STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0564

Ricky A. Olssen,
Relator,

vs.

Supermom's LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 7, 2009
Reversed
Randall, Judge[*]

Department of Employment and Economic Development
File No. 162044-4

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Supermom's LLC, 539 South Main Street, Findlay, OH 45840-3229 (respondent)

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Considered and decided by Toussaint, Chief Judge; Peterson, 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.

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

RANDALL, Judge

Relator employee Ricky A. Olssen challenges the decision by the unemployment law judge (ULJ) that he was ineligible to receive unemployment benefits because he had been discharged for employment misconduct. Relator argues, in relevant part, that he did not engage in misconduct but instead performed poorly because of inability or incapacity and was therefore eligible to receive unemployment benefits. Where tougher standards by the employer, combined with the increased duties of the employee, rendered the employee incapable of meeting the employer's heightened performance expectations, relator was discharged for reasons other than employment misconduct. We reverse.

FACTS

Respondent Supermom's LLC (employer), a large-scale bakery, employed relator as a mixer beginning in October 1990. From the start of his employment through September 2006, relator received only one disciplinary warning, in 1997.

In 2006, several changes occurred in relator's workplace that coincided with the period in which he received six warnings, beginning in October 2006, and culminating in his August 21, 2007 dismissal. In fall 2006, the employer required employees to add to their duties the task of recording lot codes on batch sheets while mixing products, which would allow the products to be traced in the event of a recall or a food safety issue. In early 2007, relator, who had previously mixed only cake doughnuts, took on the additional job of mixing yeast-raised doughnuts. Also in 2007, the employer hired new

management who held employees more accountable and disciplined them for making mistakes and errors, and in May 2007, relator was given a new supervisor.

After relator's discharge, he applied for unemployment benefits. He was initially deemed eligible to receive unemployment benefits, but the employer appealed this decision, and a hearing was held before the ULJ. The ULJ ruled that relator's conduct was indifferent to the standards of performance the employer had a right to expect of its employees, and that he had a substantial lack of concern for his employment, amounting to misconduct and rendering him ineligible to receive benefits. Relator requested reconsideration, and the ULJ affirmed. This certiorari appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, this court may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are affected by error of law or not supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4), (5) (Supp. 2007).

Whether an employee engaged in misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). "Whether the employee committed a particular act is a question of fact." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Findings that are supported by substantial evidence will be upheld. Minn. Stat. § 268.105, subd. 7(d)(5). But whether particular acts by an employee constitute misconduct is a question of law reviewed de novo. *Schmidgall*, 644 N.W.2d at 804.

Employees who are discharged for misconduct are ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). Thus, we must address "not whether an employer was justified in discharging an employee, but rather, whether the employee committed 'misconduct.'" *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721, 724 (Minn. App. 1991). The statute defines employment misconduct as "any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a) (Supp. 2007). Generally, an employee's refusal "to abide by an employer's reasonable policies and requests" constitutes misconduct. *Schmidgall*, 644 N.W.2d at 804.

Reasons for discharge that are not misconduct under the statute include:

> Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer . . . .

Minn. Stat. § 268.095, subd. 6(a). Those who attempt to be good employees but who are just unable to perform to an employer's satisfaction do not commit misconduct. *Bray v. Dogs & Cats Ltd. (1997)*, 679 N.W.2d 182, 185 (Minn. App. 2004).

The ULJ found that the employer instituted changes resulting in the employees being held much more accountable than they had been in the past, that relator took on

additional job duties, and that the warnings occurred after these changes and primarily concerned his failure to follow new procedures used in making baked goods. The ULJ nonetheless found that relator committed "employment misconduct" because, despite warnings, relator continued to perform his job as he had been doing it, and did not improve his performance in accordance with the warnings he received, even though he did not do things wrong deliberately. The ULJ ruled that relator was "indifferent" to the standards of behavior the employer had a right to expect of its employees and exhibited a substantial lack of concern for his employment. We cannot agree with this conclusion.

The undisputed facts show that before October 2006, the employer had little complaint with relator's work. It was only after the employer simultaneously toughened its standards and relator assumed additional job duties that the employer's unhappiness with relator's performance began. Further, a review of the disciplinary actions shows that they related to different specific baking-procedure errors and, once corrected, relator did not repeat them. Thus, relator's work – once satisfactory as demonstrated by the receipt of only one warning in the first sixteen years that he worked for the employer – became unsatisfactory when, under new standards and with increased duties, relator was no longer capable of performing to the employer's heightened performance expectations.

Respondent Department of Employment and Economic Development (DEED), however, hammers away with the argument that relator directly disobeyed orders to report problems to his supervisor. Although the ULJ referred to a warning on August 14, 2007, when relator was disciplined for mixing dough improperly and failing to tell his

supervisor about it, the ULJ's findings primarily relied on relator's failure to comply with certain baking procedures. Thus, there is no support for DEED's argument.

In conclusion, with the employer's toughened job standards and relator's increased duties, relator did not perform the job to the employer's new and stricter standards. This is not misconduct under Minn. Stat. § 268.095, subd. 6(1). Relator is eligible to receive his unemployment benefits. We therefore do not address relator's other arguments.

Reversed.