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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-316**

Dennis Jones,
Relator,

vs.

McDonough Truck Line, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed November 23, 2010
Affirmed
Stauber, Judge**

Department of Employment and Economic Development
File No. 23493289-3

Dennis Jones, Faribault, Minnesota (pro se relator Dennis Jones)

McDonough Truck Line, Inc., Faribault, Minnesota (respondent)

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

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

UNPUBLISHED OPINION

STAUBER, Judge

Relator Dennis Jones challenges the unemployment law judge's (ULJ) decision that he is ineligible for unemployment benefits because he was discharged for misconduct. He argues that while he may have been discharged for unsatisfactory work performance, he did not engage in misconduct because he did not act intentionally or negligently; it was his personality that was causing the problems; his supervisor was not doing his job; and the employer was trying to avoid paying additional unemployment taxes. Because the ULJ's findings are supported by substantial evidence and relator's discharge was attributable to employment misconduct, we affirm.

FACTS

Relator Dennis Jones worked as a forklift driver and a yard man for respondent McDonough Truck Line, Inc. from May 8, 2001 to September 9, 2009. His final wage was \$16.35 per hour. Leading up to his discharge, McDonough management spoke with relator several times about concerns they had with him.

On June 4, 2009, human-resources representative John Kastner met with relator to discuss ongoing problems with the dock crew. Kastner warned relator that he needed to start cooperating with his supervisor, Dave Paquette, because their conflicts were causing delays and damaged freight. On June 9, Kastner spoke with relator because relator had reported to work two hours late. Kastner warned relator that he needed to show more effort at his job or the company would need to make a change.

On July 8, relator and a supervisor, Dave Bossmann, had a heated discussion about relator's performance. Bossmann approached relator and told him that he needed to work faster, to which relator responded that he had to correct the performance of his coworkers. Bossmann informed relator that it was not his job to supervise his coworkers and that he needed to report any problems to his supervisor. Relator got upset, yelled at Bossmann, and left work for an hour.

On July 22, Kastner and Bossmann met with relator to give him another warning. Relator had given directions to a coworker that contradicted what Bossmann told the coworker to do. Kastner and Bossmann informed relator that his attempts to supervise were causing conflict with his coworkers and that he needed to focus on his own work and report problems to his supervisor. Relator was told this was his last warning and that he could be terminated if he did not rectify the problem immediately.

On August 14, relator failed to show up for his shift after he had told a manager that he would be 30 minutes late. Kastner met with relator on August 17, and relator told him that he had been sick with heat stroke and had not been able come to work on that night. Kastner was informed by another employee that relator was seen having a bonfire with a group of people at his home on the night of August 14. Relator told Kastner it was his wife who was having the party, and he was home sick. Kastner confronted relator once again when he was informed by another employee that relator was also seen at a baseball game that night drinking a beer. Relator admitted going to the game and drinking, but maintained that he was sick.

On August 26, relator left a message on Kastner's cell phone and home phone at midnight, saying that a coworker needed to show him more respect or "either he goes or I go." Kastner and Bossmann met with relator the next day. Relator admitted that he was trying to give his coworker directions and reiterated that his coworker was disrespectful to him. At the meeting, Kastner and Bossmann discharged relator for repeatedly failing to follow their instructions to stop giving direction to his coworkers, to report problems to his supervisor, and to focus on his work. Kastner granted relator's request to remain employed until September 9, at which time relator believed his DWI convictions would come off his record and make it easier for him to find employment.

Relator applied for unemployment benefits through respondent Minnesota Department of Employment and Economic Development (DEED) and was found to be eligible because he was discharged due to work performance and not employment misconduct. McDonough appealed, and an evidentiary hearing was held with a ULJ. The ULJ determined that relator was discharged for employment misconduct and is therefore ineligible for unemployment benefits. Relator filed a request for reconsideration with the ULJ, who affirmed. This certiorari appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, this court may affirm the decision, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced. Minn. Stat. § 268.105, subd. 7(d) (2008). Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether a particular

act constitutes employment misconduct is a question of law, which we review de novo.

Id. But 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). This court reviews the ULJ's factual findings "in the light most favorable to the decision." *Id.* In doing so, we "will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id.* In addition, "[c]redibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Id.* at 345.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). 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) (Supp. 2009). As a general rule, employment misconduct includes refusal "to abide by an employer's reasonable policies and requests." *Schmidgall*, 644 N.W.2d at 804. An employee's decision to violate a reasonable policy constitutes misconduct, and this is especially true "when there are multiple violations of the same rule involving warnings or progressive discipline." *Id.* at 806–07. However, employment misconduct does not include simple unsatisfactory conduct, conduct an average reasonable employee would have engaged in under the circumstances, or conduct that was a consequence of the applicant's inefficiency or inadvertence. Minn. Stat. § 268.095, subd. 6(b) (Supp. 2009).

The ULJ determined that relator was discharged for employment misconduct because of his refusal to stop supervising his coworkers, to focus on his work, and to bring his concerns to his supervisor. The ULJ found that this was a pattern of behavior rather than an isolated incident and concluded that relator's actions were violations of standards of behavior that McDonough had the right to expect, as well as a display of substantial lack of concern for the employment.

Relator argues he may have been discharged for unsatisfactory work performance, but not employee misconduct. Specifically, relator contends that his conduct was not intentional or negligent. Relator points to John Kastner's statement regarding his termination, when relator was told that his "personality was causing too many problems." However, intentional conduct merely means the conduct is deliberate, as opposed to accidental. *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004). There is sufficient evidence in the record to support the ULJ's determination that relator engaged in employment misconduct that was intentional, negligent, or indifferent.

Relator admitted that he got upset with Bossmann and left work for an hour when Bossmann confronted him about his work on July 8, 2009. Relator admitted that he was told on several occasions that he was not in charge of other employees, was not to supervise or direct them, and was to concentrate on his own work and report problems to his supervisor. Relator acknowledged that he did not report problems to his supervisor and that he gave direction to his coworkers. We agree with the ULJ that these were reasonable policies and requests by the employer, and relator's actions in not abiding by

them were not accidental or unintentional. Additionally, as noted by the ULJ, the record shows a pattern of behavior with multiple warnings rather than simply an isolated incident. A decision to knowingly violate a reasonable policy is misconduct, and “[t]his is particularly true when there are multiple violations of the same rule involving warnings or progressive discipline.” *Schmidgall*, 644 N.W.2d at 806-07.

Further, relator also admitted to calling Kastner at midnight the night before he was discharged to complain about a coworker, saying “either he goes or I go.” Finally, relator acknowledged to the ULJ that he was at a bar, a baseball game, and a bonfire on the evening of August 14, 2009, but still maintained that he was too sick to go to work. The ULJ found this testimony to be so unlikely that it served to impeach all of relator’s testimony and also found that Bossman and Kastner were more persuasive witnesses. On appeal, this court must give deference to the credibility determinations of the ULJ. *Skarhus*, 721 N.W.2d at 344.

Relator also argues that these violations were not serious. To support his claim, he specifically points to the fact that McDonough granted his request to remain employed until September 9 after they chose to discharge him on August 27. The ULJ found that relator’s conduct was both a serious violation of standards the employer could reasonably expect and displayed a substantial lack of concern for the employment. The statutory definition of employment misconduct only requires that one of these criteria be met, and therefore relator may be found to have committed misconduct even if he only displayed a substantial lack of concern for employment. *See* Minn. Stat. § 268.095, subd. 6(a).

There is ample evidence in the record to support the ULJ's conclusions. Relator's actions in arriving to work two hours late, missing an entire shift, lying to his employer about where he was, yelling at a supervisor, and leaving work when confronted about his job performance, all show a substantial lack of concern for his employment. Further, relator's disregard of his employer's reasonable request to stop directing his coworkers and to report to his supervisor was a serious violation. The record further shows that relator's conflicts with his coworkers were costing the company time and money. The fact that relator was allowed to remain employed for another two weeks does not alter the conclusion that relator's conduct leading to the discharge constituted misconduct.

The evidence substantially sustains the ULJ's finding that relator showed a lack of concern for his employment and failed to comply with his employer's reasonable directives. It was not an error of law to conclude that this constituted employment misconduct.

Affirmed.