 2010, the office of the inspector general (OIG) placed a five-dollar gift card loose in the mail in a blue collection box on Brenna's route. The following day, the gift card was spent at a store by an individual who was wearing a sweatshirt with a USPS logo and who resembled Brenna.

OIG investigators interviewed Brenna. Brenna admitted that he had forged a customer's signature on a certified-mail receipt. Brenna was shown a photograph from the store surveillance camera taken on the day the gift card was spent. Brenna identified the person in the photograph as himself. An OIG investigator asked Brenna if he had spent the gift card, and Brenna said he wanted to "plead the 5th" and requested to speak with his union representative.

On January 6, 2011, a USPS regional manager placed Brenna on an unpaid emergency suspension. On February 22, 2011, the regional manager issued a notice of removal to Brenna. Brenna filed a grievance. Brenna applied for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development (DEED) issued a determination of eligibility. The employer appealed on the basis that Brenna violated "a reasonable and known policy" by taking and spending the gift card. At the hearing before an unemployment-law judge (ULJ), Brenna stated that his union steward directed him not to answer any questions about the gift card. At the time of the hearing, Brenna was a USPS employee, was not receiving pay, and was awaiting resolution of a union grievance procedure.

An employer representative testified at the hearing that she "believe[s]" stealing a five-dollar gift card from the mail is "a felony up to $10,000 or 10 years in jail." The ULJ concluded that Brenna had been discharged for employment misconduct and aggravated employment misconduct and was ineligible for benefits. The ULJ affirmed on reconsideration. This certiorari appeal followed.

D E C I S I O N

This court may affirm a ULJ's decision, remand the case for further proceedings, or reverse or modify the ULJ's decision if the substantial rights of the 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) (2010).

This court views the ULJ's factual findings in the light most favorable to the decision and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). While this court reviews questions of law de novo, "findings that are supported by substantial evidence will not be disturbed." *Ywswf v. Teleplan Wireless Servs., Inc.* 726 N.W.2d 525, 529 (Minn. App. 2007). Substantial evidence is "(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 Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

I.

Brenna contends that there is a fact issue with respect to whether he was discharged from employment or suspended from employment. "A discharge from employment occurs when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity." Minn. Stat. § 268.095, subd. 5(a) (2010). "A suspension from employment without pay for more than 30 calendar days is considered a discharge from employment under section 268.095, subdivision 5." Minn. Stat. § 268.085, subd. 13(b) (2010).

Brenna was placed on unpaid leave beginning January 6, 2011. On February 22, 2011, he was issued a "notice of removal." Brenna applied for and was found eligible to

receive unemployment benefits in March 2011. At some point, Brenna filed a grievance with his union, which had not been resolved at the time of the hearing before the ULJ. Brenna contends that he understood that his suspension meant that he would be reinstated in the future. But at the time of the hearing before the ULJ, Brenna had not been reinstated, and, under the statute, a suspension without pay for more than 30 days is considered a discharge from employment. Substantial evidence supports the ULJ's conclusion that Brenna was discharged.

II.

For unemployment-compensation purposes, "employment misconduct" is defined as "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) (2010). Whether an employee committed employment misconduct 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, but whether an act committed by an employee constitutes employment misconduct is a question of law, which this court reviews de novo. *Skarhus*, 721 N.W.2d at 344.

Brenna was discharged, in part, for forging a customer's signature on a certified-mail receipt. Brenna admitted forging the signature on the certified-mail receipt but testified that (1) he did not know whether signing for the customer was a violation of USPS rules, (2) he believed that there was a young man in the house to retrieve the

package, and (3) forging customer signatures on certified-mail receipts is an accepted practice among letter carriers. The ULJ rejected Brenna's arguments, finding that "Brenna knew it was against [the] rules to sign a customer's name to the certified mail receipt," the practice of letter carriers signing certified mail for customers "clearly frustrates the purpose of sending packages by certified mail," and the USPS "had the right to expect Brenna to comply with workplace policies."

A former employee may be denied unemployment benefits for engaging in employment misconduct even if the conduct did not warrant termination under the employer's policies. *See Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 316 (Minn. 2011) (concluding that violations of absenteeism and tardiness policy was employment misconduct even though employer did not follow progressive disciplinary system). Also, a "[v]iolation of an employer's rules by other employees is not a valid defense to a claim of misconduct." *Dean v. Allied Aviation Fueling*, 381 N.W.2d 80, 83 (Minn. App. 1986).

Even if the USPS did not have a rule that specifically prohibited letter carriers from signing the name of a customer on a certified-mail receipt, forging a customer's signature was intentional conduct on the job that displayed clearly a serious violation of the standards of behavior that the USPS had a right to expect of Brenna or a substantial lack of concern by Brenna for his employment. As the ULJ found, the practice of letter carriers signing certified mail for customers "clearly frustrates the purpose of sending packages by certified mail." Brenna cites no evidence that the customer whose signature he forged asked that he do so, and, absent some basis for believing that he had authority to sign for the customer, Brenna's argument that forging the signature did not violate a

standard of behavior that the USPS had the right to reasonably expect of Brenna is meritless.

III.

An employee who is discharged for aggravated employment misconduct is ineligible to receive unemployment benefits and is subject to cancellation of the wage credits that the employee would have earned from that employment. Minn. Stat. § 268.095, subds. 4(2), 10(c) (2010). The definition of "aggravated employment misconduct" includes "the commission of any act, on the job or off the job, that would amount to a gross misdemeanor or felony if the act substantially interfered with the employment or had a significant adverse effect on the employment." Minn. Stat. § 268.095, subd. 6a(a)(1) (2010). "If an applicant is convicted of a gross misdemeanor or felony for the same act for which the applicant was discharged, it is aggravated employment misconduct if the act substantially interfered with the employment or had a significant adverse effect on the employment." *Id*., subd. 6a(b). Whether an act committed by an employee constitutes aggravated employment misconduct is a question of law, which this court reviews de novo. *See Stagg*, 796 N.W.2d at 315 (stating that whether act constitutes disqualifying misconduct is fact question subject to de novo review).

Brenna was discharged, in part, for taking and spending a five-dollar gift card that OIG had placed in a collection box. DEED has brought a motion in this court seeking an order striking the argument in Brenna's reply brief that Brenna's conduct did not constitute a felony or gross misdemeanor. DEED contends that "Brenna has never before

argued that the theft of which he was accused would not constitute a felony, but has instead contended that he is innocent." "The reply brief must be confined to new matter raised in the brief of respondent." Minn. R. Civ. App. P. 128.02, subd. 4. For purposes of Minn. R. Civ. App. P. 128.02, subd. 4, "new matter" means "new issues." *State v. Medibus-Helpmobile, Inc.*, 481 N.W.2d 86, 93 (Minn. App. 1992), *review denied* (Minn. Mar. 19, 1992). Reply briefs are liberally construed to allow a relator to respond to arguments advanced by the respondent. *Goeman v. Allstate Ins. Co.*, 725 N.W.2d 375, 378 (Minn. App. 2006) (citing 3 Eric J. Magnuson & David F. Herr, *Minnesota Practice* § 128.8, at 606 (2006)). In its brief, DEED asserted that "it is undisputed that theft from the mail is a felony." Brenna's argument in his reply brief is a response to DEED's assertion and within the proper scope of a reply brief. Therefore, we deny DEED's motion to strike Brenna's argument that Brenna did not commit a felony.

Furthermore, whether Brenna's conduct would amount to a gross misdemeanor or felony is a question of law, which this court reviews de novo. The ULJ found that "Brenna spent the gift card on [his] personal belongings" and "[t]he theft of mail from the U.S. Postal Service is a felony under Federal Law." But the ULJ did not cite any federal law that makes the theft of mail a felony and did not apply any federal law to the facts of this case to determine whether Brenna's conduct satisfied the elements of any criminal offense.

The only basis that we can find in the record for the ULJ's determination that theft of mail is a felony under federal law is the testimony of an employer representative that she "believe[s]" stealing a five-dollar gift card from the mail is "a felony up to $10,000 or

10 years in jail." But, like the ULJ, the employer representative did not cite any authority for her belief that taking a five-dollar gift card from a collection box is a felony. And, on appeal, DEED does not cite any authority that supports the ULJ's determination that taking the gift card is a felony.

In its motion to strike, DEED asserts that "[t]here is no question that stealing a gift card from a postal service collection box is a felony under 18 U.S.C. § 1708." That statute states:

> Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or *mail*, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein . . . [s]hall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1708 (2006) (emphasis added).

Our research has identified another federal statute that specifically addresses theft of mail by a USPS employee. That statute states:

> Whoever, being a Postal Service officer or employee, embezzles any letter, postal card, package, bag, or mail, or any article or thing contained therein entrusted to him or which comes into his possession *intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service*, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General or of the Postal Service; or steals, abstracts, or removes from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined

> under this title or imprisoned not more than five years, or both.

18 U.S.C.A. § 1709 (2006) (emphasis added).

The ULJ found that the gift card was loose in the mail, which we understand to mean that the card was not in an envelope or package and was simply the card, by itself, in the mail box. We have not found any authority that indicates that either section 1708 or section 1709 has been interpreted in a manner that would support a conclusion that a gift card that bears no address and no postage is either mail or an article or thing intended to be conveyed by mail or carried or delivered by any person employed in any department of the postal service. Without some authority that would support such a conclusion, the ULJ erred in concluding that Brenna's conduct is a felony under federal law. Failing to turn in a gift card found loose in a mail box may have violated a USPS regulation or policy, but nothing in the record or that we have found by our own research indicates that it is a felony or a gross misdemeanor. We, therefore, conclude that the ULJ erred in determining that Brenna was discharged for aggravated employment misconduct, and we reverse that determination.

IV.

DEED has filed a motion to strike Brenna's argument in his reply brief that the ULJ did not make a credibility determination and, instead, decided that the only witness presented by the employer was a more persuasive witness than Brenna. DEED argues that Brenna's argument raises a new issue that neither Brenna nor DEED raised in their principal briefs. We disagree. In its principal brief, DEED stated the principle that

determining the credibility of testimony is the exclusive province of the ULJ and a ULJ's credibility determinations will not be disturbed on appeal. Brenna's argument regarding credibility is simply a response to the statement in DEED's brief and does not raise a new issue. Therefore, we deny DEED's motion to strike.

Affirmed in part, reversed in part; motion denied.