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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-422**

Nicholas Gustafson,
Relator,

vs.

Ameriprise Financial Services Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 5, 2010
Affirmed
Halbrooks, Judge**

Department of Employment and Economic Development
File No. 389915-3

Nicholas Gustafson (pro se relator)

Ameriprise Financial Services, Inc., c/o Valerie J. Mathison, 8951 Highway 5, P.O. Box 308, Lake Elmo, MN 55042 (respondent)

Lee B. Nelson, Amy R. Lawler, Minnesota Department of Employment and Economic Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101 (for respondent Department of Employment and Economic Development)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Relator Nicholas Gustafson challenges the determination of the unemployment-law judge (ULJ) that he is not eligible to receive unemployment benefits because he was discharged for employment misconduct. Alternatively, Gustafson argues that the ULJ erred by allowing testimony that referred to documents not in the record. Because we conclude that Gustafson's actions leading to his termination constituted employment misconduct and because the ULJ conducted a fair hearing, we affirm.

FACTS

Gustafson was hired on March 19, 2007, to assist Valerie Mathison as a paraplanner. Mathison was an independent contractor for respondent Ameriprise Financial Services, Inc. Mathison terminated Gustafson on May 14, 2007, because Gustafson failed to complete his duties, failed to lock the office door, and used an office computer to conduct personal business.

Gustafson applied for unemployment benefits following his termination and was initially deemed eligible. Ameriprise contested this determination claiming, in part, that Gustafson was discharged for employment misconduct. Respondent Minnesota Department of Employment and Economic Development (DEED) also challenged the determination, and a telephone hearing was conducted on October 14, 2008. Gustafson, through his attorney, argued that he was terminated due to inadvertence or inability and that his actions did not constitute employment misconduct. Both Mathison and Gustafson testified at the hearing about the actions preceding Gustafson's termination.

According to Mathison, Gustafson failed to submit buy/sell orders on time on 19 occasions—14 of which occurred during the first two weeks of Gustafson’s employment. Mathison, based on her understanding of federal regulations, required the trades to be completed by 3:00 p.m. on the day that the client submitted the order. After two weeks, and 14 missed orders, Mathison began following up with Gustafson daily, but Gustafson failed to submit an additional five orders on time. Gustafson conceded that he failed to complete buy/sell orders on time on certain occasions. Gustafson was also responsible for submitting clients’ checks to the Ameriprise corporate office within 24 hours of receipt. Mathison recalled two occasions when Gustafson failed to submit client checks in a timely manner, but Gustafson could only recall one of those instances.

Mathison also testified that during Gustafson’s employment, she asked Gustafson to refrain from using his office computer to pay personal bills but that he continued to pay his bills from his office computer after this conversation. Over the objection of Gustafson’s attorney, Mathison referred to printed confirmations to testify to the exact dates on which Gustafson paid personal bills using the office computer. Gustafson admitted that he paid at least one personal bill after this conversation with Mathison. Mathison also testified that Gustafson was terminated, in part, for failing to lock the office on two occasions. Gustafson could only recall one such incident.

The ULJ determined that some of the behavior for which Gustafson was discharged (such as forgetting to lock the office) was due to inadvertence, but that failing to perform his duties and paying personal bills on the office computer after being told not to constituted employment misconduct. As a result, the ULJ determined that Gustafson

was ineligible to receive unemployment benefits; the ULJ ordered Gustafson to repay the \$3,159 in benefits that he had already received. Gustafson sought reconsideration, arguing that his performance was due to inability and a lack of direction from Mathison, but the ULJ affirmed her decision. This pro se certiorari appeal follows.

DECISION

On review, this court may affirm a ULJ's decision, remand it for further proceedings, or reverse or modify it

if the substantial rights of the petitioners 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, subd. 7(d) (2008).

An employee who is discharged for misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). "Employment misconduct" is defined 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.

Inefficiency, inadvertence, simple unsatisfactory conduct, . . . 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, . . . are not employment misconduct.

Id., subd. 6(a) (2006).

“Whether an employee committed employment misconduct is a mixed question of fact and law. 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) (citation omitted). This court views the ULJ’s factual findings in the light most favorable to the decision and will not disturb factual findings that are supported by substantial evidence. *Id.* This court defers to the ULJ’s conclusions regarding conflicts in testimony and the inferences to be drawn from testimony. *Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). Whether an employee’s act constitutes disqualifying misconduct is a question of law, which is reviewed de novo. *Skarhus*, 721 N.W.2d at 344.

DEED argues that “Mathison had the right to reasonably expect that Gustafson would enter the trades and do his job. His failure to do so displayed clearly a serious violation of Mathison’s reasonable expectations, and constituted misconduct.” Violating a reasonable policy or rule of the employer constitutes employment misconduct. *See, e.g., id.; Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986). Gustafson does not contend that Mathison’s expectations were unreasonable, but argues instead that the mistakes he made were good-faith errors in judgment or were due to his inexperience.

It is true that an employee cannot be denied unemployment benefits when discharged due to “good faith errors in judgment if judgment was required.” Minn. Stat.

§ 268.095, subd. 6(a). But none of the actions for which Gustafson was discharged required an exercise of judgment. Gustafson was not required to submit client checks or applications in a “timely” manner or in any other manner that required the exercise of judgment. Mathison required Gustafson to submit these documents within a specified period of time. He failed to do so. His argument that his behavior was a “good faith error in judgment” therefore has no merit.

Gustafson also argues that his mistakes were not intentional, but rather due to inexperience and a lack of guidance. Mistakes do not need to be intentional to constitute misconduct. Employment misconduct specifically includes negligent and indifferent behavior. *Id.* An employee’s behavior as a whole may be considered when determining the propriety of a discharge, and even if “unrelated to earlier misconduct, further misconduct . . . could serve as the ‘last straw,’” conclusively demonstrating the employee’s disregard for the employer’s interests. *Drellack v. Inter-County Cmty. Council, Inc.*, 366 N.W.2d 671, 674 (Minn. App. 1985). But employees who are simply 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).

Gustafson relies primarily on his assertion that Mathison did not adequately train him, and he was therefore unable to do his job. This was considered by the ULJ upon Gustafson’s request for reconsideration, and the ULJ found nothing in the record to “show that [Gustafson] was unable to perform his duties.” This finding is supported by substantial evidence in the record. Gustafson admitted that he understood that orders had to be completed by 3:00 p.m. on the day that they were received. He admitted that he

“made a mistake and that would indicate a lack of focus.” Mathison testified to 19 instances that Gustafson failed to submit orders as requested. The ULJ found that Gustafson had several opportunities to meet Mathison’s reasonable expectations, and we agree with the ULJ’s determination that Gustafson’s failure to meet those expectations demonstrates negligence or indifference, not inability. Accordingly, we conclude that Gustafson’s actions fall within the definition of employment misconduct as negligent or indifferent conduct “that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee.” *See* Minn. Stat. § 268.095, subd. 6(a).

Gustafson also argues that the ULJ erred by allowing Mathison to refer to documents not in the record while testifying to the dates on which Gustafson paid personal bills on the office computer. The ULJ only allowed Mathison to testify to her personal knowledge and asked her to refrain from reading the documents out loud, but Gustafson argues that it “defies credulity” that Mathison could have remembered the specific dates on which he paid his bills 17 months after the fact. Specifically, Gustafson argues that “by allowing Ms. Mathison to reference [the documents] informally without submitting them to the court, [the ULJ] placed [Gustafson] at a distinct disadvantage.”

“The evidentiary hearing is conducted by an unemployment law judge without regard to any burden of proof as an evidence gathering inquiry and not an adversarial proceeding.” Minn. Stat. § 268.105, subd. 1(b) (2008). “The unemployment law judge must ensure that all relevant facts are clearly and fully developed.” *Id.* The ULJ allowed both Mathison and Gustafson to testify to their personal knowledge of the events.

Because Gustafson had the opportunity to respond to or discredit Mathison's testimony, we disagree that the ULJ's decision to allow Mathison to testify to her personal knowledge rendered the hearing unfair. We conclude that the ULJ conducted the hearing using lawful procedure.

Additionally, to establish that a reversal is warranted based on unlawful procedure, Gustafson must show that his substantial rights were prejudiced by the ULJ's decision to allow Mathison's testimony. *See id.*, subd. 7(d). The ULJ did not base her decision on the number of times or the dates on which Gustafson paid personal bills at work, but rather on the simple fact that he had done so. Gustafson admitted the conduct in question; he just could not remember the specific dates. DEED asserts that the ULJ's determination that Gustafson's conduct constituted employment misconduct would stand without the fact that Gustafson paid personal bills on his office computer and that it is therefore irrelevant whether the ULJ improperly considered Mathison's testimony. We agree. Even if Mathison's testimony was improper, Gustafson was not prejudiced by it.

Affirmed.