STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0134

LeMieux Karsa,
Relator,

vs.

Minnesota Department of Corrections,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 6, 2012
Affirmed
Harten, Judge[*]

Department of Employment and Economic Development
File No. 28619397-3

Erbayne W. Jarvis, Marcus A. Jarvis, Magdalena Metelska, Brooklyn Park, Minnesota (for relator)

Minnesota Department of Corrections, St. Paul, Minnesota (respondent)

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

Considered and decided by Stauber, Presiding Judge; Chutich, Judge; and Harten, Judge.

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[*]Retired judge of the Minnesota Court of Appeals, serving 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

HARTEN, Judge

Relator, formerly employed as a corrections officer, challenges the determination of the unemployment law judge (ULJ) that he committed employment misconduct. Because relator's failure to submit written reports concerning his physical altercations with an offender constituted misconduct within the meaning of Minn. Stat. § 268.095, subd. 6(a)(1) (2010), we affirm.

FACTS

Relator LeMieux Karsa worked as a corrections officer for respondent Minnesota Department of Corrections (MNDOC). On 20 August 2011, offender X wanted to stay out of his cell at lockup time. When relator refused permission, X blocked the cell door with his foot so that relator could not lock it. Relator entered the cell and began wrestling with X. X then told relator that he respected relator, and the altercation ended.

On 3 September 2011, after relator again refused X permission to remain out of his cell, they both entered the cell and X caught relator in a bear hug. When relator told X to let him go, X complied. Relator then told X that he should call the squad, but would just warn X. Relator opted to not report either incident to a supervisor.

On 6 September 2011, another offender, Y, reported to a lieutenant that Y had observed relator enter X's cell on 3 September between 9:00 and 9:30 in the morning and that Y was upset because relator picked on some offenders but wrestled with others in their cells.

MNDOC policy states that MNDOC tolerates no form of violence or violent acts in the workplace and that, if it is necessary for an officer to physically engage with an offender, the officer must immediately report the incident to a supervisor and submit a written incident report before the end of the shift. All such incidents are reviewed, and the review includes watching relevant portions of surveillance videotapes. In watching the videotapes for the September 3 incident, MNDOC officers also discovered the 20 August incident.

X was interviewed by a special investigator. X said the incident did involve physical altercation and that he took full responsibility for it.

When relator was interviewed by his lieutenant about the 3 September incident, he said that: (1) both he and X were from Africa, where it is expected that disputes will be settled physically; (2) he entered the cell, swung X onto the bed, and held him down; and (3) as relator raised his right hand over X's head and said, "Now what?," X replied "You win; you're the boss"; and (4) relator then left X's cell.

Relator initially said he could not recall any other incident, but, when told that an incident occurred on 20 August, relator recalled that he had entered X's cell and wrestled with him, and X admitted that he now respected relator.

Relator acknowledged that he had not reported either incident. Relator's employment was terminated because of the incidents and his failure to report them. When he applied for unemployment benefits, an adjudicator for respondent Minnesota Department of Employment and Economic Development (DEED) determined that relator had reacted in self-defense when an inmate grabbed him and, because his acts were "not

intentional and therefore were not employment misconduct," relator was adjudicated eligible for benefits.

MNDOC appealed the adjudicator's determination of relator's eligibility. Following a telephone evidentiary hearing, the ULJ determined that relator had committed misconduct, was ineligible for benefits, and had been overpaid $1,860. Relator requested reconsideration, and the ULJ affirmed the decision. Relator challenges the ULJ's decision, claiming that he did not commit misconduct.

D E C I S I O N

Whether an employee committed misconduct is a mixed question of fact and law: whether the employee committed certain acts is a question of fact, but whether those acts constitute misconduct is a question of law. *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771-74 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). The ULJ's findings of fact will not be disturbed when the evidence substantially sustains them. *Id.* "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006).

Employment misconduct includes intentional, negligent, or indifferent conduct that clearly displays "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)(1) (2010). An employer's policies, rules, and reasonable requests may be the source for employment standards and conduct the employer has the right to expect. *See, e.g., Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804-05 (Minn. 2002) (injury-reporting policy); *Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986) (security-

guard attendance policy), *review denied* (Minn. Aug. 20, 1986); *Ruzynski v. Cub Foods, Inc*., 378 N.W.2d 660, 662-63 (Minn. App. 1985) (time-card policy); *Luu v. Carley Foundry Co*., 374 N.W.2d 582, 584 (Minn. App. 1985) (absenteeism policy). Generally, if an employer's requirements are reasonable and do not impose an unreasonable burden, an employee's refusal to comply with the request constitutes misconduct. *Sandstrom v. Douglas Mach. Corp*., 372 N.W.2d 89, 91 (Minn. App. 1985).

The ULJ found that:

> MNDOC had the right to expect that employees adhere to policies and procedures. The reporting procedures serve to maintain an orderly and therefore safer environment for offenders and employees. Failing to report an incident of physical altercation stemming from an offender's failure to heed instructions is a serious matter. The training provided to [relator] clearly outlined that he was to report the incidents that occurred.

The record supports this finding, and relator does not challenge it.

Relator asserts that his decision not to report the physical altercations with an offender was a good-faith error in judgment, relying on Minn. Stat. § 268.095, subd. 6(b)(6) (2010) (excluding good-faith errors in judgment from misconduct). But MNDOC's policy was:

> All staff must immediately document all occurrences that could adversely impact facility or department operations or that necessitates administrative review on an Incident Report form.
>
> . . . .
>
> A. <u>When to submit a written incident report</u>:
>
> . . . .
>
> 2. Staff have employed the use of force, (e.g., . . . physical force) other than the routine use of mechanical restraint.

> . . . .
>
> 5. A violation of facility rules or offender discipline regulations has occurred.

Thus, MNDOC staff were not permitted discretion to decide whether to report incidents involving the use of force or violations of facility rules or offender discipline—they were required to report them. *See Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 877 (Minn. App. 2011) (where employee had duty to follow policy without discretion, no judgment was required of him), *review denied* (Minn. Nov. 15, 2011).

Relator also argues that, because the incident was merely horseplay, no report was necessary. But any use of physical force was to be reported; MNDOC policy was very clear on that point. Moreover, the ULJ's questioning of relator showed that relator was aware of the policy.

When the ULJ said, "[I]f there's some physical contact between an officer and offender it has to be reported. . . . Is that not the policy[?]" relator answered, "Yes Your Honor." After relator said that not all contact with offenders was fighting, the ULJ asked, "[E]ither way, shouldn't you write a report[?] Doesn't the policy require that[?]" and relator answered, "[O]kay, literally, yes . . . ." This interchange occurred:

> [ULJ]: I've heard from you a couple times that . . . it was just horseplay, [X] wasn't trying to hurt you so that's why you didn't write up a report. I guess to put it from the employer's perspective why not just write the report[?]"
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> [Relator]: [T]he reason why I didn't write the report is . . . usually [offenders] try to talk to you, they want to put their arm around you, . . . or they trying to shake your hand, things like that so we don't write reports for those. My understanding of the policy made it clear . . . if I have to use any kind of force I have to write a report.

As the ULJ indicated, even if the incident had been simply horseplay, relator was still obliged to write a report of it.

Evidence substantially supports the ULJ's findings that MNDOC reasonably expected relator to comply with the policy of filing written reports of any physical altercation between an officer and an offender and that relator did not comply with that policy. The ULJ's conclusion that relator's failure to comply was misconduct was not an error of law.

Affirmed.