STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0643

Stephen A. Burdette,
Relator,

vs.

BCBSM, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 1, 2008
Affirmed
Poritsky, Judge[*]

Department of Employment and Economic Development
File No. 893 07

Stephen A. Burdette, 874 Haralson Drive, Apple Valley, MN 55124 (pro se relator)

Jane McMahon, P.O. Box 64560, St. Paul, MN 55164 (respondent BCBSM)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, 1st National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, MN 55101 (for respondent department)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Poritsky, Judge.

---

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

PORITSKY, Judge

The unemployment law judge (ULJ) determined that relator is disqualified from receiving unemployment benefits because he committed employment misconduct. In this pro se certiorari appeal, relator challenges the ULJ's decision, arguing that (1) the ULJ's factual findings are unsupported by substantial evidence; (2) the ULJ misinterpreted Minn. Stat. § 268.095 (2006); (3) the ULJ failed to consider relator's employment record; (4) relator was given insufficient time to prepare for the hearing before the ULJ; and (5) the ULJ erred in ignoring relator's status as a member of a protected class. We affirm.

FACTS

Relator Stephen Burdette worked for Blue Cross and Blue Shield of Minnesota, Inc. (BCBSM) as a process-improvement analyst in the membership and billing department. In late November 2006, BCBSM had a reduction in force and laid off approximately 50 employees. Although BCBSM announced that it was laying off employees, it did not publicly release the names of the individuals or departments affected, and BCBSM considered this information confidential.

Shortly after the announcement, Burdette requested information about the laid-off employees from a fellow employee, who responded on November 28, 2006, by e-mailing Burdette a list of laid-off employees and their employee-identification numbers. The same day, Burdette forwarded the list to Lizabeth Reyer, his former supervisor at BCBSM, who was no longer with the company. Burdette's e-mail to Reyer simply said, "I never sent this, of course"; apparently the list was an attachment to Burdette's e-mail.

Reyer sent a reply to Burdette, and a BCBSM security audit detected the employee-identification numbers in the e-mail correspondence between Burdette and Reyer.

Pat Perez, BCBSM's human resources manager, was notified of Burdette's e-mail. Perez and her supervisor, Paul Lyon, then conducted an investigation in which they met with Burdette and "asked [Burdette] for his side of the story," reviewed the matter with security, reviewed data files, and obtained a list of the e-mail addresses to which Burdette had sent e-mails on November 28, 2006. Based on Perez and Lyons's investigation, Burdette was discharged on December 6, 2006, for violation of two BCBSM confidentiality policies.

Burdette applied to the Minnesota Department of Employment and Economic Development (the department) for unemployment benefits. Based on Burdette's and BCBSM's reports, a department adjudicator credited Burdette's denial that he sent the e-mail, his claim that he was not provided a copy of the e-mail, and his belief that he was discharged because of his sexual orientation. On that basis, the department adjudicator determined that Burdette was not disqualified from receiving benefits. BCBSM appealed.

On January 30, 2007, a ULJ conducted a de novo evidentiary hearing. Burdette was present for the hearing and was represented by counsel. Neither Burdette nor his attorney indicated prior to or during the hearing that they had been afforded insufficient time to prepare for the hearing, and neither requested that the hearing be rescheduled. The ULJ found that Burdette had sent the e-mail containing confidential information to an individual outside the company and had lied about doing so during the investigation.

On that basis, the ULJ concluded that Burdette had committed employment misconduct and was therefore disqualified from receiving unemployment benefits. Burdette requested reconsideration, and the ULJ affirmed his decision. This certiorari appeal follows.

D E C I S I O N

When reviewing the decision of a ULJ, this court may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator 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) (2006).

I.

Burdette first challenges the ULJ's decision that he committed disqualifying employment misconduct. Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee committed a particular act is a question of fact, but whether that act constitutes employment misconduct is a question of law, which this court reviews de novo. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

A.

Burdette challenges the ULJ's factual findings, arguing that the findings are unsupported by the record and based too much on hearsay. The ULJ's factual findings are viewed in the light most favorable to the decision. *Skarhus*, 721 N.W. 2d, at 344. And such findings will not be disturbed when substantial evidence supports them. Minn. Stat. § 268.105, subd. 7(d)(5).

Burdette first challenges the ULJ's finding that Burdette sent an e-mail to Reyer containing the names and identification numbers of the laid-off employees. Specifically, Burdette argues that (1) although there is evidence in the record that he sent Reyer an e-mail, there is no evidence in the record that he sent an e-mail containing the names and identification numbers; (2) the ULJ failed to account for the fact that the routine scan that detected identification numbers in Reyer's incoming e-mail apparently did not detect the numbers in his outgoing e-mail; (3) the ULJ failed to account for the possibility that Reyer had changed the content of the e-mail to add the offending information; and (4) the ULJ "gave far too much weight" to Reyer's e-mail, which, Burdette argues, was hearsay.

But the ULJ found, and the record establishes, that another BCBSM employee sent Burdette the names and identification numbers at Burdette's request and that Burdette forwarded the list to Reyer, including the names and identification numbers. Although Burdette argues that the routine scan should have detected his e-mail if it contained offending information, he produced no evidence of how the scanning system operates. Likewise, Burdette's argument that Reyer could have altered his original message when she responded is contrary to the weight of the evidence, because it ignores the language

of the e-mails and the undisputed evidence that Burdette possessed the very information that was in Reyer's response. Finally, as Burdette acknowledges, a ULJ "may receive any evidence which possesses probative value, including hearsay." *Skarhus*, 721 N.W.2d at 345 (quoting Minn. R. 3310.2922 (2005)). When viewed in the light most favorable to the ULJ's decision, the ULJ's finding that Burdette sent Reyer the e-mail containing names and identification numbers of laid-off employees has substantial support in the record.

Burdette also challenges the ULJ's finding that the information he forwarded to Reyer was confidential. Burdette emphasizes that BCBSM does not deny that the e-mail Burdette received from his fellow employee did not indicate that the information it contained was confidential. And he argues that the employees' names were not confidential information.

Burdette does not dispute, however, that BCBSM never published the names (or identification numbers) of the individuals who were being laid off. Nor does he claim that he was unaware of or exempt from the two BCBSM confidentiality policies contained in the record, one of which explicitly states that employee-identification numbers are "reserved for internal use only and must not be disclosed to non-Blue Cross entities." Burdette was aware of or should have been aware of BCBSM's confidentiality policies, because they were readily available to all employees and were the subject of ongoing training, which included annual verification by signature that each employee understood and agreed to the policies. Finally on this issue, Burdette's statement in his e-mail to Reyes, "I never sent this, of course," suggests strongly that Burdette knew that the

information was confidential. Thus, when viewed in the light most favorable to the ULJ's decision, the ULJ's finding that the names and identification numbers of the laid-off employees constituted confidential information has substantial support in the record.

Burdette also challenges the ULJ's finding that he lied about having sent the e-mail to Reyer. Burdette argues that the ULJ erroneously found that he had lied about sending the e-mail, because the ULJ relied on an e-mail from Roger Kleppe, BCBSM's vice president of human resources, to Burdette discussing BCBSM's investigation even though Kleppe was not present at Burdette's meeting with Perez and Lyon. Burdette offered into evidence the very e-mail that he is now challenging and apparently argues not that the ULJ ought to have disregarded it but rather that the ULJ incorrectly interpreted the significance of the evidence. But the record amply supports the ULJ's finding that Burdette sent the e-mail to Reyer and also establishes that Perez and Lyon met with Burdette to "ask[ ] for his side of the story." Consequently, it was reasonable for the ULJ to rely on the statement from Kleppe, as a company representative, that Burdette had lied to Perez and Lyon about sending the e-mail. As such, the ULJ's finding that Burdette lied about sending the e-mail to Reyer has adequate support in the record.

B.

Burdette also challenges the ULJ's interpretation of Minn. Stat. § 268.095, subd. 6(a) (2006). Specifically, Burdette argues that he did not intentionally or indifferently violate any reasonably expected standards of behavior, or display lack of concern for the employment. Burdette also argues that his sending the e-mail cannot constitute

employment misconduct, because it was a single incident that had no significant adverse impact on BCBSM and he exercised judgment in good faith by sending relevant information to a former BCBSM employee.

Employment misconduct is "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." Minn. Stat. § 268.095, subd. 6(a). But "a single incident that does not have a significant adverse impact on the employer" is not employment misconduct. *Id*. Nor is a "good faith error[] in judgment if judgment was required." *Id.* An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. *Id.*, subd. 4(1).

An employee's intentional conduct counter to an employer's "reasonable policies and requests" constitutes employment misconduct. *Schmidgall*, 644 N.W.2d at 804. Conduct is "intentional" if it is deliberate and not accidental. *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004). Burdette does not deny that he was aware of and bound by BCBSM's confidentiality policy regarding employee-identification numbers, nor does he argue that the policy was unreasonable. The record adequately establishes that Burdette sent the e-mail to Reyer, and there is no evidence that Burdette sent the e-mail accidentally. Indeed, his statement "I never sent this, of course," shows that Burdette not only intentionally sent the e-mail but also intentionally violated the confidentiality policy by disclosing information that he

knew he was prohibited from disclosing. Consequently, we conclude that Burdette's violation of BCBSM's confidentiality policy constituted employment misconduct.

Burdette argues that, even if he sent the e-mail to Reyer, it was a single incident that had no significant adverse impact on BCBSM and, therefore, was not employment misconduct. Burdette maintains that BCBSM suffered no adverse impact because there was no evidence that anyone had used the information that Burdette disclosed to hack into BCBSM's computer network. And he emphasizes that the ULJ found "no actual harm to BCBSM." Had BCBSM suffered a tangible loss because of Burdette's disclosure, there would be little question that BCBSM was adversely affected. But the mere intangibility of the adverse impact to BCBSM does not mean that there was none. *See Skarhus*, 721 N.W.2d at 344 (cautioning against "disregard[ing] the type of adverse impact that is not readily quantifiable").

"A single incident can constitute misconduct when an employee chooses a course of conduct that is adverse to the employer." *Schmidgall*, 644 N.W.2d at 806. This is particularly true when the employee's conduct undermines the employer's trust in the employee and the employer's ability to "assign the essential functions of the job to its employee." *Skarhus*, 721 N.W.2d at 344. When Burdette intentionally distributed to an individual outside BCBSM the names and identification numbers of the employees being laid off, his action demonstrated his disregard for BCBSM's policies and undermined BCBSM's trust in him. Consequently, the ULJ found that, notwithstanding the absence of "actual harm," BCBSM "could no longer trust Burdette." Given Burdette's involvement in BCBSM's membership and billing procedures, BCBSM's inability to

trust Burdette with confidential information was sufficient adverse impact. *See id.* (concluding that cashier's theft undermined employer's trust, constituting adverse impact). As such, the single-incident exception to the employment-misconduct rule does not apply here.

Burdette also argues that if he erred by sending the e-mail to Reyer, it was a good faith error in judgment and not misconduct. He maintains that he exercised judgment in sending the information, because he was not told that the information was confidential and he sent it to only his former supervisor, a former BCBSM employee. But the record supports the ULJ's finding that Burdette distributed employee-identification numbers and that Burdette either knew or should have known that those numbers constituted confidential information, not to be distributed to anyone outside the company. Furthermore, Burdette does not dispute that, regardless of Reyer's prior relationship with BCBSM, she was not an employee of BCBSM at the time Burdette sent the e-mail. As the ULJ concluded, the question of whether or not to disclose confidential information to an outsider was not a question that required judgment. As such, Burdette's violation of BCBSM's confidentiality policy cannot be considered a good faith error in judgment within the meaning of Minn. Stat. § 268.095, subd. 6(a).

II.

Burdette next argues that the ULJ failed to consider relevant evidence. Specifically, he argues that BCBSM obstructed the process by not providing the ULJ a copy of his employment record and consequently the ULJ failed to consider Burdette's employment record in deciding whether Burdette was entitled to benefits. But BCBSM

never stated that Burdette had ever had disciplinary problems, and the ULJ's decision does not find that Burdette was terminated for poor performance. Furthermore, Burdette had the opportunity at the hearing to present the ULJ with any relevant information, and the ULJ accurately observed that "Burdette chose to give very little testimony." In any event, given the fact that Burdette was terminated for misconduct, his overall employment record is irrelevant. *See* Minn. Stat. § 268.095, subd. 6(a) (excluding "unsatisfactory conduct" and "poor performance" from the definition of employment misconduct). Burdette has not demonstrated that the ULJ committed error by failing to consider Burdette's employment record.

III.

Burdette also argues that he was given insufficient time to prepare for his hearing before the ULJ. Minnesota law requires the department to send notice of an appeal to "any involved applicant." Minn. Stat. § 268.105, subd. 1(a) (2006). The department may send the notice by mail and must send the notice "not less than ten calendar days before the date of the hearing." *Id.* But Burdette did not raise this issue prior to or during the hearing before the ULJ. Neither he nor his attorney claimed that the department had failed to comply with section 268.105, subdivision 1(a), nor did either ask to reschedule the hearing, as Minn. R. 3310.2908 (2005) permits. Consequently, the timeliness of the notice of appeal is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (prohibiting reviewing court from considering issues raised for first time on appeal).

IV.

Finally, Burdette states that he is a member of a protected class under Minnesota law and argues that upholding the ULJ's decision "would have a chilling effect on minority employees and embolden employers to levy unfounded charges." However, there was no evidence presented to the ULJ to support an argument that Burdette was terminated because he was a member of a protected class. To the contrary, the record shows that he was terminated solely because he violated BCBSM's confidentiality policies and then lied about it in a company investigation. On this record, his argument is meritless.

Affirmed.