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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-681**

Alan Kibler,  
Relator,

vs.

Wesco Distribution Inc.,  
Respondent,  
Department of Employment and Economic Development,  
Respondent.

**Filed January 12, 2010  
Affirmed  
Stoneburner, Judge**

Department of Employment and Economic Development  
File No. 21403306-3

Alan K. Kibler, Jr., Fridley, Minnesota (pro se relator)

Wesco Distribution Inc. c/o Unemployment Services Corporation, Wakefield,  
Massachusetts (respondent employer)

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

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and  
Huspeni, 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## **UNPUBLISHED OPINION**

**STONEBURNER**, Judge

Relator challenges the determination of an unemployment law judge that he was terminated for employment misconduct, making him ineligible for unemployment benefits. We affirm.

### **FACTS**

Relator Alan Kibler worked for respondent Wesco Distribution, Inc. (Wesco) from November 13, 1995, to October 24, 2008, most recently as an hourly-wage, inside-sales, electrical distributor. At all times relevant, Wesco employees were allotted two 15-minute paid breaks and a one-hour unpaid lunch break. Employees were required to “punch out” for the lunch break, but could take that break any time they could fit it into their schedules. It was not uncommon for employees to take more time for the paid breaks and make up that time by working through the lunch break, but, according to Jon Arbogast, branch-operations manager, employees told him if they engaged in this practice.

Kibler had never received any written or oral warnings during his almost 14-year employment with Wesco. On October 24, 2008, Kibler punched in at 7:49 a.m. At 8:30 a.m., Kibler’s manager, Scott Dagenais, who had supervised Kibler for only a month, noticed that Kibler was not at his desk. Dagenais, using a golf cart, searched the entire office building and warehouse for Kibler without finding him.

Sometime between 10:00 a.m. and 10:30 a.m., Dagenais saw Kibler, in his car, pulling into the company parking lot. Dagenais confronted Kibler, asking where he had

been. Kibler denied leaving the premises. Dagenais, who apparently considered the “premises” to be the buildings, determined that Kibler was lying and brought Kibler into his office to terminate his employment. There is some dispute about the conversation that occurred in Dagenais’s office. According to Dagenais and Arbogast, Kibler at first denied leaving the building, but, when faced with termination of his job, Kibler admitted that he was away for 30 minutes taking care of banking and personal business and later admitted he had been gone for an hour-and-a-half. Dagenais maintained that Kibler had been gone for more than two hours. According to Dagenais and Arbogast, Kibler said that he was taking care of banking and other personal issues but did not give details or any other information during this conversation. Kibler’s employment was terminated for “dishonesty and lack of procedure.” Kibler applied for unemployment benefits and appealed when benefits were denied.

At a hearing before an unemployment law judge (ULJ), Kibler, who considered “premises” to include the parking lots, testified that he was doing personal business in his car and, for additional privacy, moved his car to the other side of the building where he was not visible to employees taking cigarette breaks, and apparently was not visible to Dagenais either. Kibler denied leaving company property. Kibler testified that he never changed his story about how long he was away from his desk and that he was not given the opportunity to explain that he intended to make up the time by working through his lunch break. Arbogast confirmed that the parking lot would be considered part of the premises.

The ULJ found the testimony of Dagenais and Arbogast that Kibler had lied about the time he was away from his desk credible and found Kibler's contrary testimony not credible. The ULJ found it significant to the credibility determination that Kibler did not tell Dagenais that he intended to make up the time at lunch and that Kibler had not determined whether Dagenais, who had only supervised Kibler for approximately one month, would continue to approve the break practices that had developed under other supervisors. Concluding that Kibler had violated the duties of honesty and trustworthiness that he owed to Wesco, the ULJ held that Kibler was discharged for employment misconduct and is ineligible for unemployment benefits. On Kibler's request for reconsideration, the ULJ affirmed the decision. This certiorari appeal followed.

## **D E C I S I O N**

This court may affirm an unemployment-benefits decision or remand for further proceedings, or it may reverse or modify the decision if an employee's substantial rights may have been prejudiced because the decision of the ULJ violated the constitution, exceeded the department's jurisdiction or authority, was based on unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2008).

“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).

Determining whether the employee engaged in a particular act is a fact question.

*Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. App. 2007).

This court views factual findings in the light most favorable to the ULJ's decision and defers to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344. Whether the facts as found constitute misconduct is a question of law, reviewed de novo. *Id.* The issue is not whether an employer is justified in discharging an employee, but rather whether the employee committed "misconduct," that would disqualify the employee from receiving benefits. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721, 724 (Minn. App. 1991).

In this case, the ULJ made a factual finding that Kibler's employment was terminated "because of his insubordination in lying to his supervisor, for leaving the building for an extended time period for non-work related reason without punching in and out on the computer and for falsification of [time] records." The finding is based on the ULJ's finding that the testimony of Dagenais and Arbogast was credible, and Kibler's testimony was not credible. "Credibility determinations are the exclusive province of the ULJ." *Skarhus*, 721 N.W.2d at 345. "When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the [ULJ] must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2008). In this case, the ULJ based the finding that Kibler was not credible on Kibler's failure to mention, during the interview that ended with termination of his employment, the practice of making up extended paid breaks or to tell Dagenais that he intended to make up for his extended morning break by working during his lunch break. The ULJ noted Kibler's failure to provide any testimony or evidence that lack of prior authorization or notice to management was part of an accepted

practice, or that Kibler had checked with his relatively new supervisor to see if he would continue to honor the practice.

We conclude that the ULJ has made the necessary credibility findings and that the evidence in the record supports those findings. Therefore, under our standard of review, we must defer to the ULJ's finding that Kibler lied to his supervisor about his absence from work.

Employment misconduct is defined as:

[A]ny 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) (2008). Employment misconduct does not include “[i]nefficiency, 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, [or] poor performance because of inability or incapacity.” *Id.*

Kibler appears to argue that his action falls under the exception as conduct an average reasonable employee would have engaged in under the circumstances, but Kibler's focus is on his action of taking the long morning break without punching out, while the ULJ's focus is on Kibler's dishonesty when confronted with his break conduct. Dagenais told the ULJ that Kibler's employment would not have been terminated if he had only forgotten to punch out and had been honest about it.

“[A] single incident that does not have an adverse impact on the employer” is not misconduct. Minn. Stat. § 268.095, subd. 6(a) (2008). But we have held that a single incident that undermines an employer’s trust has an adverse impact on an employer. *See Skarhus*, 721 N.W.2d at 344 (holding that taking food from employer without paying the proper amount undermined employer’s trust and had a significant adverse impact on the employer); *see also Frank v. Heartland Auto. Servs. Inc.*, 743 N.W.2d 626, 630–31 (Minn. App. 2008) (holding that an employee’s fraudulent billing of a customer is the type of “integrity-measuring conduct” that always has a significant adverse impact on an employer). Likewise, Kibler’s dishonesty, which both Dagenais and the ULJ considered to amount to a falsification of time records, undermined Wesco’s trust in Kibler. Dagenais testified that “if [Kibler] was able to lie to my face . . . there is no limit to what else he would do. . . . You . . . can’t depend on somebody who is going to do that.”

While we are sympathetic to Kibler, a 14-year employee of Wesco with an apparently unblemished employment record aside from the day in question, we are bound to defer to the ULJ’s credibility determinations. The ULJ found that Kibler was dishonest on the day in question and, as established by case law, dishonesty that destroys an employer’s trust constitutes disqualifying employment misconduct.

**Affirmed.**