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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-2318**

Jon Gaustad,
Respondent,

vs.

Innova Industries Inc.,
Relator,

Department of Employment and Economic Development,
Respondent.

**Filed September 14, 2010**
**Reversed**
**Klaphake, Judge**

Department of Employment and Economic Development
File No. File No. 22954799-4

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Considered and decided by Klaphake, Presiding Judge; Toussaint, Chief Judge; and Schellhas, Judge.

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

**KLAPHAKE**, Judge

Relator Innova Industries, Inc., challenges an unemployment law judge's (ULJ) decision finding its former employee, respondent Jon Gaustad, was eligible for unemployment benefits. Relator argues that respondent was discharged from employment for refusing to abide by its reasonable rules and that this was employment misconduct that should have rendered him ineligible for unemployment benefits.

Because we conclude that the ULJ's decision was not supported by substantial evidence and was an error of law, we reverse.

## D E C I S I O N

We will reverse the ULJ's decision if, among other things, it is affected by an error of law or is unsupported by substantial evidence in the entire record. Minn. Stat. § 268.105, subd. 7(d) (2008). Whether an employee engaged in certain conduct is a fact question; we defer to the ULJ's credibility determinations and factual findings. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But whether a particular act constitutes employment misconduct is a question of law, which the appellate court reviews de novo. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

A person who is discharged because of employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). "Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job 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." *Id.*, subd. 6(a) (Supp. 2009). "[S]imple unsatisfactory conduct" is not employment misconduct. *Id.*, subd. 6(b) (Supp. 2009). The ULJ must consider if the applicant was discharged for a single incident in weighing whether conduct constitutes employment misconduct. *Id.*, subd. 6(d) (Supp. 2009).

If the ULJ bases his or her decision on the credibility of a party or witness, the ULJ must set out reasons for crediting or discrediting the testimony. Minn. Stat. § 268.105, subd. 1(c) (Supp. 2009). The ULJ here determined that relator's witnesses were credible and respondent was not, stating that relator's witnesses gave "the more plausible version of events and [their testimony] was supported by credible evidence in the record." The ULJ noted that respondent "was less plausible and more self-serving" and that relator's witnesses gave the "preferred testimony."

The ULJ originally determined that respondent was ineligible for benefits because he had been discharged for employment misconduct, but reversed this decision after respondent filed a request for reconsideration. On reconsideration, the ULJ concluded that the "violation was not so serious that it rises to the level of employment misconduct" and that the conduct did not have "a serious or significant impact on [relator] or [respondent's] work product" and thus did not amount to employment misconduct. This conclusion is contrary to evidence in the record.

Relator, a metal manufacturing plant, requires all workers, with a few minor exceptions, to take breaks on the same schedule: 15-minute breaks at 9:30 a.m. and 2:30 p.m. and a lunch break from 11:30 a.m. to 12:00 noon. Breaks are strictly regulated

because the flow of work would be impeded if workers took breaks at different times. Workers may take an authorized break if they become overheated or need to use the bathroom.

Relator also has a strict non-smoking policy inside the plant. Smoking is permitted in two designated areas outside of the plant. Relator maintains this strict policy because a discarded cigarette butt led to a serious plant fire in 2008. Signs are posted in the employee break room, and a notice was handed out to employees discussing the smoking policy and identifying the two areas where smoking was permitted.

On December 19, 2008, respondent was given a written warning of a violation of company policy after he was observed "smoking outside during regular shift." This written warning included the statement "I have warned him once before." On June 25, 2009, respondent's supervisor observed him leaving the building at 8:30 a.m., one hour before his scheduled break. The supervisor immediately followed respondent out the door and observed him about 75 feet from the door. There was a smell of cigarette smoke. Respondent, who was not in a designated smoking area, ducked down between two electrical enclosures and lowered his hand as if he was hiding something. The supervisor returned to his office and emailed his supervisor. After respondent returned to the building, his supervisor went back to the electrical enclosures and found a recent cigarette butt of the brand preferred by respondent. Respondent was terminated that day for violating employer policies. The ULJ found that respondent had been smoking in an unauthorized area outside of his break time.

An employee's refusal to abide by an employer's reasonable policies and directives constitutes employment misconduct. *Schmidgall*, 644 N.W.2d at 804. A policy is reasonable when the employer can articulate or identify the purpose for a policy, which furthers a legitimate employer interest. *See id.* at 805 (noting that employer required same-day notification of on-the-job injury to assure proper medical care, provide a complete record of accidents, facilitate workers' compensation and identify hazardous conditions); *see also Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 775 (Minn. App. 2008) (airline's 12-hour no alcohol policy reasonable in light of safety concerns), *review denied* (Minn. Oct. 1, 2008); *Frank v. Heartland Auto. Servs., Inc.*, 743 N.W.2d 626, 630-31 (Minn. App. 2008) (noting that even one instance of dishonest conduct can constitute employment misconduct because employer has the right to rely on integrity of employees); *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (same).

Relator has identified two policies that were violated by respondent: (1) taking unauthorized breaks and (2) violating the smoking policy. Both policies are clearly defined in the employee handbook, and the smoking policy was explained in a separate notice and reinforced with signs in the break room. Relator articulated the purpose for both policies: first, breaks are coordinated to aid in the manufacturing process, and second, smoking is strictly regulated because of a prior serious fire in the manufacturing facility. Relator's policies are reasonable and based on legitimate employer interests.

Respondent deliberately and knowingly violated relator's policies. On this record, the ULJ's determination that respondent's conduct was not a significant violation of a reasonable employer policy is not supported by the evidence and the ULJ's conclusion

that this deliberate violation of a reasonable employer policy was not misconduct is an error of law.

**Reversed.**