STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1527

Benjamin C. Van Sant,
Relator,

vs.

Modernistic, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed June 2, 2014
Affirmed
Rodenberg, Judge

Department of Employment and Economic Development
File No. 31102262-3

Benjamin C. Van Sant, Marine on St. Croix, Minnesota (pro se relator)

Modernistic, Inc., Stillwater, Minnesota (respondent)

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

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

RODENBERG, Judge

Relator Benjamin C. Van Sant challenges the denial of his claim for unemployment benefits based on a determination that he committed employment misconduct. We affirm.

FACTS

Relator was employed as an ink lab coordinator at respondent Modernistic, Inc. In January 2012, he was instructed to seek his supervisor's advance approval before sending emails to other departments regarding the implementation of new procedures. Relator sent several such emails without approval, and he was suspended for one day without pay in July 2012. In March 2013, relator learned that he would not be receiving a pay increase because he had disregarded his supervisor's instructions regarding his use of email. After again sending an unapproved email to the sales department, relator was discharged on April 3, 2013.

At an evidentiary hearing before an unemployment law judge (ULJ), evidence was received establishing that relator sent emails concerning new procedures to other departments in violation of his employer's procedures. He did not dispute the violations but testified that he "wasn't really clear on what was an unapproved email." But relator admitted that he "understood that . . . writing emails to some people might get [him] fired." Even though he "never really tried" to seek advance approval, relator "guess[ed]" that approval of his emails would take days or even weeks. And relator testified that he "couldn't accept" the instruction because "that was a rule made special for [him]." He

thought he should be able to send emails to other departments because he "considered [himself] part of management as being a coordinator."

The ULJ credited the testimony of the employer's witnesses "[w]here the testimony of the parties differed" because it "was logical and specific in nature" and concluded that "[relator's] conduct, specifically continuing to send emails he was unauthorized to send despite numerous warnings, displays clearly a serious violation of the standards of behavior [his employer] had a right to reasonably expect, and rises to the level of employment misconduct." The ULJ determined that relator is ineligible for unemployment benefits. Relator filed a request for reconsideration, and the ULJ affirmed the denial of unemployment benefits. This certiorari appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm or remand for further proceedings, or reverse or modify the decision if the relator's substantial rights have been prejudiced because the conclusion, decision, findings, or inferences are "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d) (2012). We review the ULJ's factual findings in the light most favorable to the decision and defer to the ULJ's credibility determinations. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). We "will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id.*

Relator first argues that the ULJ conducted an unfair evidentiary hearing. The ULJ must conduct an evidentiary hearing "as an evidence gathering inquiry" and "must ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2012). The ULJ "must exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2013). The ULJ "should assist unrepresented parties in the presentation of evidence." *Id.*

Relator argues that the ULJ "outlined incorrect procedures" and "incorrectly addressed the rules governing employment misconduct." But relator does not explain how the ULJ's statements were incorrect. At the close of the hearing, the ULJ asked relator if he wished to make a closing statement and relator replied by asking the ULJ to clarify the "determining factors" that shape the ULJ's decision. The ULJ explained that she would "apply the law to the facts" and "issue a written decision." The ULJ did not describe incorrect rules or procedures. *See* Minn. Stat. § 268.105, subd. 1(b), (c) (2012) (explaining that a ULJ must determine the facts based on a preponderance of the evidence and send those findings "by mail or electronic transmission[] to all involved parties").

Relator also argues that the ULJ failed to help him cross-examine respondent's witnesses and therefore failed to assist an unrepresented party in the presentation of evidence. *See* Minn. R. 3310.2921. But the ULJ asked relator multiple times if he had any additional questions for the witnesses, and the ULJ herself questioned respondent's witnesses regarding relator's discharge. We see no evidence that the ULJ failed to assist an unrepresented party in the presentation of evidence. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529-30 (Minn. App. 2007) (rejecting the relator's argument

that the ULJ "did not explain cross-examination or assist her in cross-examining" the employer's witness when the ULJ asked the relator if she had questions for the witness, asked her to explain why she disagreed with the witness, and questioned both sides regarding the factual dispute). And there is no evidence that the ULJ's decision was "made upon unlawful procedure." *See* Minn. Stat. § 268.105, subd. 7(d)(3).

Relator next argues that the ULJ erred in determining that respondent's witnesses were credible because their testimony "was logical and specific in nature." "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). Here, the ULJ properly "set out the reason for crediting or discrediting" the testimony of the witnesses. *See* Minn. Stat. § 268.105, subd. 1(c). And the record is sufficient to sustain the ULJ's credibility determination. *See Ywswf*, 726 N.W.2d at 533 (concluding that a ULJ's credibility determination was "supported by substantial evidence" when the credited-witness's testimony was "very detailed and specific"). Moreover, the ULJ's credibility determination was not critical to the outcome of relator's appeal because relator testified that he chose not to follow respondent's instructions regarding his use of email. It is evident from relator's testimony that he disagreed with the email policy and he acknowledged not following it on multiple occasions.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Employment misconduct includes "any intentional, negligent, or indifferent conduct, on 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) (2012). Inefficiency, inadvertence, inability, incapacity, and "simple unsatisfactory conduct" do not rise to the level of employment misconduct. *Id.*, subd. 6(b) (2012). "Whether an employee committed employment misconduct is a mixed question of fact and law." *Peterson*, 753 N.W.2d at 774. Whether an act was committed is a question of fact, but whether the act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

"An employer has a right to expect that its employees will abide by reasonable instructions and directions." *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004). "As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). "[A]n employee's decision to violate knowingly a reasonable policy of the employer is misconduct" and "[t]his is particularly true when there are multiple violations of the same rule involving warnings or progressive discipline." *Id.* at 806-07.

Relator refused to follow his supervisor's directions regarding emailing, even after repeated warnings. Under our caselaw, this behavior is employment misconduct. *See id.*; *see also Gilkeson v. Indus. Parts & Serv., Inc.*, 383 N.W.2d 448, 452 (Minn. App. 1986) (holding that an employee committed employment misconduct by "failing to follow policies and procedures and ignoring directions and requests"); *Campbell v. Minneapolis Star & Tribune Co.*, 345 N.W.2d 803, 805 (Minn. App. 1984) (holding that an

employee's "repeated violations of the employer's work rules" constituted employment misconduct).

Relator argues that his supervisor's instructions regarding emailing were not reasonable because they applied only to him. "[W]hat is 'reasonable' will vary according to the circumstances of each case." *Vargas*, 673 N.W.2d at 206. The record does not reveal how many other of respondent's employees, if any, were required to refrain from emailing other departments concerning implementation of new procedures. The ULJ found as a fact that the instruction that relator repeatedly violated was one with which his employer "had a right to reasonably expect" compliance. And the record sustains that finding. Whether other employees were subject to or violated that or similar instructions is irrelevant when determining relator's eligibility for unemployment benefits. *See Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986) ("Violation of an employer's rules by other employees is not a valid defense to a claim of misconduct.").

Relator also suggests that his failure to follow the employer's instructions amounted to "simple unsatisfactory conduct" or "conduct that was a consequence of . . . inability or incapacity," not employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(3), (5). But there is no evidence that relator attempted to follow the instructions and was simply unable to do so. *See Vargas*, 673 N.W.2d at 207 (concluding that the employee's conduct was not the result of inability or incapacity "because there [was] no evidence that he ever tried to comply with the plan" and there was therefore "no 'performance' from which he could be excused"). Relator admitted at the hearing that he "wasn't really accepting of that direction" and "never really tried" to seek advance

approval before sending emails. Therefore, relator's own testimony shows that he "intentionally disobeyed" his employer's reasonable instructions, making his behavior employment misconduct and not mere inability or incapacity. Because the record substantially sustains the ULJ's determination that relator committed employment misconduct, he is ineligible to receive unemployment benefits.

Affirmed.