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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1113**

Anthony Jay Velde,
Relator,

vs.

Randy's Sanitation, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 23, 2012
Affirmed
Halbrooks, Judge**

Department of Employment and Economic Development
File No. 27308352-3

Anthony Jay Velde, Montrose, Minnesota (pro se relator)

Randy's Sanitation, Inc., Delano, Minnesota (respondent)

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

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Crippen,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HALBROOKS, Judge

Relator challenges the unemployment-law judge's (ULJ) decision that he is ineligible for unemployment benefits because he was fired for employment misconduct. Because the ULJ's determination is supported by substantial evidence in the record, we affirm.

FACTS

Relator Anthony Velde worked as a full-time driver for respondent Randy's Sanitation, Inc. for 13 years. Randy's Sanitation does both commercial and residential sanitation pick-up, recycling, and "roll-off" work. Relator was discharged on March 1, 2011, for inappropriate work conduct, improperly calling in sick, incorrectly using company equipment, and insubordination.

The bases for his termination arise primarily out of his conduct from February 21-23, 2011. On February 21, the streets were covered in snow from a recent storm. Because of the slippery road conditions, relator engaged the differential locks on his truck to get better traction. Relator's direct supervisor, Curt Stubbs, testified that, as a policy, Randy's Sanitation allows drivers to lock a truck's differentials at low speeds when going from stop to stop so that they do not get stuck. But Randy's Sanitation does not allow drivers to lock the differentials on the highway or at high speeds, because when the axels are locked, a driver cannot make quick maneuvers in emergency situations. Nevertheless, relator drove back on the highway with the differentials engaged because the roads were in poor condition.

When relator returned to the shop, he told a coworker that he was going to call in sick the next day. Relator did call in sick and missed work on February 22. The following day, Ed Rowland, the operations manager, and Stubbs met with relator. They confronted him about engaging the differentials on the highway and questioned whether he was actually ill because they heard from the coworker that relator had stated his intention to call in sick. Relator told Stubbs and Rowland that he was joking when he made that statement to his coworker and that he actually was ill. Relator then became frustrated with the questions and raised his hand in a “stop” motion and told Stubbs, “I’m done talking to you.”

Rowland suspended relator for insubordination, for using the differentials on the highway, and for improperly calling in sick, and then decided to discharge him for his conduct. Relator applied for unemployment benefits with respondent Minnesota Department of Employment and Economic Development (DEED), but was denied. Relator appealed. Following a hearing, the ULJ concluded that relator was discharged for employment misconduct and was therefore ineligible for unemployment benefits. Relator requested reconsideration, and the ULJ affirmed his decision. This certiorari appeal follows.

D E C I S I O N

This court reviews a ULJ’s decision to determine whether a party’s substantial rights were prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d)(4)-(5) (2010). Substantial evidence is “(1) such relevant evidence

as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env’tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). This court reviews factual findings in the light most favorable to the decision and defers to the ULJ’s credibility determinations. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Whether an employee committed employment misconduct is a mixed question of fact and law. *Id.* “Whether the employee committed a particular act is a question of fact,” which this court will not disturb if substantially supported by the evidence. *Id.* But whether that act constitutes employment misconduct is a question of law that this court reviews de novo. *Stagg v. Vintage Place*, 796 N.W.2d 312, 315 (Minn. 2011). 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) (2010).

A. Scope of conduct to be considered

Relator contends that the ULJ should not have considered any conduct that was not specifically identified by Randy’s Sanitation as a basis for his employment termination. The employment termination form that the company submitted indicates that relator was fired because of the events that occurred on February 21 and 22, 2011. The specific incidents of misconduct cited were “dishonesty, unexcused absence, incorrect operational usage of equipment, [and] compromising safety.” But the ULJ also

considered insubordination based on relator's refusal to talk with his supervisors on February 23, 2011, in response to questions they had regarding his actions on the previous two days. While insubordination was not listed as a basis for relator's firing, the ULJ did not err when considering it because relator's behavior as a whole is relevant to a determination of eligibility for unemployment benefits. *See Drellack v. Inter-Cnty. Cmty. Council, Inc.*, 366 N.W.2d 671, 674 (Minn. App. 1985) ("Her behavior may be considered as a whole in determining the propriety of her discharge and her qualification for unemployment compensation benefits."). And as the ULJ explained in the hearing, the issue was the grounds for relator's separation from employment, which included the alleged insubordination.

B. Calling in sick

Relator contends that he was truthful when he called in sick on February 22, 2011, and that one excused absence does not constitute employment misconduct under the company's policy. He testified that he felt dizzy and sick to his stomach. He also testified that his symptoms were side effects of Lisinopril, a prescription medication that he took. Relator started taking Lisinopril on February 4, but could not recall feeling any symptoms prior to February 22. To corroborate his story, relator presented two witnesses who said that he appeared to be sick when they saw him that day. Randy's Sanitation presented evidence that relator's coworker said that at the end of their shift on February 21 relator told him that he was going to call in sick the next day, despite knowing that extra trucks were going to be deployed to help with the snow. Relator admitted that he told his coworker this but claimed that he was joking. Nevertheless, Stubbs suspected

that relator was lying because he had “shown some frustration to dispatch” with all of the snow. Stubbs explained, “Typically when we have snow days like that, the day gets a little bit longer.” When relator called in the morning of February 22 before his shift started, he told Stubbs that he was not coming in that day because he did not feel well and that he “[didn’t] feel like dealing with it.”

The ULJ concluded that relator’s claim that he was sick on February 22 was not credible, reasoning:

[Relator] did not consult his physician when he was experiencing his alleged reaction. The preponderance of the evidence shows, based on [relator]’s proclamation to [his coworker] that he was planning on calling in sick, that [relator]’s alleged reaction to medication was only a false pretext for inappropriately calling in sick to avoid working a likely difficult shift on February 22, 2011 due to poor weather conditions.

Because there is substantial evidence in the record to support the ULJ’s credibility determinations, he did not err in concluding that relator was dishonest when he called into work sick. Dishonesty constitutes employment misconduct because it is a deliberate violation of the standards of behavior that the employer has the right to reasonably expect of the employee. *See Baron v. Lens Crafters, Inc.*, 514 N.W.2d 305, 308 (Minn. App. 1994) (holding that failure to perform job responsibilities, coupled with dishonesty about that failure constituted unemployment misconduct).

C. Incorrect operational use of equipment

Relator claims that there is no proof that he drove inappropriately with the differential locks engaged. The ULJ asked relator directly whether or not he drove on the

highway with the differential locks engaged. Relator said that he did not, but immediately backed away from that statement:

ULJ: [H]ow did the differentials become engage[d] back at the shop?

RELATOR: On the 21st, road conditions were snow covered and ice packed. And, as far as I know, I would, would have never made it over 45 miles an hour due to road conditions and traffic.

ULJ: Did you believe it was okay to have the differentials engaged when you were driving on the highway as long as you were going slow enough?

RELATOR: I do.

ULJ: Do you believe there was any sort of safety issue with having the differentials engaged while you were on the highway?

RELATOR: No, sir, as long as the conditions were called for. The way the conditions were, it was called for, it was okay to have them locked in, to the best of my knowledge.

Stubbs testified that it was a safety hazard for the truck's differentials to be engaged while traveling at highway speeds because it is difficult to steer. He explained that when the differentials are locked the truck cannot turn easily. The policy of Randy's Sanitation is to allow drivers to engage the differentials from stop to stop in slippery conditions because it provides more traction, but that having the differentials locked on the highway or at high speeds is "a huge safety issue" because the driver cannot make "emergency maneuvers" in the event a car slides into his lane or the driver needs to avoid an accident.

Taking this information into consideration, the ULJ concluded that relator committed employment misconduct. The ULJ reasoned, "On February 21, 2011, [relator] violated his employer's reasonable expectations when he drove with the

differentials engaged on the highway. This violation was serious because it was a serious safety hazard and safety violation that exposed the employer to legal liability risks.” Because the record contains substantial evidence that relator drove on the highway with the differentials engaged, the ULJ did not err in determining that relator created a safety hazard. Because employers have the right to reasonably expect their employees to follow safety policies, relator’s actions constituted employment misconduct. *Cf. Risk v. Eastside Beverage*, 664 N.W.2d 16, 21 (Minn. App. 2003) (holding that a violation of a company’s safe-driving policy regarding the use of alcohol constituted a substantial lack of concern for employment).

D. Representatives during hearing

Relator contends that his wife should have been permitted to ask questions during the hearing. During an evidentiary hearing, the ULJ must fully explain how the hearing will be conducted. Minn. Stat. § 268.105, subd. 1(b) (2010). The ULJ must ensure that all relevant facts are clearly and fully developed, but does not need to follow common law or statutory rules of evidence. *Id.* Rather, the ULJ has discretion to control how the hearing is conducted. *Id.*

Before the hearing, relator received a packet of information that included a pamphlet that described the procedures. It provided that if relator wanted someone to represent him, then he had to make those arrangements. The ULJ also explained the process at the beginning of the hearing. He stated, “After each person testifies, the other party will have the chance to ask questions. At the end, each party will have the opportunity to make a brief closing statement.” Throughout the hearing, relator

represented himself and cross-examined the employer's witnesses. While the ULJ did not allow relator's wife to ask the witnesses any questions, he did allow her to "add to the conversation" provided that she had relevant knowledge. Because the ULJ has discretion to determine the procedures of the hearing and because he allowed the witnesses and parties to fully develop the relevant facts, the ULJ did not err by preventing relator's wife from asking questions.

Affirmed.