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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1566**

Jacob Rhodes,  
Relator,

vs.

U.S. Postal Service (FIC 732/ DEST 1),  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed June 18, 2012  
Affirmed  
Schellhas, Judge  
Concurring in part, dissenting in part, Randall, Judge\***

Department of Employment and Economic Security  
File No. 27339106-3

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Considered and decided by Schellhas, Presiding Judge; Chutich, Judge; and  
Randall, Judge.

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

## UNPUBLISHED OPINION

SCHELLHAS, Judge

Relator challenges the unemployment-law judge's decision that he is ineligible to receive unemployment benefits because he engaged in aggravated employment misconduct. We affirm.

### FACTS

Relator Jacob Rhodes worked as a letter carrier for the United States Postal Service (USPS) from March 1, 1986, through February 25, 2011. In November 2011, after receiving a tip concerning Rhodes, the USPS Office of Inspector General (OIG) conducted an independent integrity test. OIG placed several test pieces of mail into the mail stream. The test pieces contained a "no such number" (NSN) address on Rhodes's route and contained a return address held by OIG. The proper procedure for items that contain an address that does not exist is for a mail carrier to mark the mail as NSN and return it to the sender.

OIG placed into the mail stream one test piece on December 15, 2010; two test pieces on December 16; and one test piece on December 20. The December 20 test piece consisted of a first-class piece of mail with an enclosed \$10 Target gift card and a DVD. The OIG identified the December 20 test piece as JB1118. Rhodes properly handled all of the test pieces except JB1118, which contained the Target gift card. A Target receipt dated January 24, 2011, from a store near Rhodes's home shows that on January 24, from 7:38 p.m. through 7:39 p.m., a person negotiated a \$10 gift card with identification number 041-300-434-509-613. The identification number matches the identification

number of the gift card enclosed in test piece JB1118. A still photo from a surveillance camera shows a person leaving the store on January 24 at 7:39:58 p.m.

On February 24, OIG placed two additional test pieces into the mail stream at the Eagan Post Office on Rhodes's mail route, and Rhodes properly handled both test pieces. On February 25, OIG Special Agent Jill Burgeson interviewed Rhodes, who denied taking any gift cards from the mail or redeeming any gift cards stolen from the mail. Rhodes said that he received gift cards from customers on his route during the holidays. When Burgeson showed Rhodes the Target store surveillance photo, he identified himself, and his union steward then terminated the interview.

USPS placed Rhodes in a no-pay status pending his removal for the theft of mail. In March, Burgeson prepared a report of investigation, which identifies the test pieces used in the integrity testing, the contents of each test piece, and the results. On April 18, USPS sent Rhodes a notice of removal for mail theft effective May 26.

Rhodes applied for unemployment benefits from the Minnesota Department of Employment and Economic Development (DEED), and DEED determined he was eligible to receive benefits. USPS appealed the determination, and an unemployment-law judge (ULJ) held an evidentiary hearing on June 3 and 23.

At the evidentiary hearing, Timothy Baden, acting manager of the USPS Eagan Carrier Annex, testified that the common level of discipline for a postal worker who commits theft of the mail is removal. And the ULJ received Burgeson's report as an exhibit. The report contains photocopies of the envelope for each test piece and its contents, along with a form describing the contents. But the report does not contain these

items for JB1118. A section of the report, entitled “Details,” states that JB1118 contained a DVD and a Target gift card. A photocopy of a spreadsheet in the report lists each test piece and contains descriptive comments about them. The spreadsheet describes the DVD in JB1118 as “NEW YORK MINUTE” and the gift card identification number as 300-434-509-613.<sup>1</sup> Rhodes’s attorney asked Baden about the report, but Baden was unable to answer his questions, noting that OIG independently conducts integrity tests. No individual from OIG testified.

Rhodes testified that he did not take test piece JB1118 from the mail. He acknowledged that he negotiated a Target gift card at the Target store in Crystal on January 24 and that he is the individual in the surveillance photo. He said that he received the gift card from a customer on his route during the Christmas season and did not remember the card number. Dan Garhofer, a USPS employee and current president of a local branch of the National Association of Letter Carriers, testified as a witness for Rhodes. Rhodes did not dispute that theft of mail is a felony offense.

The ULJ found that Rhodes’s testimony was not credible and that he took the gift card from the mail and redeemed it. The ULJ determined that Rhodes’s taking of the gift card from the mail was theft and a serious violation of the standards of behavior that USPS has a right to reasonably expect of him. The ULJ decided that Rhodes was discharged for committing theft of the U.S. mail and therefore he committed both employment misconduct and aggravated employment misconduct. Consequently, the ULJ

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<sup>1</sup> The first three digits of the gift-card registration number on the Target receipt are not visible on the photocopy of the spreadsheet contained in the record.

decided that Rhodes was ineligible to receive unemployment benefits and was subject to cancellation of the wage credits that he would have earned from his employment. Rhodes filed a request for reconsideration, and the ULJ denied the request and affirmed the decision.

Rhodes appeals by writ of certiorari.

## D E C I S I O N

We review the decision of the ULJ concerning eligibility to receive unemployment benefits to determine whether

the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision 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(d) (2010). Based on our review, we may affirm, reverse, or modify the ULJ's decision, or remand the case for further proceedings. *Id.*

### ***Burden of Proof***

Throughout his brief, Rhodes contends that the employer had the burden of proof at the evidentiary hearing. As authority for his contention, Rhodes cites to caselaw decided when the law explicitly placed the burden of proof on the employer.<sup>2</sup> *See, e.g.,*

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<sup>2</sup> In 1999, the legislature added language stating that eligibility determinations were to be made “without regard to any common law burden of proof.” 1999 Minn. Laws, ch. 107,

*McGowan v. Exec. Express Transp. Enters.*, 420 N.W.2d 592, 595 (Minn. 1988) (stating that employer has burden of proving employee engaged in misconduct). Currently, the law neither expressly puts the burden of proof on employers nor contains any language concerning the burden of proof. *See* Minn. Stat. § 268.069, subd. 2 (2010) (“There is no presumption of entitlement or nonentitlement to unemployment benefits.”). Moreover, in this case, the burden of proof, if any, at the proceeding before the ULJ is not controlling on the issues raised on appeal.

### ***Employment Misconduct***

An applicant discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). “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). “Whether an employee committed employment misconduct is a mixed question of fact and law.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

#### ***1. ULJ’s finding that Rhodes took the gift card and redeemed it***

Rhodes challenges the ULJ’s finding that he took the \$10 Target gift card from test piece JB1118 and redeemed it on January 24. “Whether the employee committed a

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§ 40, at 408, § 45, at 429, § 47, at 431. In 2007, the legislature removed references to “common law.” 2007 Minn. Laws ch. 128, art. 1, § 18, at 943. In 2009, the legislature removed the references to making decisions “without regard to any burden of proof.” 2009 Minn. Laws ch. 78, art. 3, § 5, at 590, art. 4, § 32, at 614, § 34, at 615.

particular act is a question of fact.” *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). “Factual findings are reviewed in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ, and will not be disturbed when the evidence substantially sustains them.” *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 822 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 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).

The ULJ found that

[o]n December 20, 2010, OIG placed a test piece (JB1118) in the USPS mail stream, which contained a DVD and a \$10 Target gift card (#041-300-434-509-613) addressed to NSN on [Rhodes’s route]. Sometime between December 20, 2010 and January 24, 2011, Rhodes took the mail JB1118 with the \$10 gift card in question. On January 24, 2011, Rhodes redeemed the \$10 Target gift card (#041-300-434-509-613) at approximately 7:39 p.m. and is shown on surveillance video (still shot) exiting the Crystal Target store shortly thereafter.

The ULJ concluded that “the preponderance of the evidence shows that the Target gift card (041-300-434-509-613) was seeded mail on [Rhodes’s route] and Rhodes stole it from the mail and redeemed it.”

The ULJ determined that Rhodes’s testimony was not credible and explained this credibility determination as follows:

The evidence does not support that Rhodes got [the gift card] from a customer. It is more likely that the card was seeded and had a code or trigger so that Target knew to contact OIG. Target contacted OIG the [day after the gift card was redeemed] and had a matching surveillance still shot of Rhodes exiting the store immediately after completing the transaction to redeem the card. It is unlikely that Target would provide the receipt in question with a matching screen shot for some other reason. It is unlikely that Burgeson would somehow get this receipt and matching still shot and subsequently claim that it was in seeded mail.

We conclude that the ULJ's finding that Rhodes took the gift card from test piece JB1118 and redeemed it on January 24 is supported by substantial evidence in the record. The record shows that on December 20, 2010, OIG seeded test piece JB1118 into the mail, which was a first-class piece of mail containing a \$10 Target gift card and a DVD. The envelope contained a nonexistent address on Rhodes's route and a return address but was never returned to the sender. OIG's documentation identifies the number of the Target gift card in JB1118, and the visible digits on the photocopy are 300-434-509-613. A Target transaction receipt shows that on January 24, 2011, an individual redeemed a \$10 gift card with the number 041-300-434-509-613 at the Target in Crystal. The transaction took place from 7:38 to 7:39 p.m. and a surveillance photo from the store shows an individual leaving the store at 7:39:58 p.m. Rhodes testified that on January 24 he redeemed a Target gift card at the Target in Crystal and that he was the person in the surveillance photo.

Rhodes challenges the ULJ's finding because it contradicts his testimony that he knew mail theft was against the law and would never have violated the law or his employer's policy or jeopardized his anticipated retirement benefits. He asserts that the

ULJ's failure to credit his testimony over Burgeson's report was clearly erroneous. We disagree. The ULJ determined Rhodes's testimony was not credible, and "[c]redibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus*, 721 N.W.2d at 345. The ULJ carefully considered Rhodes's testimony and weighed it against the report, but concluded that in light of the evidence presented, Rhodes's version of events was less likely than the explanation provided in the report. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532–33 (Minn. App. 2007) (identifying factors ULJ may consider when determining witness credibility, including reasonableness of testimony as compared with other evidence). We defer to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344.

Rhodes also contends that the ULJ erred by failing to make a credibility determination concerning Garhofer's testimony or crediting Garhofer's testimony over the report. But because the ULJ did not rely on Garhofer's testimony, a credibility determination was not required. *See* Minn. Stat. § 268.105, subd. 1(c) (2010) (requiring that ULJ identify reasons for discrediting testimony when credibility of witness has "a significant effect on the outcome of a decision").

***2. ULJ's conclusion that Rhodes's taking of the gift card constitutes employment misconduct***

Rhodes challenges the ULJ's conclusion that his taking of the gift card from the mail constitutes employment misconduct. Whether the act constitutes employment misconduct is a question of law, which we review de novo. *Lawrence*, 785 N.W.2d at 822.

The ULJ concluded that Rhodes's taking of the gift card from the mail was "a serious violation of the standards of behavior that USPS had a right to reasonably expect of him." We agree. USPS policy requires that mail carriers adhere to ethical conduct, including not engaging in criminal, dishonest, or immoral conduct prejudicial to the USPS. Rhodes acknowledged on the record that he understood that mail theft would result in termination of his employment. Dishonesty or theft, even of a small amount, may be considered employment misconduct. *See Skarhus*, 721 N.W.2d at 342, 344 (affirming ineligibility for unemployment benefits for failing to pay less than four dollars for food). Rhodes's taking of the gift card from the mail compromised the integrity of USPS and displayed a serious violation of the standards that USPS had a right to reasonably expect of Rhodes as a letter carrier. We conclude therefore that Rhodes's taking of the gift card from the mail constitutes employment misconduct.

Rhodes argues that his conduct was inadvertent or a good-faith error. *See* Minn. Stat. § 268.095, subd. 6(b)(2), (6) (2010) (stating this exception to employment misconduct). Rhodes points only to his testimony that he would not have jeopardized his employment or anticipated retirement benefits to take and redeem a \$10 gift card. This argument is without merit because the ULJ determined that Rhodes's testimony was not credible, and we defer to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344.

Rhodes also asserts that his conduct was not employment misconduct because it was a single incident that did not have a significant adverse impact on his employer. But, in 2009, the legislature removed the single-incident exception from the statutory

framework. 2009 Minn. Laws ch. 15, § 9, at 48; *Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 876 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011). Moreover, this court has consistently concluded that an act that undermines the employer’s ability to entrust an employee with key employment functions constitutes a “significant adverse impact” on the employment. *See, e.g., Peterson*, 753 N.W.2d at 776 (concluding pilot consuming alcohol while on flight-reserve status had significant adverse impact on employment).

Next, Rhodes contends that there was no causal relation between the mail theft and his discharge because there was a significant lapse of time between the two events. *See Redalen v. Farm Bureau Life Ins. Co.*, 504 N.W.2d 237, 239 (Minn. App. 1993) (stating that lapse of time between alleged misconduct and discharge, absent circumstances explaining delay, may tend to negate causal relation between misconduct and discharge). But here, a valid explanation for the delay exists. OIG seeded JB1118 into the mail on December 20. The USPS learned of Rhodes’s theft of the gift card on January 25, put him on no-pay status on February 24, and discharged him effective May 26. This lapse of time is not so extended as to call into question the discharge, and it was to Rhodes’s advantage. *See id.* at 238–39 (rejecting employee’s argument that lapse of time of three years between alleged misconduct and dismissal and noting that relator benefited from employer’s delay).

### ***Aggravated Employment Misconduct***

An employee discharged for aggravated employment misconduct is ineligible to receive unemployment benefits and subject to cancellation of the wage credits earned

from that employment. Minn. Stat. § 268.095, subds. 4(2), 10(c) (2010). “Aggravated employment misconduct” is defined as “the commission of any act, on the job or off the job, that would amount to a gross misdemeanor or felony if the act substantially interfered with the employment or had a significant adverse effect on the employment.” Minn. Stat. § 268.095, subd. 6a(a)(1) (2010). Whether a particular act constitutes disqualifying misconduct is a question of law, which we review de novo. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

At the hearing, neither party disputed that theft from the mail is a felony offense. The ULJ concluded that “[t]he preponderance of the evidence being that Rhodes committed theft of the U.S. mail, it follows that the preponderance of the evidence supports aggravated misconduct occurred. The [ULJ] determines that Rhodes was discharged for aggravated employment misconduct.” Rhodes challenges the ULJ’s conclusion, arguing that the facts in the record are not sufficient to satisfy the elements in Minnesota’s mail-theft statute, Minn. Stat. § 609.529 (2010).

Because we have already concluded that the record evidence substantially supports the ULJ’s finding that Rhodes took the gift card from the mail and it is undisputed that mail theft is a felony offense, we conclude that Rhodes’s theft of the mail is an “act . . . that would amount to a . . . felony” under either federal or state law. Minn. Stat. § 268.095, subd. 6a(a)(1); *see* 18 U.S.C. § 1709 (2006) (prohibiting USPS employees from embezzling mail entrusted to them); Minn. Stat. § 609.529 (prohibiting theft of mail). Accordingly, the ULJ did not err by concluding that Rhodes’s conduct constituted aggravated employment misconduct.

Rhodes argues that the record does not support the conclusion that he engaged in aggravated employment misconduct because there is no evidence that he had a motive for taking the gift card. To support his assertion, Rhodes cites *Posch v. St. Otto's Home*, 561 N.W.2d 564, 566 (Minn. App. 1997). But we do not read *Posch* to require evidence of an employee's motive for theft when, as is the case here, substantial evidence in the record supports the ULJ's finding of theft. *See* 561 N.W.2d at 566 (holding that record lacked adequate evidence to support finding that employee stole drugs from patient and noting that lack of evidence included lack of motive).

Rhodes contends that the ULJ's decision is a violation of constitutional provisions because Minn. Stat. § 268.095, subd. 6a(1)'s language "would amount to" is subjective and therefore vague and arbitrary, leaving the public uncertain as to the conduct it prohibits. We disagree. Section 268.095, subdivision 6a(1), states that aggravated employment misconduct includes an act "that would amount to" a felony. "Amount" is defined as the "full effect or meaning," to "add up in import or effect," and to "be equivalent or tantamount." *The American Heritage College Dictionary* 47 (4th ed. 2007). The plain language of the statute makes clear that an employee's act that would have the meaning of a felony, add up to a felony, or be equivalent to a felony, is an act sufficient to support a conclusion that an employee engaged in aggravated employment misconduct.

Rhodes also asserts that the ULJ's decision is in excess of the statutory authority or jurisdiction of the department because the ULJ overstepped her jurisdiction in considering whether Rhodes's conduct would amount to a felony. To support his assertion, Rhodes cites Minn. Stat. § 627.01 (2010), which requires that criminal cases be

tried in the county where the offense was committed. Here, Rhodes was not criminally charged, the ULJ did not convict Rhodes of a criminal offense, and neither the ULJ's decision nor findings of fact have collateral estoppel effect. *See* Minn. Stat. § 268.105, subd. 5a (2010) (stating findings of fact and decision may not be used as evidence in subsequent action). The ULJ made findings of fact concerning a relevant statutory basis for determining Rhodes's eligibility for unemployment compensation benefits, which is within the ULJ's authority as provided by the legislature. *See* Minn. Stat. §§ 268.095, subs. 4 (stating an employee discharged for aggravated employment misconduct is ineligible for benefits), 6a (defining aggravated employment misconduct); 268.105, subd. 1 (stating that after evidentiary hearing, ULJ must make findings of fact and issue decision on eligibility) (2010). Thus, the decision is not in excess of the statutory authority or jurisdiction of the department.

Finally, because we conclude that substantial evidence supports the ULJ's findings and that, as a matter of law, Rhodes's theft of the gift card constitutes aggravated misconduct, we conclude that Rhodes's other assignments of error are not bases for reversal.

**Affirmed.**

**RANDALL**, Judge (concurring in part, dissenting in part)

I concur in the result that Rhodes committed clear unemployment misconduct and is ineligible to receive unemployment benefits. The majority sets out in orderly fashion more than enough findings of fact (and no errors of law) to support the ULJ's decision. I dissent only on the issue of "punishment." Rhodes took a \$10 Target gift card out of the mail, a "test piece mail," basically a sting operation. What it comes down to is that Rhodes took a \$10 Target gift card, which may or may not have been used by the intended recipient, that the record cannot show, and we will never know.

What makes his act serious enough to lose his job and his unemployment eligibility is not the amount, but the fact that he is a United States postal employee. The integrity of "the mail going through" cannot be overstated. So Rhodes loses his job and his unemployment benefits. Now what about punishment? With this act on his record, Rhodes did himself far, far more economic harm than he could have imagined at the time. His chances of getting a job as good as this one or anything like it, with any federal, state, county, or city government is severely weakened. Private employers looking at a record with an incident of "mail theft," might well pass over his application for blue collar or common labor work. Thus, I would not have gone on to conclude that Rhodes was discharged because of "aggravated employee misconduct," a step more serious than the "employee misconduct" needed to deny one unemployment benefits. It just seems to me to be piling on. I would have let it go as the standard employee misconduct—loss of his job and loss of unemployment benefits for this job. Rhodes now suffers cancellation of all wage credits earned from postal employment. *See* Minn. Stat.

§ 268.095, subds. 4(2), 10(c) (2010) (stating that employee discharged for aggravated employment misconduct is ineligible to receive unemployment benefits and cancellation of wage credits earned from that employment).