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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1466**

Nathan Viste Ross,  
Relator,

vs.

Quality Bicycle Products (Corp),  
Respondent,

Department of Employment and Economic Development,  
Respondent

**Filed May 6, 2013  
Affirmed  
Smith, Judge**

Department of Employment and Economic Development  
File No. 28752712-5

Nathan Viste Ross, Minneapolis, Minnesota (pro se relator)

Matthew S. Moore, Bloomington, Minnesota (for respondent Quality Bicycle Products)

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

Considered and decided by Hooten, Presiding Judge; Cleary, Judge; and Smith,  
Judge.

## UNPUBLISHED OPINION

SMITH, Judge

Relator challenges the determination of the unemployment law judge (ULJ) that his discharge was due to employment misconduct, which renders him ineligible for unemployment benefits. Because we defer to the ULJ's credibility determinations, and the record contains substantial evidence to support the ULJ's determination, we affirm.

### FACTS

Quality Bicycle Products (QBP) employed relator Nathan Viste Ross from March 8, 2010 until October 3, 2011<sup>1</sup> as an inventory control mezzanine, a position which required him to operate a forklift. QBP maintains a detailed forklift training manual that contains various policies. According to these policies, if an employee commits three violations within a rolling calendar year, they will “[a]t a minimum . . . lose their powered equipment operator’s license (certification) and they will no longer be able to operate equipment.” For employees whose position required them to operate a forklift at least twice a week (two 30-minute session), maintaining their forklift certification was a requirement for employment. Relying on documented evidence of three offenses within a rolling calendar year, which resulted in the loss of his forklift-operator certification, QBP discharged Ross on October 3, 2011. Ross applied for unemployment benefits. On November 9, the Minnesota Department of Employment and Economic Development

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<sup>1</sup> The caption in the decision on appeal referred to the relator as Viste Ross (unhyphenated). However, the relator has submitted numerous documents indicating his last name contains a hyphen. *See* Minn. R. Civ. App. P. 143.01 (directing that the title of an action “not be changed in consequence of [an] appeal”). In light of the rule, we utilize the unhyphenated spelling for consistency.

(DEED) determined that Ross was ineligible for unemployment benefits, concluding that his discharge was the result of employment misconduct. Ross appealed.

On November 29, the ULJ conducted an initial telephonic hearing. QBP was unable to participate due to technical difficulties. Relying solely on Ross's testimony and his explanation of the events, the ULJ concluded that his discharge was because of employee inadvertence rather than employment misconduct. As a result, the ULJ granted Ross eligibility for benefits. QBP filed a request for reconsideration, which the ULJ granted after determining that QBP's evidence substantially challenged Ross's version of events.

On April 10, 2012, the ULJ conducted a second telephonic hearing. All parties participated. QBP submitted additional evidence and testimony regarding the three alleged workplace violations that involved Ross. The first was a "near miss" incident while Ross was driving his forklift. According to the accident report, Ross drove through a crosswalk while a pedestrian-employee was halfway through the aisle. Ross admitted that QBP's policy requires a forklift driver to stop their vehicle if a pedestrian is in a crosswalk but argued that the incident was not as QBP alleged. Ross contended there was no "near miss" but that the area of the incident involved a long walkway and that he was not in close proximity to anyone. Ross received a verbal warning in accordance with QBP policy.

The second alleged incident stemmed from a variety of occurrences in early September 2011. According to Ross's written warning and accident reports, he drove his forklift with the forks in an elevated position, pushed a picking cart with the forklift,

stacked boxes or materials too high, and made other employees uncomfortable as a result of his forklift operation. The written warning noted that in the future Ross would “[a]lways travel with the forks in a lowered position.” QBP suspended Ross’s forklift operation privileges pending a retraining. The written warning indicated that further violations may result in QBP permanently terminating Ross’s forklift operation privileges. Ross disputed all of QBP’s accounts of the alleged instances and alerted the ULJ to the fact that he had noted on the written warning that he had “comments to add.”<sup>2</sup> Upon further questioning, Ross admitted that he moved the picking cart with his forklift and that this action may have constituted a “bad judgment call.” Ross maintained that in all of his actions he attempted to apply QBP’s policies as he understood them.

The ULJ indicated that she was most concerned with the third alleged incident. While en route via forklift to his required retraining, a coworker observed Ross driving with his forklift prongs nearly 16 feet into the air. Ross admitted that had his coworker not yelled to stop that he would have struck the mezzanine. However, no injury or damage resulted from the incident. Ross immediately reported the occurrence to his supervisor, indicating that he inadvertently “hit the button on the switch” to raise the forks. Ross admitted that when the forks are raised, it produces a “noticeable noise.” He informed the ULJ that he had made a terrible mistake and that, although a forklift operator normally would hear the forks elevating, he did not because he was

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<sup>2</sup> The record contains no evidence that Ross received the opportunity to present his comments or, if he did, there is no documented evidence of such comments.

“preoccupied about being embarrassed” at having to wear a training vest.<sup>3</sup> He testified that to calm down he was thinking, “don’t be stupid, just accept this, just go on.” Based on what Ross relayed about the incident to his supervisor, the supervisor, not realizing the severity of the incident, proceeded with the training. On September 30, a safety committee convened and determined that Ross’s actions were the result of operator error. Because this was Ross’s third violation within one rolling calendar year, QBP revoked his forklift operation privileges. Because the revocation rendered Ross unable to perform his job duties, QBP discharged him shortly thereafter.

On May 14, 2012, the ULJ determined that Ross was ineligible for unemployment benefits because he was discharged for employment misconduct. The ULJ specifically noted that “[t]he parties presented conflicting evidence [and] . . . QBP [was] more credible than [Ross].” Specifically, the ULJ decided that QBP’s evidence was consistent and presented a more plausible sequence of events.” The ULJ found that Ross committed three violations of QBP’s policies within one calendar year, that he received the requisite warnings following each incident, and that he was discharged because the loss of his driving certification made it impossible for him to perform his essential job functions. The ULJ discredited Ross’s explanations for the repeated violations and determined that his continued conduct, “despite warnings,” constituted a substantial lack of concern for

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<sup>3</sup> Ross later admitted that this incident constituted a mistake but qualified the admission by stating that his actions were “not consistent with [his] history.”

his employment. Ross filed a request for reconsideration, which the ULJ denied.<sup>4</sup> This certiorari appeal followed.

## DECISION

This court may reverse the decision of a ULJ if it is in excess of the statutory authority of the department, affected by an error of law, or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(2), (4)-(5) (2012). While Ross challenges many facets of the ULJ's decision, we interpret the core of his appeal as a challenge to the ULJ's conclusion that he is ineligible for unemployment benefits because his discharge stemmed from employment misconduct. Determining whether an employee committed employment misconduct is a mixed question of fact and law. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether an employee committed a particular act is a question of fact. *Id.* Whether particular conduct constitutes employment misconduct is reviewed de novo. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). A ULJ's factual findings are reviewed in the light most favorable to the decision and will not be disturbed on appeal if there is evidence that

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<sup>4</sup> Ross contended that the ULJ failed to distinguish a Minnesota Supreme Court case that the ULJ cited in the initial decision, which concluded that his actions constituted employee inadvertence. However, in the August 13, 2012 decision, in which the ULJ affirmed her determination that Ross was ineligible for benefits, she clearly distinguished the case as inapplicable. The ULJ explained that after receiving QBP's evidence the case became distinguishable. Ross also contended that he could subpoena multiple witnesses to present new information, but he failed to explain why those witnesses did not testify at either of the prior two hearings. In fact, the ULJ specifically informed Ross at the initial hearing of his right to subpoena witnesses and offered to continue the hearing. Ross declined.

substantially sustains those findings. *Skarhus*, 721 N.W.2d at 344; *see* Minn. Stat. § 268.105, subd. 7(d)(5) (2012).

Employment misconduct includes intentional, negligent, or indifferent conduct on the job that clearly displays a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee or a substantial lack of concern for the employment. Minn. Stat. § 268.095, subd. 6(a) (2012). Knowingly violating an employer's directives, policies, or procedures constitutes employment misconduct because it demonstrates a willful disregard of the employer's interests. *Schmidgall*, 644 N.W.2d at 806-07. An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012).

QBP has a clear policy governing forklift driving that relies on a three-step process for managing violations. For a first offense, the employee receives a verbal warning. After a second offense, there is a written warning, temporary driving suspension, and a mandatory retraining. Upon a third offense, the employee will (at a minimum) lose their powered equipment operator's license. Based on the record, QBP followed this procedure when it managed Ross's violations. The record includes documented accident reports, e-mail communications, and Ross's written warning. The ULJ's finding that Ross engaged in three qualifying violations, which in turn subjected him to QBP's three-step process for managing violations, is amply supported by substantial evidence.

While Ross disputes many of the ULJ's findings, we note that he admitted his involvement, in part or with clarification, to at least two of the three alleged violations.<sup>5</sup> Regarding the alleged "near miss," Ross agreed that QBP's policy required a driver in his position to yield to pedestrians. However, in his recollection, the pedestrian in question was over 50 feet away. Ross received the required verbal warning. Although the second incident contained a variety of alleged violations, Ross admitted that he moved a picking cart "a foot or two," that this action was a bad judgment call, and that he "shouldn't have done that." The ULJ noted that any contact between a machine and a picking cart was a clear violation of QBP's policies. Ross received a written warning that included the admonition that a forklift operator must "[a]lways travel with the forks in a lowered position." Following this written warning, Ross admitted to an incident where he drove a forklift with the forks elevated approximately 16 feet into the air on the way to a retraining program. Ross now urges us to characterize his conduct as good-faith mistakes at best or employee inadvertence at worst, neither of which would disqualify him from receiving unemployment benefits. *See* Minn. Stat. § 268.095, subd. 6(b)(2), (6) (2012).

The true dispute is not whether the incidents occurred but rather how we classify the conduct at issue for purposes of unemployment-benefit eligibility. Ross argues that the various incidents were implicitly authorized, that they were inconsistent with his history, and that other employees considered him a valued employee not indifferent to his

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<sup>5</sup> Regarding all of the evidence accepted by the ULJ, Ross contends that QBP improperly relied on hearsay evidence to establish the foundation for the three alleged violations. However, a ULJ is permitted to receive any evidence that possesses probative value, including hearsay. Minn. R. 3310.2922 (2011).

employment. But witness credibility is within the sole province of the ULJ, and we afford such determinations great deference on appeal. *See Skarhus*, 721 N.W.2d at 344.

Minnesota law requires that a ULJ make a credibility determination when the evidence conflicts and that the ULJ provide the reasons for crediting or discrediting testimony. Minn. Stat. § 268.105, subd. 1(c) (2012). Here, the ULJ considered Ross's version of events and concluded that his explanations were "inconsistent" and "self-serving" before determining that QBP's version of events was more plausible. The resolution of this case ultimately hinges on whose version of events is more credible; QBP's characterizations of misconduct or Ross's characterization of employee inadvertence. For us to credit Ross's arguments that his conduct was employee inadvertence would ignore the credibility determinations made by the ULJ, who was in the best position to judge credibility. *See Skarhus*, 721 N.W.2d at 344.

Despite Ross's adamant alternative characterizations, we must accept the ULJ's credibility determination that QBP's version of events is more plausible. The ULJ determined that Ross violated QBP policies three times within a rolling calendar year, rendering him unable to perform his essential job functions. Substantial evidence supports this conclusion in the form of the multiple documents outlining the violations. The ULJ also determined that Ross was ineligible for unemployment benefits because the "repeated violations . . . which continued despite warnings" constituted behavior that QBP reasonably has the right to expect its employees to cease. *See* Minn. Stat. § 268.095, subd. 6(a)(1); *Schmidgall*, 644 N.W.2d at 806-07. We are not in a position to disagree. Therefore, the ULJ's conclusion that Ross is ineligible for unemployment

benefits was not erroneous. Ross remains liable for any received, and thus overpaid, benefits. *See* Minn. Stat. § 268.18, subd. 1 (2012).

**Affirmed.**