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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0197**

Eric R. Mitzuk,
Relator,

vs.

Davlyn Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 6, 2009
Affirmed
Schellhas, Judge**

Department of Employment and Economic Development
Agency File No. 100975787

Eric R. Mitzuk, P.O. Box 342, Prescott, WI 54021 (pro se relator)

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55101 (for respondent Department of Employment and Economic Development)

Davlyn Inc., 8 South Owasso Boulevard West, St. Paul, MN 55117 (respondent)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

By writ of certiorari, relator challenges the decision of an unemployment-law judge (ULJ) that relator is ineligible to receive unemployment benefits after he was discharged for employment misconduct because of a verbal outburst during an argument with his supervisor. We affirm.

FACTS

Relator Eric R. Mitzuk was a full-time employee of respondent Davlyn Inc. (Davlyn) between January 3, 2006 and August 13, 2007. Relator and Davlyn disagree about the reason for relator's termination from employment, but agree that an argument between relator and his supervisor, Steven Andert (Andert), preceded the termination.

In response to relator's application for unemployment benefits, Davlyn claimed relator voluntarily quit employment after Andert refused to lend him a \$150 advance on his paycheck. The two men were peaceably eating lunch together until relator went outside to take a phone call. Upon his return, relator asked Andert for \$150 to pay for a drug rehabilitation program. When Andert refused to give relator the money, relator screamed at him, smashed a fan, and, at some point during the argument, yelled, "I f---ing quit, you cheap bastard."

Relator denies asking Andert for \$150. Relator claims that Andert told him to leave after he accused Andert of filing false wages with the Minnesota Department of Human Services (DHS), which resulted in relator being overpaid \$3,000 in MinnesotaCare benefits for which DHS had demanded repayment. Relator claims that

while leaving the building, he tripped over the fan and his foot became stuck in it, so he kicked the fan off his foot.

Respondent Department of Employment and Economic Development (DEED) determined that relator is ineligible to receive benefits because his separation from employment with Davlyn was “a discharge for reasons of employment misconduct when the applicant had a verbal outburst and kicked the company fan.” The determination was based in part on relator’s failure to address Davlyn’s claim that he had asked Andert for \$150.

Relator appealed DEED’s determination, and the ULJ conducted a telephone hearing on October 31, 2007. Andert, Davlyn-owner Gary Andert, and employee Craig Jones testified. Jones testified that he witnessed part of the argument between Andert and relator, heard relator screaming at Andert, saw relator kick the fan, and felt threatened when pieces of the fan flew eight to ten feet toward him. Jones also heard relator say he quit.

The ULJ upheld DEED’s determination that relator was ineligible to receive unemployment benefits and adopted Davlyn’s version of events, finding that relator asked to borrow \$150 from Andert and became enraged when he refused the request. The ULJ further found that relator’s yelling, swearing, breaking of the fan, and other aggressive behavior caused Andert and Jones to feel threatened, which resulted in relator’s discharge. The ULJ concluded that Davlyn’s version of events was more credible because the events described by Andert and Jones were more plausible than relator’s version. Additionally, the ULJ observed that it was implausible that relator was

calmly eating lunch with Andert immediately before relator's outburst about the MinnesotaCare issue. The ULJ concluded that regardless of the reason for his outburst, relator's behavior amounted to employment misconduct because it "displayed clearly a serious violation of the standards of behavior that Davlyn Inc. had the right to expect of [relator] as an employee."

Relator filed a request for reconsideration, disputing the findings that he asked Steven Andert for \$150 and kicked the company fan. Relator also claimed that Andert should not have been allowed to make comments about relator's past criminal record or the allegations that relator battered his wife. Upon reconsideration the ULJ affirmed her prior decision. This certiorari appeal follows.

D E C I S I O N

Findings of Fact

This court may reverse or modify a ULJ's decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

Minn. Stat. § 268.105, subd. 7(d) (Supp. 2007); *see also Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007) (citing this standard of review).

“Whether the employee committed a particular act is a question of fact.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (citation omitted). “We view the ULJ’s factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ. In doing so, we will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Id.* (citations omitted).

Relator contends that the ULJ’s factual findings are erroneous regarding the reason for his dispute with Andert and his smashing and kicking of a company fan. The ULJ explicitly found the corroborative testimony of Andert and Jones more credible and plausible than relator’s testimony. Deference to the ULJ’s credibility determination is justified when the record contains evidence that supports the factual findings. *Id.* The testimony of Andert and Jones supports the ULJ’s factual determinations regarding relator’s employment termination. Because substantial evidence in the record supports the findings of fact, the ULJ did not commit reversible error.

Misconduct

An applicant discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). “Whether an employee has engaged in conduct that disqualifies him from unemployment benefits is a mixed question of fact and law.” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). Whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Employment misconduct is any conduct, on or off the job, that is intentional, negligent, or indifferent, which (1) displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) displays clearly a substantial lack of concern for the employment. Minn. Stat. § 268.095, subd. 6(a) (Supp. 2007). The ULJ found that relator's outburst caused his separation and concluded that the outburst amounted to misconduct under section 268.095, subdivision 6, because it displayed a clear violation of the standards of behavior that Davlyn had a right to expect from relator. The ULJ determined that relator's termination from employment was based on employment misconduct under Minn. Stat. § 268.095, subd. 6, and that relator was disqualified from collecting unemployment benefits under Minn. Stat. § 268.095, subd. 4(1).

Conduct that is aggressive or disruptive amounts to employment misconduct. *See Feia v. St. Cloud State College*, 244 N.W.2d 635, 636 (Minn. 1976) (concluding that continuously expressing disapproval was disruptive activity that amounted to employment misconduct); *Pitzel v. Packaged Furniture & Carpet*, 362 N.W.2d 357, 357 (Minn. App. 1985) (determining aggressive, offensive, erratic and disruptive behavior constituted employment misconduct). And an employer has the right to expect an employee to act peaceably and to refrain from conduct that endangers the safety of others. *See Shell v. Host Int'l Corp.*, 513 N.W.2d 15, 17 (Minn. App. 1994) (concluding that pushing a supervisor created danger in the workplace and was employment misconduct); *Hayes v. Wrico Stamping Griffiths Corp.*, 490 N.W.2d 672, 675 (Minn. App. 1992) (concluding that driving dangerously through the company parking lot was

employment misconduct). Additionally, the use of profanity in conjunction with some other act of aggression or physical confrontation is generally considered employment misconduct. *See, e.g., Isse v. Alamo Rent-A-Car*, 590 N.W.2d 137, 139 (Minn. App. 1999) (concluding that uttering an obscenity in conjunction with grabbing and pushing a co-worker was employment misconduct), *review denied* (Minn. Apr. 20, 1999).

Relator's outburst, which included yelling, swearing, and threatening behavior, constitutes employment misconduct under the law. Relator's conduct in smashing the company fan and then kicking pieces in the direction of a fellow employee was disruptive, aggressive, and presented a danger to others. Additionally, relator used profanity in conjunction with his act of aggression. The characteristics of relator's outburst displayed a serious violation of the standards of behavior that Davlyn had the right to expect from him as an employee. The ULJ did not err in concluding relator's outburst constituted employment misconduct that disqualified him from receiving unemployment benefits.

Other Arguments

Relator raises other arguments that do not directly challenge the ULJ's factual findings or conclusion that his outburst constituted employment misconduct. Relator argues that the ULJ should have investigated his assertion that Davlyn falsely reported the amount of his wages and cites to Minn. Stat. § 268.184, subd. 1(b)(1)(iii) (Supp. 2007), which provides an administrative penalty against an employer when the employer makes a knowingly false statement that causes an overpayment of unemployment benefits to any applicant. This argument is unavailing. Even if Davlyn falsely reported

relator's wages, relator would still be disqualified from receiving benefits because his actions amounted to misconduct.

Additionally, relator argues that Davlyn's disregard and neglect of requests for information during the MinnesotaCare audit should not have been taken so lightly. This argument is also unavailing. Even if Davlyn failed to respond to requests for information in relation to the MinnesotaCare audit, relator would still be disqualified from receiving benefits because his actions amounted to misconduct.

Affirmed.