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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1745**

Stephen R. Colburn,
Relator,

vs.

Top Tool Company,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 23, 2014
Affirmed
Peterson, Judge**

Department of Employment and Economic Development,
File No. 31238090-3

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Considered and decided by Stauber, Presiding Judge; Peterson, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this certiorari appeal from an unemployment-law judge's decision that relator is ineligible for unemployment benefits because he was dismissed for employment misconduct, relator argues that he was dismissed only for performance deficiencies that did not amount to misconduct. We affirm.

FACTS

Relator Stephen R. Colburn was employed as a shipping-and-receiving clerk at respondent Top Tool Company from January 4, 2010 through May 17, 2013. Top Tool makes tools and stampings used in manufacturing products such as medical devices. Among his duties, relator was assigned to review company purchase orders and verify that materials included in the orders matched the specifications required by customers.

Relator had performance problems during much of his employment, particularly including making repeated errors. In May 2011, Top Tool placed relator on a performance-improvement plan (PIP) after he gave incorrect counts to customers, placed incorrect job numbers and identifications on shipping paperwork, was too slow in processing paperwork, and failed to create work instructions. Following implementation of the PIP, relator's performance improved, but performance problems arose again in October 2012. Relator mistakenly shipped 50,500 parts "out of sequence to de-burring instead of heat treat," causing the parts to be scrapped and costing the company nearly \$6,500 in lost profits; and incorrectly placed a declaration of value on two boxes to be shipped, costing the company more than \$700 in excess fees to insure the boxes. In a

final warning dated January 4, 2013, Top Tool listed these and five additional incidents of unsatisfactory performance, directed him to correct deficiencies, and informed him that he could be subject to dismissal if his performance failed to improve.¹

In February 2013, relator received materials from a vendor that did not meet the specifications set forth in a purchase order. The purchase order indicated that the materials were required to be certified to a hardness of between 45 and 75, but the materials received were certified only to a hardness of 36, and relator approved the materials for receipt by Top Tool. Because of relator's error in approving the materials, Top Tool used the materials for making parts and sent them to a customer. Relator learned about his error during a May 2013 audit and was dismissed after telling his supervisor about it.

Following his dismissal, relator applied for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development (DEED) issued a determination of ineligibility. Relator appealed, and after a hearing before an unemployment-law judge (ULJ), relator was determined to be ineligible to receive unemployment benefits because he was dismissed for employment misconduct within the meaning of Minn. Stat. § 268.095, subd. 6(a) (2012). The ULJ found:

The evidence shows that [relator] made multiple mistakes because he did not properly review certain documentation that he was required to review. Furthermore, [Top Tool] issued a [PIP] and a warning to show [relator] how serious it was that his performance needed to improve. It is clear that

¹Two incidents involved relator's failure or refusal to follow company policies or directives by sending a "rude" e-mail to another employee and by communicating with subcontractors or vendors by e-mail rather than by telephone.

[relator] had the ability to complete his work because there was an extended period of time after the [PIP] that his performance improved. Under the circumstances, the accumulation of performance problems was a serious violation of the standards of behavior [Top Tool] has the right to reasonably expect from him.

The ULJ affirmed on reconsideration. 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 relator's substantial rights were prejudiced because the conclusion, decision, findings, or inferences are, among other reasons, unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d)(5) (2012). Substantial evidence is “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). This court reviews factual findings in the light most favorable to the decision and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

“Employment misconduct means 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). Employment misconduct does not include inefficiency or inadvertence, simple unsatisfactory conduct, poor performance

because of inability or incapacity, or good-faith errors in judgment. *Id.*, subd. 6(b)(2)-(3), (5)-(6) (2012). Whether an employee committed misconduct is a mixed question of fact and law. *Stagg v. Vintage Place*, 796 N.W.2d 312, 315 (Minn. 2011). Whether the employee committed a specific act is a fact question, reviewed in the light most favorable to the decision and affirmed if supported by substantial evidence. *Skarhus*, 721 N.W.2d at 344. Whether the employee’s act constitutes employment misconduct is a question of law subject to de novo review. *Stagg*, 796 N.W.2d at 315.

Relator argues that he should be eligible for unemployment benefits because he engaged in mere unsatisfactory performance or made good-faith errors in judgment that did not rise to the level of misconduct. But the ULJ’s findings, which in part depended on credibility determinations, do not support these arguments. For the incident that led to his dismissal, relator testified that

[t]he cert[ification]s that came in with the material did not have the hardness listed on it. . . . So when I compared the cert[ification]s to the purchase order and the dimensions of the material were correct I accepted it as good to move on to . . . production, because on the purchase order the hardness spec[ification] was down in the footnote part of the text on the [purchase order] rather than up with the dimensions of the material where typically the requirements are stated.

Relator also claimed that he received inadequate training and supervision to carry out his duties.²

²With regard to this incident, relator’s supervisor testified that relator initially said that “he did everything right. Then he said there [weren’t] any spec[ification]s on the [purchase order].”

The testimony of relator's supervisor and the company president contradicted relator's testimony with regard to the dismissal incident. Mark Erickson, the company president, testified that the certification filed at Top Tool, which may not have been the original certification, contained a hardness requirement. He also testified that even if the certification contained no hardness requirement, the purchase order did include it, and it was relator's job to verify that the two matched. Erickson further testified that relator participated in writing his own job description, that relator signed off on his own job description at every performance review, and that relator was directed to ask for help from other cross-trained employees when needed.

Also, relator's supervisor, Deon Hawfitch, testified that relator was placed on the PIP "[t]o help him improve his performance to correct . . . the wrong counts to customers, incorrect job numbers. To help him improve in the process of his job and help him succeed." According to Hawfitch, after relator was placed on the PIP in May 2011, he performed pretty well, but relator began to make major errors again in October 2012. Hawfitch also testified that relator should not have accepted the materials in the dismissal incident until he obtained the correct certification and relator's conduct showed "a repeated pattern" of failing to follow company procedures.

The ULJ gave credence to Top Tool's testimony "because it was detailed and persuasive under the circumstances." The ULJ is required to "set out the reason for crediting or discrediting . . . testimony" when credibility significantly impacts a decision. Minn. Stat. § 268.105, subd. 1(c) (2012). While the ULJ's credibility determinations are cursory, they are supported by substantial evidence and meet the statutory requirements.

See Ywswf v. Teleplan Wireless Servs., Inc., 726 N.W.2d 525, 532-33 (Minn. App. 2007) (noting that credibility determination requires more than mere recitation of parties' testimony and listing factors relevant to credibility determination); *see also* Minn. Stat. § 268.105, subd. 1(b) (2012) (stating that "facts will be determined based on a preponderance of the evidence").

Giving deference to the ULJ's credibility determinations, we find no error in the ULJ's decision that relator was dismissed for misconduct within the meaning of the unemployment statute. Relator argues that his conduct was more like the employee's conduct in *Bray v. Dogs & Cats Ltd.* (1997), 679 N.W.2d 182, 185 (Minn. App. 2004), in which this court reversed a ULJ's determination that a retail-store manager who repeatedly violated company policies did not commit employment misconduct because she "attempted to be a good employee but just wasn't up to the job and was unable to perform her duties to the satisfaction of the employer." The factual scenario here is different from *Bray*. After relator was told that his performance was unsatisfactory and instructed about how to properly perform his job, he adequately performed his job for one year and five months before again making serious errors that violated company policies. His actions amount to employment misconduct because he had the ability to perform but did not do so; his negligent or indifferent conduct showed a substantial lack of concern for his employment as required under Minn. Stat. § 268.095, subd. 6(a).

Affirmed.