STATE OF MINNESOTA
IN COURT OF APPEALS
A09-924

Todd Goble,
Relator,

vs.

Speedway SuperAmerica LLC.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed May 11, 2010
Affirmed
Johnson, Judge

Department of Employment and Economic Development
File No. 21885694-3

Peter B. Knapp, James T. Graves (certified student attorney), William Mitchell Law Clinic, St. Paul, Minnesota (for relator)

Speedway SuperAmerica LLC, Columbus, Ohio (respondent)

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Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and Johnson, Judge.

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

JOHNSON, Judge

Speedway SuperAmerica LLC (SuperAmerica) terminated the employment of Todd Goble because he twice used the store's intercom system to speak in a disrespectful manner to customers of the store. Goble sought unemployment benefits but was deemed ineligible on the ground that he was terminated for employment misconduct. We affirm.

FACTS

Goble was employed by SuperAmerica, a gas station and convenience store, for approximately 20 years, most recently as the full-time lead person on his shift. On January 10, 2009, Goble had a verbal altercation with a customer. Goble's co-worker refused to sell cigarettes to the customer because her driver's license appeared to have been altered. The customer, an African-American woman, became upset and yelled at Goble and his co-worker. The woman called Goble and his co-worker names and said that they were racist. She also said, "[G]ood thing Obama was elected" because "the racism [is] going to stop."

The customer eventually left the store. But while she was in the parking lot, Goble used the store's outdoor intercom system to say, "Obama sucks." The woman lodged a complaint by telephone with SuperAmerica's customer service department and described the incident as racial in nature.

SuperAmerica conducted an internal investigation into the incident. Goble and his co-worker admitted that they made the comments alleged. The investigation also considered an incident in December 2003 in which Goble used a store's outdoor intercom

system to antagonize a customer. On that occasion, as a customer used a squeegee to clean the windows of his vehicle, Goble said, in a sarcastic and rhetorical manner, "why don't you clean your whole car with our squeegee?" Goble was disciplined at that time. Goble's personnel records include the following notation: "This type of behavior is totally unacceptable, and will not be tolerated. This is Todd's final notice, and any other similar complaints will result in termination." At the conclusion of the internal investigation on January 20, 2009, SuperAmerica terminated Goble's employment as well as that of his co-worker.

Goble sought unemployment benefits from the Department of Employment and Economic Development (DEED), which made an initial determination that he was ineligible because he had been terminated for misconduct. After Goble filed an administrative appeal, a ULJ conducted a telephonic hearing on March 25, 2009, at which two persons testified: Goble and Yasser Gharib, SuperAmerica's district manager. The ULJ issued a written decision the following day in which he concluded that Goble is ineligible for unemployment benefits. After Goble sought reconsideration, the ULJ affirmed his earlier decision. Goble appeals by way of a writ of certiorari.

D E C I S I O N

Goble argues that the ULJ erred by concluding that he was discharged for misconduct and, thus, is ineligible for unemployment benefits. Goble's argument has two parts. First, he argues that he did not engage in employment misconduct. Second, he argues that, even if he did engage in employment misconduct, his misconduct falls within the single-incident exception to misconduct.

This court reviews a ULJ's decision denying benefits to determine whether the findings, inferences, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (2008). The evidentiary hearing is an evidence-gathering inquiry, not an adversarial contest, and is conducted without regard to any particular burden of proof. *Id*., subd. 1(b) (2008); *Vargas v. Northwest Area Found.*, 673 N.W.2d 200, 205 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004). The ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination whether an employee is ineligible for unemployment benefits based on employment misconduct is a question of law, which is subject to a *de novo* standard of review. *Id*.

A. Misconduct Determination

Goble contends that his actions did not constitute employment misconduct because his conduct "did not go beyond the conduct that could reasonably be expected of an employee under the circumstances." An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct includes "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) (2008). As a general rule, refusing to follow an employer's reasonable policies and requests is misconduct because it shows a substantial lack of

concern for the employer's interest. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

The ULJ concluded that Goble's conduct "displayed a serious violation of the standards of behavior SuperAmerica had a right to reasonably expect." Goble admits that he made a mistake but contends that his conduct was not "a deliberate choice adverse to his employer" but, instead, "a short comment under the heat of the moment." The question whether a person's conduct "displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee," Minn. Stat. § 268.095, subd. 6(a), "is an objective determination." *Jenkins v. American Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006). The key question is: "was the employer's expectation for the employee reasonable under the circumstances?" *Id.*

In this case, there are several reasons why SuperAmerica would reasonably expect Goble to adhere to higher standards of behavior. SuperAmerica is a retail business, which means that it receives revenue from persons such as the woman whom Goble offended. In addition, SuperAmerica has a legal duty to not interfere on the basis of race with its customers' freedom to form and enjoy contractual relationships. *See Gregory v. Dillard's, Inc.*, 565 F.3d 464, 468-72 (8th Cir. 2009) (en banc) (analyzing claim of violation of 42 U.S.C. § 1981(a), which concerns "right . . . to make and enforce contracts"), *cert. denied*, 130 S. Ct. 628 (2009). These reasons are sufficient to support the conclusion that SuperAmerica's expectation that Goble refrain from intentionally offending its customers is objectively "reasonable under the circumstances." *See Jenkins*, 721 N.W.2d at 290. This conclusion is consistent with caselaw in which we have

affirmed determinations of ineligibility in similar circumstances, albeit under slightly different statutory standards. *See, e.g., Pitzel v. Packaged Furniture & Carpet*, 362 N.W.2d 357, 357-58 (Minn. App. 1985) (holding that employee engaged in "conduct [that] evinces a willful or wanton disregard of the employer's interest" due to "aggressive and offensive [behavior] with customers"); *see also Montgomery v. F & M Marquette Nat. Bank*, 384 N.W.2d 602, 605 (Minn. App. 1986) (holding that employee engaged in misconduct by being "rude to customers, fellow employees, and supervisory personnel"), *review denied* (Minn. June 13, 1986). Furthermore, Goble worked in a retail environment for 20 years and was a shift lead at the time of his termination. He does not contend that he did not understand his employer's expectations.

Goble's argument that he did not engage in misconduct because he acted in "the heat of the moment" is not based on a viable legal theory. At one time, an employee terminated for misconduct could avoid ineligibility by establishing that the misconduct arose from "an isolated hotheaded incident." *See, e.g., Windsperger v. Broadway Liquor Outlet*, 346 N.W.2d 142, 145 (Minn. App. 1986). But in 1997, the legislature removed the statutory language on which the "hotheaded" exception was based. *Isse v. Alamo Rent-A-Car*, 590 N.W.2d 137, 139-40 (Minn. App. 1999), *review denied* (Minn. Apr. 20, 1999). In 2003, however, the legislature codified a similar concept in an exception for "a single incident that does not have a significant adverse impact on the employer." Minn. Stat. § 268.095, subd. 6(a); *see also* 2003 Minn. Laws 1st Spec. Sess. ch. 3, art. 2, § 13, at 1473-74. Goble has made the argument that his conduct is within the single-incident exception; we analyze that argument below. Thus, he may not also argue that his conduct

is within the "hotheaded" exception. *See generally* Marshall H. Tanick, *The Moving Target of Misconduct: Hot Heads, Single Incidents, and Overall Conduct*, Bench & Bar of Minnesota, Nov. 2009, at 31-33.

Goble also contends that his comment about President Obama was not misconduct because SuperAmerica did not have "a policy covering how and when gas station intercom systems could be used." But Goble was told in 2003 that antagonizing a customer via the store's outdoor intercom system "is totally unacceptable, and will not be tolerated." He was warned at that time that "any other similar complaints will result in termination." In light of the direct communication from SuperAmerica to Goble on this issue, it is irrelevant whether SuperAmerica's handbook contained any information about the outdoor intercom system.

Thus, the ULJ did not err by concluding that Goble was discharged for employment misconduct.

B. Single-Incident Exception

Goble also argues that, even if he engaged in employment misconduct, his misconduct is within the single-incident exception, which is part of a statute that creates several exceptions to the definition of misconduct, including an exception for

> 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.

Minn. Stat. § 268.095, subd. 6(a) (emphasis added).

The ULJ concluded that the single-incident exception is inapplicable because although "Goble was discharged primarily for [the 2009] incident, he did something similar in 2003." Goble challenges this finding on two grounds. First, he contends that the 2003 incident may not be considered because it occurred too many years before the 2009 incident. Second, he contends that the 2009 incident of misconduct did not have a significant adverse impact on SuperAmerica.

1. Time Interval

Goble argues that the 2009 incident is within the single-incident exception because the 2003 incident was too remote in time to be considered alongside the 2009 incident. Goble does not cite any caselaw in support of this argument. Goble contends that an unqualified application of the statute would result in absurd applications with harsh results, such as a finding of misconduct based on two incidents that are 20 years apart. But Goble's two incidents of misconduct are not separated by 20 years; he engaged in two incidents of misconduct that are separated by approximately five years. It appears that SuperAmerica did not regard the 2003 incident as obsolete; in January 2009, SuperAmerica still possessed its records of the December 2003 incident. The statute contains no time limit for considering prior incidents, and the facts of this case do not present a compelling reason to recognize such a limit. Thus, the ULJ did not err by considering the 2003 incident when finding that Goble's misconduct in the 2009 incident was not a single incident.

2. Significant Adverse Impact on Employer

Goble also argues that, assuming the 2009 incident is a single incident, it did not have a significant adverse impact on SuperAmerica. He contends that the 2009 incident was a "lesser offense" akin to swearing at a co-worker and "simply did not rise to the same level of egregiousness as dishonesty or a violation of safety rules."

Goble's argument is inconsistent with both the law and the facts. Gharib, SuperAmerica's district manager, testified about significant disruption in the store after the 2009 incident. He testified that Goble's conduct "actually caused a lot of issues with some of the customers," who "came in and . . . started talking about politics." He testified that "it wasn't really a good sight that we had to go through after what happened." This evidence is sufficient to preclude application of the single-incident exception.

In addition, the ULJ found that, after Goble's repeated abuse of the intercom system, "SuperAmerica's ability to trust him to not react inappropriately is greatly undermined." An employer's loss of trust in an employee may be a significant adverse impact on the employer that defeats the single-incident exception to misconduct. *See Skarhus*, 721 N.W.2d at 344 (holding that employee's small theft had significant adverse impact because employer no longer could trust employee with essential functions of job). Gharib emphasized in his testimony that SuperAmerica does not tolerate the type of conduct in which Goble engaged and that "it's considered a serious violation of the company standards." This evidence supports the ULJ's finding that SuperAmerica lost trust in Goble as a result of his misconduct on January 10, 2009.

In sum, Goble engaged in employment misconduct, and his misconduct is not within the single-incident exception.

Affirmed.