

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1798**

Jason Griggs,  
Relator,

vs.

Flint Hills Resources Pine Bend, LLC,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed July 2, 2012  
Affirmed  
Connolly, Judge**

Department of Employment and Economic Development  
File No. 28094278-3

Richard Michael Waterman, Mudge Porter Lundeen & Seguin, S.C., Hudson, Wisconsin  
(for relator)

Mark W. Schneider, Rhiannon C. Beckendorf, Littler Mendelson P.C., Minneapolis,  
Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Willis, Judge.\*

## UNPUBLISHED OPINION

**CONNOLLY**, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for misconduct for violating his employer's policy prohibiting the electronic distribution of inappropriate material. Because relator's act met the statutory definition of misconduct, we affirm.

### FACTS

In 2004, relator Jason Griggs began to work for respondent Flint Hills Resources Pine Bend LLC (the employer) as a production specialist. Griggs was aware of the employer's policy prohibiting employees from accessing or distributing materials "that could be considered unethical, inappropriate, offensive, disrespectful, or abusive to others."

In June 2011, while Griggs was at work in a room with three other employees, he received an e-mail message from an acquaintance. The subject line read, "FW: Just a reminder of what Tiger left behind XXX." The e-mail had an attachment that included at least four pictures of a naked woman, as well as pictures of Tiger Woods and of a house. Griggs opened the e-mail attachment and, according to his testimony, viewed the first three pictures, saw nothing inappropriate, and then forwarded the e-mail to one of the

---

\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

coworkers in the room. When asked why he sent it, he replied, “I had received the email and I had opened it. It was actually a slide show.”

Griggs testified that he first learned from the coworker that the attachment contained inappropriate material. When asked if he was aware that the employer prohibited sending such e-mails, Griggs answered, “Yes, I believe there would be no doubt in anyone’s mind that works out there [i.e., for the employer] that the material contained in this one would be inappropriate.”

Griggs testified that, after he learned of the inappropriate content in the e-mail from the coworker to whom he sent it, he notified the shift supervisor and said he had made a mistake in forwarding the e-mail. The following day, Griggs told his immediate supervisor that, when he sent the e-mail, he “was under the assumption that this was the same [email] I had seen before” and that e-mail did not include inappropriate material. The inappropriate e-mails were discovered by the employer when it audited employees’ computers in July, and Griggs was discharged as a result.

After he applied for unemployment benefits, respondent Department of Employment and Economic Development (DEED) issued a determination that he was ineligible for benefits because he was terminated for misconduct. Griggs appealed that determination. Following a telephone hearing, the ULJ also determined that Griggs’s acts constituted employment misconduct for which he had been terminated and was therefore ineligible for benefits. In response to Griggs’s request for reconsideration, the ULJ affirmed the prior decision.

Griggs challenges that decision, arguing that his act did not meet the statutory definition of misconduct.

## D E C I S I O N

“Whether an employee committed employment misconduct is a mixed question of fact and law. Whether the employee committed a particular act is a question of fact.” *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citation omitted), *review denied* (Minn. Oct. 1, 2008). “[T]his court will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Id.* But “whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo.” *Id.*

Employment misconduct includes “any intentional, negligent, or indifferent conduct . . . 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). “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).

It is undisputed that Griggs forwarded to a coworker an e-mail message with an attachment that included photographs of a naked woman in violation of the employer’s policy prohibiting the distribution of inappropriate material. He asserts that forwarding the e-mail was not misconduct because, when he forwarded it, he was not aware that the attachment included inappropriate material. Even assuming that this assertion is true, the

statute defines as misconduct negligent or indifferent conduct, as well as intentional conduct, that violates an employer's reasonable expectation or shows a lack of concern for the employment. *See* Minn. Stat. § 268.095, subd. 6(a). Thus, whether Griggs was acting intentionally, negligently, or through indifference when he violated the policy is irrelevant.

In any event, the ULJ made a credibility determination and concluded that Griggs's act was intentional because he did know what the attachment contained when he forwarded the e-mail. The ULJ gave as the reasons for her decision:

The employer provided more credible testimony than the self-serving denial of [Griggs]. The employer's testimony was more credible because it was a more plausible version of events. . . . Griggs was aware of the employer's internet policy and the restriction from distributing unethical, inappropriate, offensive, disrespectful material to coworkers. We have considered Griggs's assertions and denials pertaining to [the employer's] allegations regarding his conduct and find them to be self-serving and lacking in credibility. After a careful review of the evidence, we are persuaded that Griggs intentionally forwarded a personal e-mail which contained inappropriate material to a coworker. Griggs contends that he did not look at or read the title of the e-mail prior to forwarding it to a coworker and only reviewed the first two or three pictures before forwarding the e-mail to a coworker. Griggs contends that he did not see the pictures of the naked women, only the pictures of the interior of a house. These statements are not persuasive. The preponderance of the evidence shows that the e-mail was a personal e-mail which was sent to Griggs's work e-mail address . . . . An average, reasonable employee understands that having an e-mail address, whether at work or at home, may lead to receipt of unsolicited e-mail containing offensive and inappropriate content. Employees viewing personal e-mails on their work e-mail account do so at their own risk. Because computer and internet usage is each employee's responsibility, an average reasonable employee would review

the subject line of every e-mail sent to his work e-mail account. At minimum, an average reasonable employee would review the subject line of a personal e-mail sent . . . to their work e-mail account to determine if the e-mail violated the employer’s policy before opening the document. This is especially true when the [employer] has a strict no-tolerance policy prohibiting the viewing and distributing of unethical, inappropriate, offensive, disrespectful material. Additionally, an average reasonable employee would review the entire contents of the e-mail message before distributing the e-mail to coworkers. The subject line of the personal e-mail clearly lists the contents of the e-mail as “XXX”. Based upon Griggs’s testimony, Griggs understood the meaning of XXX. While being questioned by his attorney regarding the content of the e-mail and the subject line of the e-mail, Griggs stated, “The content of the e-mail are not triple X so it doesn’t matter anyway.” The language, “triple X” is used when describing pornographic material. Griggs’s conduct was clearly wrongful in nature. . . . Griggs’s conduct was a single incident. However, Griggs’s conduct seriously violated the standards of behavior [the employer] had a right to reasonably expect of him, and further displayed a substantial lack of concern for the employment.

Griggs raises three objections to the ULJ’s comments about how “an average, reasonable employee” would handle a personal e-mail message arriving in the workplace. First, Griggs notes that the phrase “average reasonable employee” is used in Minn. Stat. § 268.095, subd. 6(b)(4) (defining employment misconduct) and claims it therefore should not be used “for assessing the credibility of witness testimony.”<sup>1</sup> But the ULJ used the phrase to explain why Griggs’s account of the incident was not plausible, contrasting what Griggs said he did with what an “average reasonable employee” in

---

<sup>1</sup> Griggs actually says it appears in Minn. Stat. § 268.095, subd. 6(a); this is inaccurate. The phrase does occur elsewhere in the statute. *See, e.g.*, Minn. Stat. § 268.095, subd. 2(d) (defining a quit from a staffing service job); *Id.*, subd. 3(a)(3) (defining good reason to quit caused by the employer).

Griggs's circumstance would have done. Moreover, a ULJ's credibility determinations are entitled to deference because the ULJ has the ability to weigh the evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Second, Griggs objects to the lack of evidence about how employees were supposed to handle personal e-mails. But the employer's policy manual prohibited what relator did: distributing material "that could be considered unethical, inappropriate, offensive, disrespectful, or abusive to others." The ULJ legitimately inferred that a policy prohibiting the distribution of certain materials implicitly requires employees to know what was in material before distributing it. *See Ywswf v. Teleplan Wireless Services, Inc.*, 726 N.W.2d 525, 532-33 (Minn. App. 2007) (stating that, in assessing witness credibility, ULJs are to rely on, among other things, their own common sense).

Third, Griggs argues that his testimony that he did not view all the slides before sending the e-mail does not show that his testimony was not credible. But the ULJ was entitled to consider whether Griggs's testimony that he forwarded an e-mail without first looking at it was reasonable compared with other evidence, including his own testimony, that he was aware of the company's policy and was so concerned about doing the right thing that he immediately reported what had happened. The ULJ also commented on Griggs's testimony that he "didn't think anything" of the XXX at the end of the subject line on the memo although relator "understood the meaning of XXX," as evidenced by his testimony that "in fact the content of the email is actually not triple X anyway." *See id.* (stating that a ULJ may consider whether a witness's testimony is reasonable compared with other evidence).

Griggs also argues that the employer's evidence does not substantially sustain the ULJ's finding that Griggs forwarded an inappropriate e-mail knowing that it was inappropriate. But Griggs does not explain what evidence his employer could have produced of his own state of mind.<sup>2</sup> The employer could not have been expected to provide direct evidence of Griggs's knowledge or intent when he forwarded the e-mail.

Moreover, an employer's evidence on any topic is not necessary to the award or denial of unemployment benefits. *See* Minn. Stat. § 268.069, subd. 2 (2010) ("The commissioner has the responsibility for proper payment of unemployment benefits regardless of the level of interest or participation by an applicant or an employer in any determination or appeal."); *see also* *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 376 (Minn. 1996) (noting that unemployment benefits are considered to be state funds and rejecting a statutory interpretation that would "ha[ve] the effect of triggering the expenditure of public funds by reason of dilatory action on the part of an employer"). An applicant does not automatically become entitled to benefits because an employer fails to assert that the applicant is not entitled to them.<sup>3</sup>

The ULJ's findings that the employer's evidence was more credible than Griggs's, that Griggs's account of the incident was not plausible, and that Griggs knowingly forwarded an e-mail that violated the employer's prohibition on distributing inappropriate

---

<sup>2</sup> Analogously, in the criminal context, the fact-finder must infer a defendant's state of mind. *See State v. Johnson*, 719 N.W.2d 619, 631 (Minn. 2006) (stating that intent is a state of mind generally provable only by inferences).

<sup>3</sup> While this may have been the case when employees were presumed to be eligible to receive benefits, *see McGowan v. Exec. Express Transp. Enters. Inc.*, 420 N.W.2d 592, 595 (Minn. 1988), "[t]here is [now] no presumption of entitlement or nonentitlement to unemployment benefits." Minn. Stat. § 268.069, subd. 2.

material are substantially supported by the evidence and indicate that Griggs committed misconduct.

**Affirmed.**