

No. A11-153

State of Minnesota
In Court of Appeals

JAMES CUNNINGHAM,

Relator,

vs.

WAL-MART ASSOCIATES, INC,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

PETER B. KNAPP (#151087)
JUSTIN C. MCCLUSKEY (Certified Student
Attorney)
WILLIAM MITCHELL LAW CLINIC
875 SUMMIT AVENUE
ST. PAUL, MINNESOTA 55105
(651) 290-6423
Attorney for Relator

WAL-MART ASSOCIATES, INC
c/o TALX UCM SERVICES, INC
PO BOX 283
ST. LOUIS, MISSOURI 63166-0283
(800) 829-1510
Respondent- Employer -Pro se

LEE B. NELSON (#77999)
AMY R. LAWLER (#0388362)
MINNESOTA DEPARTMENT OF EMPLOYMENT
AND ECONOMIC DEVELOPMENT
1ST NATIONAL BANK BUILDING
332 MINNESOTA STREET, SUITE E200
ST. PAUL, MINNESOTA 55101-1351
(651) 259-7117
Attorneys for Respondent-Department

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).

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Legal Issues

Under the law, an employee who is discharged for committing a serious violation of the standards of behavior the employer has a right to reasonably expect, or for conduct demonstrating a lack of concern for the job, commits employment misconduct and is ineligible for benefits. Wal-Mart Associates, Inc. discharged James Cunningham, a night stocker at a Sam's Club store, after he did not report or call in to work for several days. Cunningham had been told to come to work with ideas for a performance improvement plan, but Cunningham did not believe this was something he could ethically do, as he was already performing as well as his medical conditions allowed him to do. Cunningham had already notified his employer that he was doing everything he could, in light of aftereffects of several strokes he had suffered. Did Cunningham's conduct amount to employment misconduct under Minnesota law?

Unemployment Law Judge Richard Reeves found that Cunningham committed a serious violation of Wal-Mart's reasonable standards, and was therefore ineligible for unemployment benefits.

Statement of the Case

The question before this Court is whether James Cunningham was discharged for employment misconduct. Cunningham established a benefit account with the Minnesota Department of Employment and Economic Development (the "Department"). A Department adjudicator determined that

Cunningham was eligible for benefits, finding that he was discharged for unsatisfactory work performance.¹

Wal-Mart appealed that determination, and Unemployment Law Judge (“ULJ”) Richard Reeves held a de novo hearing in which both parties participated. The ULJ found that Cunningham was discharged for employment misconduct and was therefore ineligible for benefits.² This resulted in an overpayment of benefits Cunningham previously received. Cunningham filed a request for reconsideration with the ULJ, who affirmed.³ This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Cunningham under Minn. Stat. § 268.105, subd. 7(a) (2010) and Minn. R. Civ. App. P. 115. The Department is charged with the responsibility of administering and supervising the unemployment insurance program.⁴ Unemployment benefits are paid from state funds, the unemployment insurance trust fund, not by an employer or employer funds.⁵ Because unemployment benefits are state funds, the Department is the primary responding party in this case.⁶ The Department does not represent the co-respondent in this proceeding, and this brief should not be considered advocacy for Wal-Mart.

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

² Appendix to Department’s Brief, A5-A9.

³ Appendix, A1-A4.

⁴ Minn. Stat. § 116J.401, subd. 1(18).

⁵ Minn. Stat. § 268.069, subd. 2.

⁶ Minn. Stat. § 268.105, subd. 7(e).

Statement of Facts

James Cunningham worked as a night stocker at Sam's Club, a division of Wal-Mart, from April of 2009, through August 31, 2010.⁷ He earned approximately \$10.40 an hour, and worked about 35 hours a week.⁸ In 2008, Cunningham suffered a series of strokes, and since that time has suffered from a number of health issues, including memory and concentration problems.⁹ His tasks included stocking shelves, driving a forklift, and using a pallet jack.¹⁰

Sometime in the spring of 2010, Cunningham's store got a new manager, B.J.¹¹ Under the new manager, the night crew was reduced from 11 to as few as six employees, and they were expected to do things more meticulously than they were under the old manager.¹² He was only able to meet B.J.'s standards when he had an extra hour or hour and a half more than he usually did, so that he could be more meticulous and could double-check all of his work areas.¹³ Cunningham received a "coaching" during the summer of 2010 relating to his performance.¹⁴

In July of 2010, Cunningham met with B.J., his store manager, and gave him a letter outlining his medical problems and explaining that his performance

⁷ T.12, E-3(1, 10).

⁸ T. 12, 16.

⁹ T. 13, 20, 28, 30-32.

¹⁰ T. 33.

¹¹ T. 20.

¹² T. 20-21, 33-35, 38, 42.

¹³ T. 38.

¹⁴ T. 17, E-3(11).

issues were related to his condition.¹⁵ B.J. discouraged Cunningham from seeking a formal accommodation, and told him it involved copious amounts of paperwork, so Cunningham made no formal accommodation request.¹⁶

When Cunningham arrived at work on August 30, he was called into a “decision day” meeting with Julie Scott, the overnight assistant manager, and [REDACTED] the store’s night supervisor, because management did not think he was meeting Wal-Mart’s performance expectations.¹⁷ Scott told him that he was being sent home with pay for the day, in order to come up with a written plan of action to improve his performance.¹⁸ Scott and [REDACTED] did not tell Cunningham not to come back to work; instead, they told him to come back to work on his next shift with an action plan to address his performance issues.¹⁹ Scott expected him to spend his paid day at home thinking of ideas.²⁰ Scott anticipated that Cunningham’s action plan might include having a supervisor walk through his area with him to help him double-check areas, as had been done in the past.²¹

Cunningham did not think that he could improve his performance unless his duties were reduced, or unless he was given more hours in a shift.²² He told Scott that he could not think of anything to write down in the plan, but did not outright

¹⁵ T. 32-33.

¹⁶ T. 32-33, 41.

¹⁷ T. 18, 22.

¹⁸ T. 18-19.

¹⁹ T. 35, 39.

²⁰ T. 40.

²¹ T. 24.

²² T. 38-39.

refuse to do it.²³ Cunningham did not call in or report to his next scheduled shift on September 3, nor did he call in or report for any of his next four scheduled shifts after that.²⁴ Wal-Mart made no effort to contact him during this time.²⁵ Wal-Mart terminated him on September 14 for being a no-call/no-show during these five shifts.²⁶

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 Cunningham'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.²⁷

The Supreme Court in *Stagg v. Vintage Place* recently reiterated that the issue of whether an employee committed employment misconduct is a mixed question of fact and law.²⁸ Whether the employee committed a particular act, and whether that act was the reason for the discharge, are fact questions.²⁹ In *Stagg* the

²³ T. 25-26, 40.

²⁴ T. 22-23.

²⁵ T. 23.

²⁶ T. 23.

²⁷ Minn. Stat. § 268.105, subd. 7(d)(1)-(6) (2010).

²⁸ 796 N.W.2d 312, 315 (Minn. 2011).

²⁹ *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997) (citing *Harringer v. AA Portable Truck & Trailer Rental*, 379 N.W.2d 222, 224 (Minn. App. 1985)).

Court again made clear that the issue of whether those facts amount to employment misconduct is a question of law.³⁰ The Court also said in *Stagg* that it views the ULJ's "factual findings in the light most favorable to the decision," and that it will not disturb the findings when the evidence substantially sustains them.³¹ "Substantial evidence" is the relevant evidence that "a reasonable mind might accept as adequate to support a conclusion."³² But, the Court of Appeals made clear in *Skarhus v. Davannis* that determining the credibility of testimony is the exclusive province of the ULJ and will not be disturbed on appeal.³³

In *Stagg*, the Court noted the standard that an appellate court reviews de novo the legal question of whether the employee's acts constitute employment misconduct.³⁴

Argument

Relator's brief does not dispute that generally an employee who is discharged for multiple no-call/no-shows has committed a serious violation of the standards of behavior that the employer had the right to reasonably expect of him, or has generally shown a substantial lack of concern for the employment. The only question here is whether, under the unique facts of this case, in which

³⁰ *Stagg*, 796 N.W. 2d at 315 (citing *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002)).

³¹ *Id.* (citing *Jenkins v. Am. Express*, 721 N.W.2d 286, 289 (Minn. 2006)).

³² *Moore Assoc. v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996).

³³ 721 N.W.2d 340, 345 (Minn. App. 2006).

³⁴ *Stagg*, 796 N.W.2d at 315.

Cunningham did not believe that he could honestly propose a performance improvement plan, he committed misconduct by not calling or going in to work.

The relevant statute explains:

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:

(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.

(b) Regardless of paragraph (a), the following is not employment misconduct:

(1) conduct that was a consequence of the applicant's mental illness or impairment;

(2) conduct that was a consequence of the applicant's inefficiency or inadvertence;

(3) simple unsatisfactory conduct;

(4) conduct an average reasonable employee would have engaged in under the circumstances;

(5) conduct that was a consequence of the applicant's inability or incapacity;

(6) good faith errors in judgment if judgment was required;

(7) absence because of illness or injury of the applicant, with proper notice to the employer;

(8) absence, with proper notice to the employer, in order to provide necessary care because of the illness, injury, or disability of an immediate family member of the applicant;

(9) conduct that was a consequence of the applicant's chemical dependency, unless the applicant was previously diagnosed chemically dependent or had treatment for chemical dependency, and since that diagnosis or treatment

has failed to make consistent efforts to control the chemical dependency; or
(10) conduct that was a consequence of the applicant, or an immediate family member of the applicant, being a victim of domestic abuse as defined under section 518B.01. Domestic abuse must be shown as provided for in subdivision 1, clause (9).³⁵

As a general rule, an employee who is discharged for frequent absences or tardiness has committed misconduct, and is ineligible for benefits. As this Court explained in *Del Dee Foods, Inc.*, even a single absence without prior notification may constitute misconduct.³⁶ In *Plante v. Target Corp.*, the Court cited *Wichmann v. Travalia & U.S. Directives, Inc.* for the proposition that “an employer may establish and enforce reasonable rules governing employee absences.”³⁷

1. The narrow question before this Court is whether Cunningham’s failure to report to work or contact Wal-Mart constituted misconduct.

At the outset, the Department must fully acknowledge that Cunningham engenders a great deal of sympathy in this matter. Wal-Mart made no apparent effort to accommodate his medical conditions, and Cunningham endeavored to succeed in his position, and to overcome the limitations that his stroke recovery placed on him. If Wal-Mart had terminated Cunningham for performance reasons, on this record there would be no question that Cunningham would be eligible for benefits. But Cunningham was not terminated for having crooked signs in his

³⁵ Minn. Stat. § 268.095, subs. 4 & 6 (2010).

³⁶ 390 N.W.2d 415, 418 (Minn. App. 1986).

³⁷ 2010 WL 2362811, at *1 (Minn. App. June 15, 2010), citing 729 N.W.2d 23, 28 (Minn. App. 2007) (Appendix, A10-A12).

area, for leaving a trash can out of position, or for otherwise performing in a way that did not meet Wal-Mart's exacting standards. Instead, Cunningham was terminated because he was told to come in to work with an action plan, and he never reported for work again. Cunningham knew that Wal-Mart expected him to come in and work his next shift. While it is true that Wal-Mart made no effort to contact Cunningham, it is also true that Cunningham made no effort to contact Wal-Mart. Cunningham never contacted Scott to tell her that he wouldn't be coming in to work his next shift, and never informed her that he wouldn't be submitting an action plan. He did not ask whether he could request an accommodation in lieu of submitting a plan, or submit a plan that proposed longer hours or more limited tasks. Cunningham left work and did nothing.

Relator argues that his conduct could fall under one of two exceptions: mental impairment or conduct an average reasonable employee would engage in under the circumstances.³⁸ First, this was not conduct that an average, reasonable person would have engaged in under the circumstances. An employer has a right to expect its employees to follow reasonable instructions and directions.³⁹ The Minnesota Supreme Court held in *Schmidgall v. FilmTec Corp.* that employment misconduct includes refusals to abide by the employer's reasonable policies and directives.⁴⁰ An average, reasonable employee, when ordered to show up at his

³⁸ Relator's brief, p. 11.

³⁹ *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004).

⁴⁰ 644 N.W.2d 801, 804 (Minn. 2002).

next shift with some sort of performance improvement plan, would do so. Even if an average, reasonable employee believes that his plan will not be accepted, or that his performance will not ultimately be acceptable to his employer, he would not seek to preempt the employer's decision by simply not showing up. Cunningham had a choice, and knew that he could take his paid day off, try to come up with something to put down in a plan, and then either report to work or contact Scott with the result of his efforts. But Cunningham foreclosed any possibility that Wal-Mart might accept any sort of modification to his hours or his duties, and simply chose not to show up to work or contact Wal-Mart again. An average, reasonable employee, when told to do something necessary to continue in employment, would not refuse to do so, thereby sealing his own discharge papers.

Cunningham also contends that his belief that he was not supposed to return to work without an action plan was influenced by the mental impairments that he suffered as a result of his strokes.⁴¹ But at hearing, Cunningham explained the logic behind his decision; he knew that he could only perform up to his employer's expectation if he were accommodated in some way, perhaps by being given reduced duties or more time to do his work.⁴² He may well have believed that there was no way that he could promise to improve his work performance under the status quo, or that none of his proposals would be accepted. Nonetheless, he was expected to arrive at his next shift with some ideas. He explained all of this

⁴¹ Relator's brief, p. 12.

⁴² T. 38-39.

coherently and articulately at hearing, and never professed to have not understood the expectation that he arrive at his next shift with some sort of plan. His decision not to submit a plan, contact Wal-Mart, or return to work was a calculated one, and one that Cunningham eloquently defended at hearing. It was not a consequence of mental illness or impairment.

2. ULJ properly developed the record and assisted Cunningham.

This is not a case in which there is a great deal of factual dispute, nor one in which there are gaping holes in the record. At hearing, Cunningham and Scott presented nearly-identical testimony, with both agreeing that Cunningham was told to report at his next shift with a performance improvement action plan. Cunningham, thought, took this to mean that if he could not come up with a good plan, he should simply not come back at all. This is not, as relator's brief contends, a credibility issue under Minn. Stat. § 268.105, subd. 1(c).⁴³ The fact that Cunningham took Scott's statement to mean that he should not come back without a plan was not a question of credibility, but of Cunningham's own interpretation, as well as the ethical qualms he felt about submitting a plan that was unlikely to succeed.

Both parties agreed to the same essential fact: Cunningham was told to report to his shift on September 3rd with an action plan, and he chose not to do so. Both parties also agreed that Cunningham suffered from a series of strokes, and had previously informed Wal-Mart about how the strokes affected his ability to do

⁴³ Relator's brief, p. 16.

certain tasks. The ULJ properly explained the process, asked Cunningham questions, and allowed Cunningham to question Scott and to provide a closing statement. He fulfilled his obligation to assist unrepresented parties and to develop the record, under Minn. Stat. § 268.105, subd. 1(b) and Minn. R. 3310.2921. This case poses a legal question, which this Court will review de novo, but it does not present the Court with any factual disputes.

3. The ULJ did not abuse his discretion in failing to order an additional evidentiary hearing.

Finally, relator's brief argues that the ULJ abused his discretion in denying relator's request for an additional evidentiary hearing, as he should have done more to develop the record on how Cunningham's strokes affected his ability to understand directions and do his job.⁴⁴ In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the appeal hearing.⁴⁵ An additional evidentiary hearing must be ordered if an involved party shows that evidence which was not submitted at the evidentiary hearing would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence, or would show that the evidence that was submitted at the evidentiary hearing was likely false and that

⁴⁴ Relator's brief, pp. 19-22.

⁴⁵ Minn. Stat. § 268.105, subd. 2(c) (2010).

the likely false evidence had an effect on the outcome of the decision.⁴⁶ This Court must give deference to a ULJ's decision not to hold an additional evidentiary hearing and reverse only for an abuse of discretion.⁴⁷

Here, the ULJ carefully weighed the value of the additional medical evidence on reconsideration but determined that an additional evidentiary hearing was unwarranted because the proffered evidence would not change the outcome of the decision.⁴⁸ Cunningham testified, and the ULJ accepted, that his strokes left him with numb fingers, trouble with multi-tasking, memory, and concentration problems.⁴⁹ Additional evidence on the fact that Cunningham's strokes had these effects would not likely have changed the outcome of the ULJ's decision. Cunningham was told to report to his next shift with an action plan, and he made a thoughtful and deliberate decision not to do so. His memory and concentration issues do not change the fact that his testimony at hearing was clear: he was expected to show up at his next shift with a plan, and he believed he was already performing to the best of his abilities given the time limits he labored under and the number of tasks he was assigned. No further factual evidence is necessary in this case, and the ULJ did not abuse his discretion in refusing an additional evidentiary hearing. The ultimate question before this Court is a legal one.

⁴⁶ *Id.*

⁴⁷ *Vasseei v. Schmitt & Sons School Buses Inc.*, 793 N.W.2d 747, 750 (Minn. App. 2010).

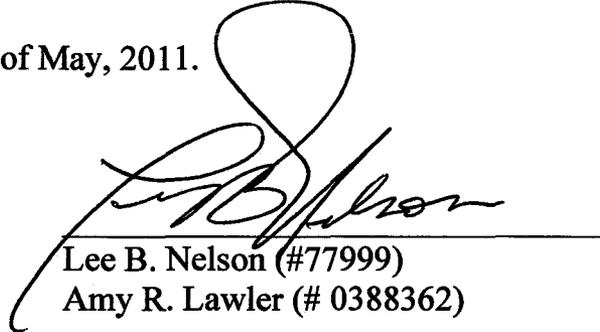
⁴⁸ Return-5, Appendix, A1-A4.

⁴⁹ T. 13, 20, 28, 30-32.

Conclusion

Unemployment Law Judge Richard Reeves correctly concluded that Cunningham was terminated for employment misconduct. The Department requests that the Court affirm the decision of the Unemployment Law Judge.

Dated this 31st day of May, 2011.



Lee B. Nelson (#77999)
Amy R. Lawler (# 0388362)

Department of Employment and
Economic Development
1st National Bank Building
332 Minnesota Street, Suite E200
Saint Paul, Minnesota 55101-1351
(651) 259-7117

Attorneys for Respondent Department