STATE OF MINNESOTA
IN COURT OF APPEALS
A10-947

Paul Ellis,
Relator,

vs.

Menard, Inc.,
Respondent,
Department of Employment and Economic Development,
Respondent.

Filed February 8, 2011
Affirmed
Stoneburner, Judge

Department of Employment and Economic Development
File No. 235494626

Thomas H. Boyd, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for relator)

Menard, Inc., Eau Claire, Wisconsin (respondent employer)

Lee B. Nelson, Christina Altavilla, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Bjorkman, Presiding Judge; Toussaint, Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

In this certiorari appeal, relator challenges the unemployment-law judge's (ULJ's) determination that he is ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Relator Paul Ellis was employed by respondent Menard Inc. from August 1, 2001, until he was discharged on October 1, 2009. During this period, relator held various positions at a Menards store in Maplewood; his most recent job description was lumber sales. From 2003 until he was discharged, relator received approximately 12 warnings or reprimands for various issues, including sloppy work, not completing required "to-do" lists in a timely fashion, not including names on invoices or necessary information on signs, using his cell phone while on the clock, socializing with coworkers instead of being productive and fulfilling his duties, failing to properly stack boards, exhibiting a perceived attitude problem, providing poor customer service, leaving his work station (a service desk) unattended, and failing to seek assistance from coworkers with customer service when needed. Relator was informed at least three times in 2009 that a failure to improve in the areas of concern could result in his discharge.

At approximately 7:30 a.m. on October 1, 2009, relator, who was stationed at a service desk, received a telephone call from the Menards store in Stillwater. The caller asked if a particular type of truss was in stock at the Maplewood store. Relator, who in the past had been criticized for leaving the service desk unattended, told the caller that he

would look for the item as soon as he could leave the desk to look for the item. Relator stated that he would call back if he found the item but, if he did not find the item, he would confirm that information with his manager when the manager arrived at 10:00 a.m. Jason Wheeler, an assistant general manager, and Ronald Cleveland, a service manager, were standing close enough to the service desk to hear part of relator's telephone conversation, but relator did not seek the assistance of either manager.

The Stillwater caller promptly called the Maplewood store again and spoke to Cleveland about the item. Cleveland immediately checked the inventory, discovered that the item was not in stock, and so informed the caller. Relator's employment was then terminated for failing to provide prompt service in this situation and for relator's history of work-performance issues.

Relator applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development (DEED) made an initial determination that he was ineligible for benefits. Relator filed an administrative appeal. After an evidentiary hearing, the ULJ determined that relator was discharged for employment misconduct, making him ineligible for unemployment benefits. Relator requested reconsideration, and the ULJ affirmed the determination of ineligibility. This certiorari appeal followed.

D E C I S I O N

I. Standard of review

This court may affirm or reverse or modify a ULJ's decision if the substantial rights of a petitioner may have been prejudiced because, among other things, the decision

is affected by an error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2010).

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 "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." Minn. Stat. § 268.095, subd. 6(a) (Supp. 2009). But employment misconduct does not include the applicant's "inefficiency or inadvertence; . . . simple unsatisfactory conduct; . . . conduct an average reasonable employee would have engaged in under the circumstances; . . . [or] good faith errors in judgment if judgment was required." *Id.*, subd. 6(b)(2)–(6) (Supp. 2009).

Whether an employee engaged in employment misconduct is a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

II. October 1, 2009 incident

The ULJ found that relator was discharged due to his failure to provide reasonable customer service on October 1, 2009, and prior performance problems for which relator had been warned that his job was in jeopardy. The ULJ concluded that relator's conduct constituted employment misconduct, making relator ineligible for unemployment

benefits. Relator does not dispute the ULJ's findings of fact, but relator characterizes his conduct as merely an inefficient or inadvertent, unsatisfactory performance, or a good-faith error in judgment not constituting employment misconduct under Minn. Stat. § 268.095, subd. 6(b).

Relator's primary argument is that, because he knew he was not to leave the service desk unattended, "it was not unreasonable . . . for [relator] to assume that leaving the sales desk right away or having someone else watch the desk would be less prudent than waiting for a better time to check on the [item] and hear from the manager." But approximately five months earlier, relator had received a written warning regarding his failure to ask for assistance when needed to provide prompt customer service without leaving the service desk unattended. Relator had been told that future discipline for such failures could include termination of employment.

As a general rule, refusing to follow an employer's reasonable policies and requests constitutes employment misconduct. *See Schmidgall*, 644 N.W.2d at 804. *Bray v. Dogs & Cats Ltd. (1997)*, 679 N.W.2d 182 (Minn. App. 2004), the only published opinion relator relies on to argue that his conduct did not constitute misconduct, is distinguishable.[1] In *Bray*, the record demonstrated that the employee was unable to perform her duties to the satisfaction of the employer. *Id*. at 185. There is no evidence in the record that relator was unable to perform his duties to the satisfaction of Menards. Rather, relator testified that he was just having a "really bad morning." On this record,

[1] Because unpublished opinions do not have any precedential effect, we decline to analyze unpublished opinions cited by relator. *See* Minn. Stat. § 480A.08, subd. 3 (2010).

we conclude that the ULJ did not err by concluding that relator's conduct on October 1, 2009, was employment misconduct.

III. Prior incidents

Relator next contends that the prior incidents leading up to his discharge were minor, isolated, and materially different from one another and that, therefore, the ULJ erred by concluding that the prior incidents, in combination with the incident on October 1, 2009, constitute employment misconduct. We disagree. We have held that an employee's behavior over a period of almost four years, showing repeated violations of work rules and neglect of job responsibilities, constituted employment misconduct, making the employee ineligible for unemployment benefits. *Campell v. Minneapolis Star & Tribune Co.*, 345 N.W.2d 803, 804 (Minn. App. 1984). Similarly, in *Gilkeson v. Indus. Parts & Serv., Inc.*, this court affirmed a determination that an employee's behavior that exhibited a "pattern of failing to follow policies and procedures and ignoring directions and requests" constituted employment misconduct. 383 N.W.2d 448, 452 (Minn. App. 1986). In this case, the record demonstrates that relator was discharged after his behavior over a period of six years showed repeated violations of his employer's work rules. Relator does not cite any legal authority supporting his position that the numerous prior incidents cannot be considered because they were minor or because some of the incidents were materially different from others. *See Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919–20 n.1 (Minn. App. 1994) (declining to address allegation unsupported by legal analysis or citation). We conclude that the ULJ did not err by concluding that

the prior incidents, in combination with the October 1, 2009 incident, constitute employment misconduct.

Affirmed.