

No. A06-2217

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State of Minnesota  
In Court of Appeals

DAVID FRANK,

*Relator,*

vs.

HEARTLAND AUTOMOTIVE SERVICES 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).

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## **I. LEGAL ISSUE**

Employees whose conduct shows a serious violation of the employer's reasonable expectations are disqualified from receiving unemployment benefits. David Frank, the general manager of an auto service business, charged a customer for a service despite knowing that the service had not been completed and the customer should not be charged. Is Frank disqualified from receiving benefits?

## **II. STATEMENT OF THE CASE**

This case involves whether Relator David Frank is entitled to unemployment benefits. Frank established a benefit account with the Minnesota Department of Employment and Economic Development. A department adjudicator initially determined that Frank was discharged by Heartland Automotive Services for reasons other than employment misconduct and was not disqualified from receiving benefits. (D1)<sup>1</sup> Heartland appealed that determination, and a de novo hearing was held. A department unemployment law judge reversed the initial determination, holding that Frank was discharged because of employment misconduct and was disqualified from receiving benefits. (Appendix to Department's Brief, A3-A5) Frank filed a request for reconsideration with the unemployment law judge, and the unemployment law judge issued an order affirming the decision. (Appendix, A1-A2)

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<sup>1</sup> Transcript references will be indicated as "T" with the page number following. Exhibits in the record will be "D" for the department, with the number following.

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Frank under Minn. Stat. § 268.105, subd. 7(a) (2004 and Supp. 2005) and Minn. R. Civ. App. P. 115.

### **III. STATEMENT OF FACTS**

David Frank worked for Heartland Automotive Services at a Jiffy Lube facility from May 14, 2005 until June 8, 2006. (T.9)

On May 27, 2006, a customer named Fred came to the shop, and Frank went over service recommendations for Fred's Chevy Tahoe. (T.11-12) Fred decided to purchase a signature service oil change, along with a serpentine belt service and a transfer case service. (T.12) The serpentine belt service involved removing and replacing a drive belt that typically becomes worn after a time. (T.12) The transfer case service, which cost approximately \$30, involved draining the fluid from a part of the four-wheel drive mechanism and refilling it with new fluid. (T.12)

Frank asked employee Jon Shinnick to perform the transfer case service. (T.12) Shinnick noticed that there was a brace underneath the vehicle that prevented him from accessing the transfer case, so he would not be able to complete the transfer case service. (T.13) He called this out to Frank, who came down to the lower bay to try to access the transfer case himself. He was unable to do so either, so he told Shinnick to proceed without doing the transfer case service.

Shortly thereafter, Frank went to "bill out" the customer, meaning he completed and closed out the invoice and accepted payment. (T.13) As Frank was

about to bill out the customer, assistant manager Jake Zoccoli reminded him that they hadn't been able to do the transfer case service. (T.13) Frank acknowledged that this was the case, and said it was too bad, because the transfer case service is one of the "big nine," a group of services that salespeople are encouraged to sell, and that they can earn bonuses for selling. (T.13) Frank billed out the customer that day. The invoice included the transfer case service, for which Frank charged the customer. (T.17)

Later that day, another employee working at the time, Cody Erickson, showed Zoccoli that the statistics for the day showed that a transfer case service had been done that day. (T.14) Knowing that it was still relatively early in the day and he did not believe a transfer case service had been done, Zoccoli asked Shinnick whether he had done one. (T.14) Shinnick said he hadn't. (T.14) Zoccoli told Shinnick not to mention it, and decided to pursue it through channels other than approaching Frank. Zoccoli called the company's loss-prevention line and also contacted district manager Chad Lundeen. (T.14)

After an investigation showed that the customer had indeed been billed for a transfer case that had not been completed, Frank was discharged for falsifying an invoice and charging a customer for a service that was not completed. (T.23) This is treated as defrauding a customer, and it is cause for immediate termination. (T.23)

## **IV. ARGUMENT**

### **A. SUMMARY OF ARGUMENT**

Frank was discharged because the ULJ credited testimony and documentation showing that he was aware – and had just been reminded – that the service at issue had not been performed at the time he charged the customer for it. The ULJ found as a fact that Frank charged a customer for a service knowing that the service had not been performed. This was misconduct.

### **B. STANDARD OF REVIEW**

Effective for unemployment law judge decisions issued on and after June 25, 2005 that are directly reviewed by the Court of Appeals, the legislature restated the standard of review at Minn. Stat. § 268.105, subd. 7(d) (Supp. 2005) as follows:

(d) The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the 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.

The issue of whether an employee committed misconduct, and the unemployment law judge's determination of that issue, is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W. 2d 801, 804 (Minn. 2002),

citing *Colburn v. Pine Portage Madden Bros., Inc.*, 346 N.W.2d 159, 161 (Minn. 1984). Whether or not the employee committed an act alleged to be misconduct is a fact question, but whether that act is employment misconduct is a question of law. *Scheunemann v. Radisson South Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether or not an employee's acts constitute employment misconduct is a question of law on which a reviewing court remains "free to exercise its independent judgment." *Lolling v. Midwest Patrol*, 545 N.W. 2d 372, 377 (Minn. 1996).

### C. EMPLOYMENT MISCONDUCT

An applicant who is discharged from employment is disqualified from benefits only if the conduct for which the applicant was discharged amounts to employment misconduct. Minn. Stat. § 268.095, subd. 4 (Supp. 2005) provides:

Subd. 4. Discharge. An applicant who was discharged from employment by an employer shall be disqualified from all unemployment benefits according to subdivision 10 only if:

- (1) the applicant was discharged because of employment misconduct as defined in subdivision 6; or
- (2) the applicant was discharged because of aggravated employment misconduct as defined in subdivision 6a.

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 (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the

employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

\* \* \*

(e) The definition of employment misconduct provided by this subdivision shall be exclusive and no other definition shall apply."

Frank makes a series of arguments in his brief. He first claims that Zoccoli's testimony contains "inconsistencies." He claims that while Zoccoli testified that Shinnick reported that he was unable to complete the transfer case service, in fact, Shinnick merely said he was "having trouble" with it. Zoccoli's version, however, is consistent with what Shinnick said in his own statement. Shinnick said that he reported that he couldn't access the transfer case, and that's why Frank came down to see for himself. This "inconsistency," even to the degree it exists, is insignificant. Shinnick and Zoccoli agree on the primary issue, which is that Frank was entirely aware that they were not doing the service: Shinnick's statement says that Frank told him not to do it, and Zoccoli testified that he reminded Frank that they hadn't done it less than a minute before Frank billed the customer out.

Frank also denies that he did all of the computer work, but he does not dispute that he is the one who ultimately billed the customer and accepted payment. Furthermore, Frank was the store manager, and cannot simply blame employees for failing to remove services when he was the one who ultimately issued the invoice to the customer and accepted payment. The ULJ credited the testimony of Zoccoli when he stated that he reminded Frank when Frank was

finishing up with the customer that they hadn't done the transfer case service. This would clearly place the responsibility with Frank to remove the charge, and in fact, that appears to be the reason Zoccoli reminded Frank of the unfinished service in the first place.

Frank attempts to make something of the fact that Zoccoli initially stated that he had this conversation with Frank 30 seconds before he billed the customer out, but then stated that it might actually have been more like 45 seconds, but was less than a minute. Far from casting doubt on Zoccoli's testimony, this simply is an example of a witness acknowledging that without a stopwatch, he might not recall the difference between 30 seconds and one minute. The point of his testimony was that he reminded Frank of the fact that they hadn't done the service, and that Frank lamented that fact, just before Frank billed out the customer. This supports the ultimate conclusion by the ULJ that Frank knew the customer had not received the service at the time he billed the customer.

Frank's unsupported allegations about other acts by Jiffy Lube are entirely outside the record, and are irrelevant in any case. Similarly, allegations about Lundeen, Shinnick, and Zoccoli are not relevant here.

The ULJ found as a fact that Frank was aware at the time he billed the customer that the service for the customer had not been performed. This determination relied primarily on crediting Zoccoli's testimony that just before the customer was billed, Zoccoli reminded Frank that they had not done the transfer case service and the customer should not be billed. As the ULJ noted, Frank's

explanation that there was a tool in the shop that would have allowed the service to be done, and that Shinnick simply didn't go and look for it as asked, is not believable, since all agree that it was beneficial to the shop to perform one of the "big nine" services. It is unclear why Shinnick would not want to perform the service and would instead simply decline to look for the tool.

In order for Frank's testimony and version of events to be believed, it must also be believed that Shinnick and Zoccoli both lied about several different points. Shinnick must have lied in his statement that the service could not be done and that Frank told him not to do it. Zoccoli would have to have fabricated the conversation in which he reminded Frank that the service was not done, and he and Shinnick would have to have fabricated the discussion they agree they had when Zoccoli, confused by the appearance on the system of a service he knew was not done and should not have been billed, approached an equally confused Shinnick to see whether there was some service done that he didn't know about.

Notwithstanding the unsupported claims made in Frank's brief, there is nothing in the record providing any incentive for Zoccoli to invent this entire incident, including a conversation with Frank, simply to make Frank look bad over a \$30 service. The evidence shows that Frank falsified the invoice and charged a customer for a service he knew had not been completed. The ULJ found as a fact that Frank billed the customer knowing that the service had not been performed, contrary to what he claims in his brief. This finding of fact is supported by the record and should not be disturbed on appeal.

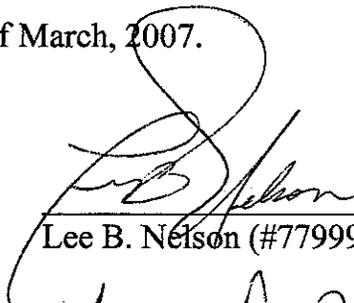
A business has the right to expect scrupulous honesty from employees when dealing with its customers. Particularly in the case of car repairs and maintenance, customers essentially leave themselves entirely at the mercy of the staff, relying on honesty to protect them from fraud. Customers are very unlikely to have any direct knowledge of whether a service was or was not performed, and should they believe that the shop will fabricate services to pad invoices or increase the staff or management's shot at a bonus, they are unlikely to ever patronize the business again. Frank was the general manager of the shop at the time this incident occurred. His honesty was perhaps more critical to the operation of the shop than anyone else's. For him to knowingly charge a customer for a service that was never performed was certainly a serious violation of his employer's reasonable expectations, and was misconduct.

## **V. CONCLUSION**

The unemployment law judge correctly concluded that Frank's behavior constituted employment misconduct under the statute.

The department respectfully requests that the Court affirm the agency decision.

Dated this 6<sup>th</sup> day of March, 2007.

  
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