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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2126**

David Chilko,
Relator,

vs.

Qwest Corporation,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed October 12, 2010
Reversed
Johnson, Judge**

Department of Employment and Economic Development
File No. 22662322-3

David Chilko, Lindstrom, Minnesota (pro se relator)

Qwest Corporation, Garden City, New York (respondent)

Lee B. Nelson, Britt K. Lindsay-Waterman, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent Department)

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

UNPUBLISHED OPINION

JOHNSON, Judge

Qwest Corporation terminated the employment of David Chilko because he failed to meet Qwest's standards of productivity. The Department of Employment and Economic Development (DEED) determined that Chilko is ineligible for unemployment benefits because he was discharged for employment misconduct. We conclude that Qwest terminated Chilko's employment not because of misconduct but, rather, because of inefficiency and simple unsatisfactory conduct. Therefore, we reverse.

FACTS

Chilko was employed by Qwest from January 2001 to May 2009. He was a network technician, with responsibility for repairing telephone cables. Qwest has established productivity standards for its network technicians. Before January 2008, the productivity standard was 2.76 service calls per day. In January 2008, Qwest increased the standard to 3.00 service calls per day.

In mid-2008, Chilko's supervisor, Eric Whisler, noticed that Chilko was not meeting Qwest's productivity standards. Whisler met with Chilko on July 17, 2008, and informed him that, in the following month, he was required, at the least, to meet the former standard of 2.76 service calls per day. Chilko met the 3.00 standard in August 2008.

Chilko did not work for Qwest in November 2008 due to his status as a part-time seasonal employee. He was called back to work in December 2008. On December 11, 2008, Whisler gave Chilko a written warning concerning his lack of productivity.

Whisler accompanied Chilko on his service calls for half a day in December 2008 to observe him and provide feedback on improving his productivity.

On February 5, 2009, Whisler gave Chilko a second written warning because Chilko failed to meet the 3.00 standard in January 2009. The warning stated, in part:

To succeed in today's competitive environment Qwest must provide excellent customer service. Qwest relies upon the skills and efforts of all employees . . . to provide the best possible service at the lowest possible cost to our customers. When technician productivity or quality falls below standards, it weakens our ability to control the costs of serving our customers.

The warning informed Chilko that his failure to improve his productivity could result in the termination of his employment. In February 2009, Whisler again accompanied Chilko on his service calls and also gave Chilko a GPS device to help him find customer locations more quickly. In March 2009, Chilko attended a training class on computer-based maps.

At the agency hearing, Chilko testified that his lack of productivity was due in part to his efforts to work faster. When calculating a network technician's daily average, Qwest subtracts from the number of service calls completed any service calls that require a follow-up repair. Chilko testified that he sometimes would use a separate wire to bypass a fault in a telephone cable because he was "under such stress to get jobs done in an expedient manner," knowing that the temporary solution would need to be addressed further. Whisler corroborated Chilko's testimony on this issue by testifying that Chilko's temporary solutions often required a follow-up call, which reduced the number of completed service calls that counted toward his productivity goals. Whisler testified that

approximately one quarter of Chilko's service calls required a follow-up call, which means that he received credit for only approximately three-quarters of his service calls.

Whisler gave Chilko a final written warning on April 14, 2009. Chilko failed to meet the 3.00 standard in that month. Qwest terminated Chilko's employment on May 21, 2009. The notice of termination states that Chilko was terminated for "[i]nability to meet expectations" and "continued unsatisfactory performance." As far as the record reveals, Chilko's monthly productivity between June 2008 and the date of his termination was as follows:

June 2008	2.19
July 2008	NA
August 2008	3.00
September 2008	2.57
October 2008	2.18
November 2008	NA
December 2008	2.30
January 2009	2.15
February 2009	2.44
March 2009	2.65
April 2009	2.16

In late May 2009, Chilko submitted an application for unemployment benefits. DEED made an initial determination that he is ineligible for benefits due to employment misconduct. After Chilko sought review of the decision, a ULJ conducted an evidentiary hearing in September 2009. Chilko and Whisler were the only witnesses. One week later, the ULJ affirmed the initial determination, finding that Chilko was terminated for employment misconduct. After Chilko sought reconsideration, the ULJ denied the request and affirmed her initial decision. Chilko appeals by way of a writ of certiorari.

DECISION

Chilko argues that the ULJ erred in two ways: first, by denying his request for reconsideration and, second, by finding that he was discharged for employment 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). We view the ULJ's factual findings "in the light most favorable to the decision." *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.*

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct is defined by statute to include "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). The same statute also sets forth exceptions to the definition of misconduct, including "[i]nefficiency, . . . simple unsatisfactory conduct, . . . poor performance because of inability or incapacity, [or] good faith errors in judgment if judgment was required" *Id.*

In this case, the ULJ relied on the second type of misconduct described in subdivision 6(a). She found that “Chilko’s continuing failure to meet the productivity standards displays clearly a substantial lack of concern for his employment.” Chilko contends, however, that the ULJ should have applied the exceptions to misconduct that are quoted above. The ULJ’s decision addresses the exception for inability or incapacity by finding that Chilko was not “incapable of meeting the productivity standards.” This conclusion apparently was based on the finding that Chilko was able to meet the former standard of 2.76 service calls per day and that he “continued to be able to meet the standard [of 3.00 service calls per day] on occasion.” The ULJ’s decision does not expressly address the other exceptions to misconduct on which Chilko relies.

Contrary to the ULJ’s determination, Chilko’s performance as a network technician for Qwest was within at least two exceptions to the definition of misconduct. First, the evidence in the agency record reveals that Qwest terminated Chilko because of “inefficiency.” Minn. Stat. § 268.095, subd. 6(a). The common definition of the word “efficient” is “[a]cting or producing effectively with a minimum of waste, expense, or unnecessary effort,” or “[e]xhibiting a high ratio of output to input.” *The American Heritage College Dictionary* 446 (4th ed. 2007). In this case, Qwest measured the efficiency of its network technicians by quantifying both input and output in numerical terms. Qwest terminated Chilko solely because he failed to achieve its numerical goals. If Chilko had been more efficient by performing an average of 3.00 service calls per day, he would not have been terminated. Qwest’s termination of Chilko is a classic example of a termination for “inefficiency.”

Second, the evidence in the agency record reveals that Qwest terminated Chilko because of “simple unsatisfactory conduct.” Minn. Stat. § 268.095, subd. 6(a). The written notice of termination that Qwest provided to Chilko refers to Chilko’s “unsatisfactory performance.” Neither the notice of termination nor the written warnings describe Chilko’s performance as being exceptionally unsatisfactory. Qwest continued to employ Chilko for nearly one year after first observing his lack of productivity. The circumstances of this case are well within the statutory exception for “simple unsatisfactory conduct.” *Id.*

Only one published opinion has explored the exceptions to misconduct that we apply here, and our conclusion is consistent with that opinion. In *Bray v. Dogs & Cats Ltd.*, 679 N.W.2d 182 (Minn. App. 2004), the relator was the manager of a retail store. *Id.* at 183. She was terminated because she failed to turn in paperwork on time, violated company policy by overstaffing the store, and failed to discipline an employee in writing. *Id.* at 183-84. The ULJ determined that Bray was ineligible for unemployment benefits because her failure to perform was “intentional disregard of the employer’s expectations.” *Id.* This court reversed the ULJ’s determination, reasoning that Bray “attempted to be a good employee but just wasn’t up to the job and was unable to perform her duties to the satisfaction of the employer.” *Id.* at 185. We concluded that Bray did not commit employment misconduct because she “was discharged for inefficiency, inadvertence, simple unsatisfactory conduct, [or] poor performance because of inability or incapacity.” *Id.* (alteration in original; quotation omitted). By comparison, Chilko showed no less concern for his employment than did Bray, and his failure to meet

his employer's expectations was less attributable to his voluntary choices and more attributable to natural limitations on his abilities. Thus, *Bray* supports Chilko's argument for reversal.

The evidence in the agency record is inconclusive as to whether Qwest terminated Chilko because of "inability or incapacity." Minn. Stat. § 268.095, subd. 6(a). The ULJ found that Chilko was not "incapable." This finding appears to be based in part on the ULJ's finding that Chilko had met Qwest's productivity standards "on occasion." In fact, between June 2008 and April 2009, Chilko met the 3.00 standard in only one month. The ULJ's finding finds some support in Whisler's testimony that he did not believe that Chilko lacked skill or ability. But this testimony appears to refer generally to Chilko's ability to repair a single telephone cable, not his ability to make a certain number of repairs within a fixed time frame. It is significant that the written notice of termination that Qwest provided to Chilko states, in part, that he was terminated for "[i]nability to meet expectations." Nonetheless, because we have concluded that Chilko's conduct fits within the two exceptions described above, we need not decide whether it also fits within the exception for "inability or incapacity." *Id.* Likewise, we need not decide whether Chilko's conduct also fits within the exception for "good faith errors in judgment." *Id.*

In sum, the ULJ erred by concluding that Chilko's employment was terminated for employment misconduct and, thus, that he is ineligible to receive unemployment benefits. We conclude instead that Chilko was terminated for inefficiency and simple unsatisfactory conduct. Thus, Chilko is eligible for unemployment benefits. In light of

this conclusion, we need not consider Chilko's other argument, that the ULJ erred by denying his request for reconsideration.

Reversed.