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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-325**

Tommy Fisher,
Relator,

vs.

Genuine Parts Company-NAPA,
Respondent,

Department of Employment
and Economic Development,
Respondent.

**Filed January 12, 2010
Affirmed as modified
Crippen, Judge***

Department of Employment and Economic Development
File No. 21348168-3

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

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Crippen, Judge.

UNPUBLISHED OPINION

CRIPPEN, Judge

Relator Tommy Fisher challenges the unemployment law judge's (ULJ) decision that he was ineligible to receive unemployment benefits due to his discharge for misconduct. Relator's employment was terminated after he lost necessary commercial driving privileges due to his refusal to submit to implied-consent testing. Because substantial evidence supports the finding that relator did not have commercial driving privileges on the date he was discharged, we affirm as modified.

FACTS

Relator was employed full time by respondent Genuine Parts Company – NAPA from May 2000 through October 15, 2008, most recently as a freight delivery driver, a position that requires a valid Class B Commercial Driver's License (CDL). In September 2008, relator's driving license was suspended. The employer allowed relator to exhaust his vacation time and then placed him on paid suspension pending his October 14, 2008 court appearance. The employer advised relator that if his license was not reinstated at that time, his employment would be terminated.

Relator later brought a form to the employer indicating that his Minnesota driver's license was valid. But when the employer checked motor vehicle records, the record for relator listed his "lic status" as "valid" and his "CDL status" as "pending." Respondent understood this report to show that appellant's general license but not his Class B license

had been reinstated. Testimony at a hearing before the ULJ and notations on two reports from a security service indicate that the employer investigated relator's driver's license status and determined that relator's commercial privileges remained suspended.

When relator appealed the administrative denial of his claim for unemployment benefits, the ULJ determined that relator committed employment misconduct and, therefore, was ineligible for benefits. On relator's request for reconsideration, the ULJ affirmed her initial decision.

D E C I S I O N

Whether an employee committed 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 fact question, which we review in the light most favorable to the decision and will affirm if supported by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether an employee's act constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

An employee who was discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). "Employment misconduct" includes a driving offense in violation of sections 169A.20, 169A.31, or 169A.50 to 169A.53 that "interferes with or adversely affects" employment. Minn. Stat. § 268.095, subd. 6(d) (2008). Whether employment misconduct has been committed is determined based on the available evidence without regard to any burden of proof.

Vargas v. Northwest Area Found., 673 N.W.2d 200, 205 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004).

Relator's only argument on appeal is that he had commercial driving privileges on October 15, the date he was discharged, and, therefore, he is eligible for benefits. Although relator had evidence that his driver's license was valid, the employer's investigation regarding the status of relator's commercial privileges, which were simply noted as "pending" in the motor vehicle record, resulted in a determination that those privileges remained suspended, and the documentation provided by relator does not refute that determination.

Relator disputes the employer's testimony that he failed to deliver his reinstatement order to the employer. This issue became irrelevant in that the employer acknowledged knowing about the reinstatement and independently obtained information to determine the status of relator's commercial privileges.

Relator argues that the year-long suspension of his commercial driving privileges imposed in February 2009 supports his position that his commercial privileges were valid on October 15, 2008. But the notice (which may not be a proper part of the record) does not show that it did not merely continue an existing suspension.

The ULJ's order treats relator's offense as a gross misdemeanor and, thus, labels the misconduct as "aggravated" according to Minn. Stat. § 268.095, subd. 6a(b) (2008). The commissioner concedes that the offense was a simple misdemeanor and that the decision should be modified to provide for ordinary misconduct. We agree.

Because substantial evidence supports the finding that relator did not have commercial driving privileges on the date he was discharged, we affirm as modified.

Affirmed as modified.