

No. A10-517

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State of Minnesota  
In Court of Appeals

PATRICK KELLY,

*Relator,*

vs.

AMBASSADOR PRESS, INC,

*Respondent,*

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

*Respondent.*

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RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

**TABLE OF CONTENTS**

**LEGAL ISSUE..... 1**

**STATEMENT OF THE CASE ..... 1**

**STATEMENT OF FACTS ..... 2**

**STANDARD OF REVIEW ..... 5**

**ARGUMENT FOR INELIGIBILITY ..... 6**

    1. KELLY DID NOT PARTICIPATE IN THE EVIDENTIARY HEARING, AND DID NOT  
    HAVE GOOD CAUSE FOR FAILING TO DO SO..... 7

    2. KELLY’S FAILURE TO INSURE QUALITY CONTROL, IN THE FACE OF MULTIPLE  
    WARNINGS, CONSTITUTED MISCONDUCT..... 9

**CONCLUSION ..... 12**

**APPENDIX..... 14**

**TABLE OF AUTHORITIES**

CASES

*Haskins v. Choice Auto Rental, Inc.*, 558 N.W.2d 507, 512 n.4 (Minn. App. 1997) ----- 12

*Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627 (Minn. App. 2000), *review denied*  
(Minn. Dec. 20, 2000) -----6

*Lolling v. Midwest Patrol*, 545 N.W.2d 372 (Minn. 1996)-----6

*Minn. Ctr. For Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d  
457 (Minn. 2002)-----6

*Osman v. JFC Inc.*, 2009 WL 5091919 (Minn. App. December 29, 2009)----- 12

*Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32 (Minn. App. 1997)-----5

*Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801 (Minn. 2002)----- 10

*Skarhus v. Davannis*, 721 N.W.2d 340 (Minn. App. 2006) -----5, 6

*Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988) ----- 12

*Ywswf v. Teleplan Wireless Services, Inc.*, 726 N.W.2d 525 (Minn. App. 2007) ---6

STATUTES

Minn. Stat. §116J.401, subd. 1(18) (2009) -----2

Minn. Stat. §268.095, subd. 4 (2009) -----9

Minn. Stat. §268.095, subd. 6 (2009) ----- 9, 10

Minn. Stat. §268.105, subd. 2(d) (2009)----- 7, 12

Minn. Stat. §268.105, subd. 7 (2009) -----2, 5, 6

RULES

Minn. R. Civ. App. P. 110.01 ----- 11

Minn. R. Civ. App. P. 110.05 ----- 11



## **Legal Issue**

Under the law, an individual who is discharged from his employment for violating the standards of behavior the employer has a right to expect of him, or for conduct demonstrating a lack of concern for the job, commits employment misconduct, and is ineligible for unemployment benefits. Ambassador Press, Inc. terminated Patrick Kelly after he failed to inspect products for defects, causing a customer to cancel its account with Ambassador Press. Kelly had previously been warned for failing to inspect products. Did Kelly commit acts constituting employment misconduct under Minnesota law?

Unemployment Law Judge (“ULJ”) Elizabeth Owen found Kelly was terminated for employment misconduct, and was ineligible for unemployment benefits.

## **Statement of the Case**

The question before this court is whether Patrick Kelly is entitled to unemployment benefits. A Department adjudicator determined that Kelly was eligible for benefits because he was discharged for reasons other than employment misconduct.<sup>1</sup>

Ambassador Press appealed that determination, and ULJ Elizabeth Owen held a de novo hearing, in which Kelly did not participate. The ULJ found that

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<sup>1</sup> E-1. Transcript references will be indicated “T.” Exhibits in the record will be “E” with the number following.

Kelly was discharged for employment misconduct, and was therefore ineligible for benefits.<sup>2</sup> Kelly filed a request for reconsideration with the ULJ, who affirmed.<sup>3</sup>

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Kelly under Minn. Stat. § 268.105, subd. 7(a) (2009) and Minn. R. Civ. App. P. 115.

The Department is charged with the responsibility of administering and supervising the unemployment insurance program, and is the primary responding party in this case.<sup>4</sup> The Department does not represent the co-respondent in this proceeding, and this brief should not be considered advocacy for Ambassador Press.

### **Statement of Facts**

Patrick Kelly worked in the general bindery department of Ambassador Press from October 2006 to November 12, 2009.<sup>5</sup> His final rate of pay was \$15.65 per hour.<sup>6</sup> Ambassador Press is an offset commercial printing business.<sup>7</sup>

On September 8, 2009, Kelly was working with a machine that assembled calendars.<sup>8</sup> Kelly was responsible for checking the calendars for quality and

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<sup>2</sup> Appendix to Department's Brief, A5-A8.

<sup>3</sup> Appendix A1-A4.

<sup>4</sup> Minn. Stat. § 116J.401, subd. 1(18); Minn. Stat. § 268.105, subd. 7(e).

<sup>5</sup> T. 7-8.

<sup>6</sup> T. 8.

<sup>7</sup> T. 9.

<sup>8</sup> T. 9, 10.

boxing them.<sup>9</sup> He was supposed to check one calendar per box.<sup>10</sup> Kelly did not check the calendars and over 50 defective calendars were placed into boxes.<sup>11</sup> It took four workers eight hours to sort out the defective product, which caused additional cost to Ambassador Press.<sup>12</sup> Kelly was given a verbal warning, in which he was told that he could be discharged for further incidents, and received a written copy of the warning.<sup>13</sup>

On November 11, 2009, Kelly was working on the same job, with the same machine.<sup>14</sup> The same defect in the calendars occurred.<sup>15</sup> Kelly was responsible for checking the product for defects.<sup>16</sup> Kelly was also responsible for drilling holes in the calendars, and was supposed to check the product for defects a second time when he drilled the holes.<sup>17</sup> Kelly did not check the calendars, and all of the calendars were defective.<sup>18</sup> Kelly signed a quality sheet indicating that he had checked the calendars before they were sent out.<sup>19</sup> The defective product was sent to the customer who had ordered it, and the customer cancelled its account with

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<sup>9</sup> T. 9.

<sup>10</sup> T. 9.

<sup>11</sup> T. 13.

<sup>12</sup> T. 13, 14.

<sup>13</sup> T. 13, 14.

<sup>14</sup> T. 15.

<sup>15</sup> T. 15.

<sup>16</sup> T. 17.

<sup>17</sup> T. 17.

<sup>18</sup> T. 15, 17, 18.

<sup>19</sup> T. 17.

Ambassador Press.<sup>20</sup> This account was worth \$150,000 a year.<sup>21</sup>

On June 23, 2009, Kelly received a warning for inappropriately supervising other workers.<sup>22</sup> A representative from a temporary agency that provided workers to Ambassador Press contacted Jeffrey Gray, plant manager, and told him that Kelly had been telling temporary workers to slow down production.<sup>23</sup> Ambassador Press had previously instructed these workers to work faster.<sup>24</sup> In November 2009, Kelly contacted the owner of another temporary agency and requested that a certain employee be sent back to work.<sup>25</sup> Gray had previously requested that this employee not be sent back to work at Ambassador Press.<sup>26</sup> When the owner of the temporary agency told Kelly this, Kelly told her that Gray did not know what he was talking about.<sup>27</sup> This made the owner of the agency uncomfortable, and she complained to Gray.<sup>28</sup>

Kelly also received warnings on June 3, 2009 and November 1, 2009.<sup>29</sup> Both of these warnings involved making mistakes in assembling product to be sent to customers.<sup>30</sup> Ambassador Press received several customer complaints as a

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<sup>20</sup> T. 16.

<sup>21</sup> T. 16.

<sup>22</sup> T. 24.

<sup>23</sup> T. 24.

<sup>24</sup> T. 24.

<sup>25</sup> T. 20.

<sup>26</sup> T. 20.

<sup>27</sup> T. 20.

<sup>28</sup> T. 20.

<sup>29</sup> T. 25, 27.

<sup>30</sup> T. 26.

result of Kelly's errors.<sup>31</sup> One of the mistakes resulted when Kelly did not read a ticket that told him how to assemble the product.<sup>32</sup> Kelly's explanation as to why the mistake happened was that he "messed up."<sup>33</sup>

Kelly was discharged on November 12, 2009, for failing to check for defective product after being warned, which resulted in the loss of business to Ambassador Press.<sup>34</sup>

### Standard of Review

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceeding, reverse, or modify the decision if Kelly's substantial rights were prejudiced because the decision of the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.<sup>35</sup>

The Court of Appeals held in *Skarhus v. Davannis* that the issue of whether an employee committed employment misconduct is a mixed question of fact and law.<sup>36</sup> Whether the employee committed a particular act is a fact question.<sup>37</sup> Whether the employee's acts constitute employment misconduct is a question of

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<sup>31</sup> T. 26.

<sup>32</sup> T. 26.

<sup>33</sup> T. 26.

<sup>34</sup> T. 8, 9.

<sup>35</sup> Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (2009).

<sup>36</sup> 721 N.W.2d 340, 344 (Minn. App. 2006).

<sup>37</sup> *Id.* (citing *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997)).

law.<sup>38</sup> The Court of Appeals also held in *Skarhus* that it views the ULJ's factual findings "in the light most favorable to the decision,"<sup>39</sup> and gives deference to the ULJ's credibility determinations.<sup>40</sup> The Court also stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.<sup>41</sup> The Supreme Court in *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency* defined substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>42</sup> In *Ywswf v. Teleplan Wireless Services, Inc.*, the Court of Appeals reiterated the standard that the Court reviews de novo the legal question of whether the employee's acts constitute employment misconduct.<sup>43</sup>

### **Argument for Ineligibility**

An applicant who is discharged from employment is ineligible for benefits if the conduct for which the applicant was discharged amounts to employment misconduct. Kelly's repeated failure to inspect product as he had been instructed to do constitutes misconduct under the statute. Moreover, Kelly did not have good cause for failing to attend his evidentiary hearing before the ULJ, and thus is not entitled to an additional evidentiary hearing.

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<sup>38</sup> *Id.*

<sup>39</sup> 721 N.W.2d 340, 344 (Minn. App. 2006) (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)).

<sup>40</sup> *Id.* (citing *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000)).

<sup>41</sup> *Id.* (citing Minn. Stat. § 268.105, subd. 7(d)).

<sup>42</sup> 644 N.W.2d 457, 466 (Minn. 2002).

<sup>43</sup> 726 N.W.2d 525 (Minn. App. 2007).

**1. Kelly did not participate in the evidentiary hearing, and did not have good cause for failing to do so.**

Kelly did not participate in the evidentiary hearing, and as he did not have good cause for failing to do so, he is not entitled to an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(d) explains that a ULJ must issue “an order setting aside the decision and directing that an additional evidentiary hearing be conducted” if the applicant “who failed to participate had good cause for failing to do so.” The same statute defines “good cause” as “a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing.”

Here, Kelly did not participate in the evidentiary hearing. The Department mailed Kelly a Determination of Eligibility on December 7, 2009. The Determination informed Kelly that “This determination will become final unless an appeal is filed by Monday, December 28, 2009.”<sup>44</sup> Kelly claims that he went to Toronto on vacation on December 22, 2009.<sup>45</sup>

Ambassador Press filed an appeal on December 17, 2009. A hearing was scheduled for December 31, 2009. A Notice of Appeal, which contained the date and time of the appeal hearing, was subsequently sent to Kelly’s address of record. Kelly claims that he did not receive the Notice in time to participate in the hearing, because he did not return to Minnesota until January 4, 2010.<sup>46</sup>

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<sup>44</sup> E-1.

<sup>45</sup> Relator’s brief, p. 1.

<sup>46</sup> Relator’s brief, p. 1.

However, Department records indicate that Kelly logged on to his account on the Department's website on December 28, 2009, for the purpose of requesting benefits. When Kelly logged on, he would have viewed a screen that stated "Important Messages-These Messages Need Your Attention" and informed Kelly of the fact that his employer had appealed his Determination of Eligibility. Kelly would not have been able to request benefits without viewing this information. Having been made aware of the appeal, it was Kelly's responsibility to contact the Department and either request a rescheduled hearing or arrange to participate in the hearing by phone from Toronto. Kelly did nothing, and now claims that he has good cause for failing to participate in the hearing.

It is also important to note that when Kelly requested benefits on December 28 and January 4, he answered "yes" to the Department's question as to whether he was available for work during the previous week. Kelly was not, in fact, available for work, as he was out of the country during the period for which he requested benefits. Kelly's obvious lack of candor toward the Department shows that Kelly has no reservations about misrepresenting the facts to elicit a favorable outcome. Kelly was out of the country when he claimed to have been available for work in order to obtain benefits. Kelly is now claiming that he was completely unaware of his employer's appeal in order to obtain an additional evidentiary hearing. In light of his previous false statements, Kelly's claims are not credible and an additional hearing should not be granted.

The ULJ considered Kelly's argument, and found that "[w]hen Kelly is requesting unemployment benefits, he is responsible for being aware of all eligibility issues affecting his account."<sup>47</sup> Kelly's claim that he was unaware that his employer had appealed his determination of eligibility is clearly false. An applicant who is aware that his determination has been appealed, but who fails to take any action or make any further inquiry, has not acted with due diligence. The ULJ's finding that Kelly did not have good cause to participate in the hearing is substantially supported by the record, and this Court should not disturb it.

**2. Kelly's failure to insure quality control, in the face of multiple warnings, constituted misconduct.**

Kelly repeatedly failed to perform his assigned job duties of checking products for defects, despite the fact that he was warned that continued failure to do so could lead to his termination. This constitutes misconduct. The statute provides:

Subd. 4 . **Discharge.** An applicant who was discharged from employment by an employer is ineligible for all unemployment benefits according to subdivision 10 only if:

(1) the applicant was discharged because of employment misconduct as defined in subdivision 6...

The definition of "employment misconduct" reads:

Subd. 6. **Employment misconduct defined.**

(a) Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly:

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<sup>47</sup> Return-6(3) (Appendix, A1-A4).

- (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.

\* \* \*

(e) The definition of employment misconduct provided by this subdivision is exclusive and no other definition applies.<sup>48</sup>

The Minnesota Supreme Court held in *Schmidgall v. FilmTec Corp.*, employment misconduct includes refusals to abide by the employer's reasonable policies and directives.<sup>49</sup> It was certainly reasonable for Ambassador Press to expect Kelly to inspect products for defects before sending them to customers. On November 11, Kelly would have only needed to inspect one calendar in every box to discover the defect and prevent the defective calendars from reaching the customer. Kelly does not argue that performing the required inspections imposed any kind of a hardship, or offer any excuse for not doing as he had been instructed. He signed off on a quality sheet, indicating that he had performed the inspections when he had not actually done so. If Kelly had a good reason for not inspecting the product as his job required, he should have brought it to his employer's attention. Instead, Kelly simply failed to inspect any of the calendars and then lied about having done so. Kelly did this after having already received a warning for failing to inspect product on the same job. This constitutes misconduct.

The evidence shows that Kelly received multiple warnings for failing to properly perform his job duties. Kelly does not claim that he in any way lacked

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<sup>48</sup> Minn. Stat. § 268.095, subd. 6 (2009).

<sup>49</sup> 644 N.W.2d 801, 804 (Minn. 2002).

the ability or the capacity to properly perform the work that was assigned to him. Kelly could easily have avoided all of the incidents for which he was warned, and the resulting harm to his employer, by simply following the directions that he had been given. On November 11, Kelly neglected to perform product inspections not once, but twice, and then lied about it by signing the quality sheet. Kelly obviously knew that he was expected to inspect the calendars for defects. He had been warned for failing to do so in the past, and he signed the quality sheet in an attempt to conceal his failure to do so from his employer. Ambassador Press has the right to reasonably expect that its employees will follow the directions they are given, perform their assigned job duties, refrain from dishonesty and protect the company's reputation with customers. Kelly violated the standards of behavior Ambassador Press had the right to expect of him, and thus committed employment misconduct.

In his brief, Kelly argues that his employer's testimony was false. However, Kelly waived his opportunity to present evidence refuting his employer's testimony when he failed to appear at the evidentiary hearing. Kelly also asks this Court to consider materials he submitted with his request for reconsideration.<sup>50</sup> These materials are not properly before this Court. Minnesota Rules of Civil Appellate Procedure Rule 110.01 explains that "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Rule 110.05 provides for the

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<sup>50</sup> Relator's brief, p. 5.

supplementation of the record on appeal only if anything material has been omitted as a result of error or accident. The evidence Kelly submitted with his request for reconsideration was not considered by the ULJ, except for purposes of deciding whether to order an additional evidentiary hearing<sup>51</sup>, and is not part of the record. As this Court has repeatedly ruled, a relator waives an argument when he fails to raise it before the ULJ below.<sup>52</sup>

There is sufficient evidence in the record to sustain the finding that Kelly failed to inspect products for defects as he had been instructed, even after being warned. The ULJ was correct in finding that Kelly was discharged from his employment for employment misconduct.

### **Conclusion**

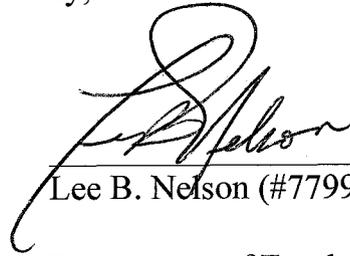
Unemployment Law Judge Elizabeth Owen correctly concluded that Kelly was terminated for employment misconduct. The Department requests that the Court affirm the decision of the Unemployment Law Judge.

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<sup>51</sup> Minn. Stat. § 268.105, subd. 2(c).

<sup>52</sup> *Haskins v. Choice Auto Rental, Inc.*, 558 N.W.2d 507, 512 n.4 (Minn. App. 1997); see also *Osman v. JFC Inc.*, 2009 WL 5091919 (Minn. App. December 29, 2009), Appendix, A9-A13, citing *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988).

Dated this 20<sup>th</sup> day of July, 2010.

A handwritten signature in cursive script, appearing to read "Lee B. Nelson". The signature is written in black ink and is positioned above a horizontal line.

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