STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1183

Yusuf Adam,
Relator,

vs.

Qwest Corporation,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed March 30, 2010
Affirmed
Halbrooks, Judge

Department of Employment and Economic Development
File No. 20674661-3

Yusuf Adam, Minneapolis, Minnesota (pro se relator)

Qwest Corporation, Garden City, New York (respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Kalitowski, Judge; and Crippen, Judge.*

* 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

HALBROOKS, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that he is ineligible to receive unemployment benefits because he was terminated for employment misconduct. Because the ULJ's decision is supported by substantial evidence, we affirm.

FACTS

Relator Yusuf Adam brings this pro se certiorari appeal after being deemed ineligible for unemployment benefits. Relator worked for respondent Qwest Corporation as an outside sales representative from September 2004 until March 2008. In October 2007, relator was speaking with a customer interested in Qwest's phone service who also asked about cable TV. When relator quoted her a price for Qwest's alternative to cable—DirecTV—the customer complained that Qwest's DirecTV package was too expensive. Relator then provided the customer with a name of a Comcast representative (Abdul) with whom he had a reciprocal referral arrangement. With no further involvement on relator's part, Abdul hooked up cable for the customer, but her service was later disconnected. She eventually learned that Abdul did not provide her cable through Comcast, but apparently connected her to "pirated" cable. After being made aware of this incident, Qwest conducted an investigation. Mark Mulligan, Qwest's lead investigator, interviewed the customer involved in the incident, relator's direct supervisor, Laura Willox, and relator.

In his interview of relator, Mulligan asked relator about relator's knowledge of "Qwest's Code." Mulligan reported that "[relator] acknowledged that he violated the

Code. [Relator] stated that he regretted saying what he did and that he had learned his lesson. [Relator] stated that he understood he crossed the line and he would never do it again." Despite this ultimate admission, relator was not immediately forthright with Mulligan during this interview. According to Mulligan:

> [Relator] denied the allegations against him and that he knew Abdul until presented with the Qwest literature with his name printed on it and Abdul's name written next to [relator]'s. After repeated questions regarding Abdul's identity and how his name came to be on Qwest's literature, [relator] acknowledged he knew Abdul and had referred Qwest customers to him.

Relator was terminated on March 4, 2008, "for violation of Qwest's Conflict of Interest policy."

Relator applied for unemployment benefits and was initially deemed eligible. Respondent Minnesota Department of Employment and Economic Development (DEED) concluded that relator "was trying to provide good customer services and was unaware of the policy. Also the applicant was not given a warning regarding the policy." Qwest's agent, Barnett Associates, Inc., faxed in an appeal of this determination dated April 8, 2008. DEED filed its appeal on September 10, 2008, and an evidentiary hearing was held in November 2008.

In his testimony at the hearing, relator admitted to being aware that Qwest had a code of conduct but denied knowing the specifics of the conflict-of-interest policy. Relator also denied that he told Mulligan he did not know Abdul. He claimed instead that he knew two Abduls and was confused about which one Mulligan was asking about.

The ULJ determined that relator is ineligible for benefits because he was terminated for employment misconduct. According to the ULJ:

> Qwest had a right to reasonably expect that [relator] would not provide the names of competitors to customers. . . . Qwest had a right to reasonably expect that [relator] would be honest in his responses during the entirety of the investigation. [Relator] was not honest when questioned about his knowledge of the other person. [Relator]'s conduct displayed clearly a serious violation of the standards of behavior Qwest had the right to reasonably expect of him as an employee so as to amount to employment misconduct and ineligibility.

This determination resulted in an overpayment of $18,830.

Relator (through an attorney) submitted a request for reconsideration. In this request, relator asserted that "[n]othing [he] did went against Qwest policies or common practice." Relator stated that "[i]t is common practice at Qwest and at other companies within the telecommunications industry for sales representatives to assist their customers by providing the name of a company which provides a service that cannot be fully met by the products offered by their employer, in this case, Qwest." Relator argued that his conduct was not negligent or indifferent. Relator also brought up his belief that his termination was in fact retaliation for an earlier complaint he had made against Willox for racial discrimination. Relator further argued that the ULJ should not have considered arguments pertaining to relator's purported dishonesty during the investigation because Qwest's notice of appeal stated only that it was "protesting this determination as the claimant violated a known Qwest conflict of interest policy." Finally, relator argued that "[e]ven if these facts were properly considered, the alleged fleeting untruthfulness in

response to interrogation by Qwest managers does not rise to the level of 'employment misconduct.'"

The ULJ denied relator's request for reconsideration. The ULJ discredited the assertion that a referral system was commonplace because "[i]f that is the case, there would have been no reason for [relator] to deny any knowledge of the matter when he was questioned." The ULJ found that evidence of relator's dishonesty was presented at the hearing and was therefore properly considered. Finally, the ULJ disagreed with the characterization of relator's dishonesty as "fleeting," stating that relator "initially denied knowing the other person, continued to deny knowledge of that person and admitted knowing that person only at the very end of the interview." The ULJ did not address the allegation that relator's termination was made in retaliation for his complaint of racial discrimination. This pro se certiorari appeal follows.

D E C I S I O N

Relator first asserts that his eligibility determination was not appealed in a timely manner. An appeal of a determination of ineligibility must be filed within 20 calendar days after DEED sends the determination. Minn. Stat. § 268.101, subd. 2(f) (2008). "Filed" is defined as personal delivery to DEED, depositing in U.S. mail, or, where allowed, use of electronic transmission. Minn. Stat. § 268.035, subd. 17 (2008). When electronic transmission is used, "it is considered filed on the day received by the department." *Id.* The record includes a fax from Barnett Associates, Inc. dated April 8, 2008, appealing the determination of relator's eligibility for unemployment benefits. The ULJ concluded on the record at the hearing that Qwest's appeal was timely. "I'll point

out that Qwest did file a timely appeal, [its] letter of April 8, 2008, is a timely appeal to the determination of March 24, 2008." There is nothing to indicate that DEED did not receive this fax. Accordingly, the ULJ did not err when he determined that Qwest's appeal was timely.

Relator also argues that his actions did not constitute employment misconduct:

> The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:
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> (1) in violation of constitutional provisions;
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> (2) in excess of the statutory authority or jurisdiction of the department;
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> (3) made upon unlawful procedure;
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> (4) affected by other error of law;
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> (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).

The ULJ concluded that "Qwest had a right to reasonably expect that [relator] would not provide the names of competitors to customers" and that "[relator]'s conduct displayed clearly a serious violation of the standards of behavior Qwest had the right to reasonably expect of him as an employee so as to amount to employment misconduct and ineligibility." Whether an employee committed employment misconduct presents a mixed question of fact and law. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). Whether the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). The ULJ's

factual findings will not be disturbed on appeal if they are supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5). Whether the act committed by the employee constitutes employment misconduct presents a question of law, which we review de novo. *Scheunemann*, 562 N.W.2d at 34.

Employment misconduct is "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) (2008). An employee who is discharged for employment misconduct is ineligible from receiving unemployment benefits. *Id*., subd. 4(1) (2008). An employer has a right to expect an employee to abide by reasonable policies and procedures. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Generally, refusal to do so constitutes misconduct, especially when the employee has received repeated warnings or instructions regarding the unacceptable behavior. *Id.* at 806-07.

By law, misconduct does not include "conduct an average reasonable employee would have engaged in under the circumstances . . . [or] good faith errors in judgment if judgment was required." Minn. Stat. § 268.095, subd. 6(a). Relator argued at the hearing that he did not knowingly violate Qwest's conflict-of-interest policy. If true, it is possible that his referral could have been conduct a reasonable employee would have engaged in or a good-faith error in judgment. But Mulligan's report, which the ULJ found "clear, detailed and persuasive," stated that relator admitted to violating Qwest's conflict-of-

interest policy. Relator's admission provides substantial evidence to support the ULJ's finding that he knowingly violated the conflict-of-interest policy. Accordingly, we agree with the ULJ that relator's referral was neither a good-faith error in judgment nor conduct in which a reasonable employee would have engaged.

The statutory definition of "misconduct" also excludes "a single incident that does not have a significant adverse impact on the employer." *Id*. This court has concluded that an incident that causes the employer to lose trust in the employee does have a significant adverse impact. *See, e.g., Frank v. Heartland Auto. Servs., Inc*., 743 N.W.2d 626, 630–31 (Minn. App. 2008) (holding that employee's fraudulent billing of customer is "integrity-measuring conduct" that always has a significant adverse impact on an employer). Under this standard, we conclude that relator's dishonesty during the investigative interview with Mulligan was sufficient to cause Qwest to lose trust in relator. Accordingly, if this was a single incident, it did have a significant adverse impact and is appropriately considered employment misconduct. Because we conclude that relator's violation of Qwest's conflict-of-interest policy was employment misconduct and because none of the exceptions apply, we affirm.

We have also reviewed the record concerning relator's allegation that his termination was in fact retaliation for his complaint about Willox. We find no support for this claim.

Affirmed.