STATE OF MINNESOTA
IN COURT OF APPEALS
A09-949

Ronald Stagg,
Relator,

vs.

Vintage Place Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed June 1, 2010
Reversed
Connolly, Judge

Department of Employment and Economic Development
File No. 22002661-3

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Vintage Place Inc., St. Paul, Minnesota (respondent)

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

Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that he was ineligible for unemployment benefits because he was discharged for employment misconduct. Because the employer did not follow the applicable progressive-discipline steps contained in its employee handbook before firing relator, the ULJ erred in determining that relator's conduct amounted to employment misconduct. We reverse.

FACTS

Relator Ronald Stagg was employed as an overnight counselor for respondent Vintage Place Inc. (Vintage). Vintage is a group home for troubled youths. Relator began working at Vintage on November 23, 2007, and was discharged on January 29, 2009. At the time of his termination, relator was making $12 per hour and working 40 hours per week.

While working at Vintage, relator struggled with tardiness and absenteeism. Vintage's employee handbook contained a progressive-discipline policy. The policy provided that Vintage's "employee[s] may be disciplined" according to a five-step schedule permitting an oral warning for the first unexcused absence, a written warning for the second, a three-day suspension for the third, a ten-day suspension for the fourth, and termination for the fifth. It is undisputed that, as a result of his "ongoing attendance problems," relator received oral and written warnings and a three-day suspension, but was fired before receiving a ten-day suspension.

Relator applied for unemployment benefits, and the determination of ineligibility was ultimately appealed to the ULJ. Following an evidentiary hearing, the ULJ found that relator was discharged for employment misconduct, and thus was ineligible for unemployment benefits. Following a request for reconsideration, the ULJ affirmed his earlier determination, concluding that it was legally and factually correct. This certiorari appeal follows.

D E C I S I O N

Relator argues that the ULJ erred in concluding that he engaged in employment misconduct because (1) his employer did not follow the progressive-discipline steps mandated by the terms contained in the employee handbook; and (2) his employer could not have reasonably expected him to show up to work on time because, given the employer's selective enforcement of the attendance policy, a reasonable employee would have had similar attendance problems.

This court may affirm a ULJ's decision or remand for further proceedings, or it may reverse or modify the ULJ's decision if the findings, inferences, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (2008). The ULJ's factual findings are viewed in the light most favorable to the decision being reviewed and will not be disturbed if the evidence substantially sustains them. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether an employee committed a particular act is a question of fact, but whether the act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). "[A]ny intentional, negligent, or indifferent conduct . . . (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" is employment misconduct. *Id.*, subd. 6(a) (2008). Conduct is not employment misconduct if it consists of "conduct an average reasonable employee would have engaged in under the circumstances" or "absence because of illness or injury with proper notice to the employer." *Id.*

Generally, an employer has a right to expect its employees to work when scheduled. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. App. 1984). Even a single absence without permission may amount to misconduct, although the reason for the absence is relevant. *Hanson v. Crestliner Inc.*, 772 N.W.2d 539, 543 (Minn. App. 2009). However, caselaw establishes that an act otherwise constituting employment misconduct is not employment misconduct when an employer fails to follow the applicable and enforceable disciplinary provisions in its employee handbook. In *Hoemberg v. Watco Publishers, Inc.*, this court held that the acts of the discharged employees did not amount to misconduct for unemployment-benefits purposes when the employer failed to follow the disciplinary provisions in the employee handbook that the employees could have reasonably expected the employer to follow because the handbook and its provisions were contractually enforceable. 343 N.W.2d 676, 678-79 (Minn. App. 1984), *review denied* (Minn. May 15, 1984).

Respondent Department of Employment and Economic Development (DEED) relies on *Thurner v. Philip Clinic, Ltd.*, in which we held that Thurner was ineligible for unemployment benefits because he was fired for employment misconduct despite his employer's failure to follow the disciplinary steps in its personnel manual. 413 N.W.2d 537, 541 (Minn. App. 1987). *Thurner* expressly did not overrule *Hoemberg*, but found it distinguishable because in *Thurner* (1) the provisions in the personnel manual were not contractually enforceable conditions of the employment agreement but were mere general statements of policy; and (2) by the personnel manual's own terms, the disciplinary steps were not applicable to "more serious" breaches, which included Thurner's conduct. *Id.*

This court has continued to apply the *Hoemberg* rule that handbook discipline provisions must be followed before we will find misconduct precluding eligibility for unemployment benefits. *E.g.*, *Eyler v. Minneapolis Star & Tribune Co.*, 427 N.W.2d 758, 761 (Minn. App. 1988) (remanding for determination of whether Star Tribune followed its own disciplinary procedures before discharging Eyler); *see also Foix v. Clusiau Sales & Rental*, No. A09-728, 2010 WL 346401, at *3 (Minn. App. Feb. 2, 2010) (affirming ULJ's ineligibility determination because handbook terms allowed employer to terminate employees for violating attendance policy without following progressive-discipline procedures); *Krueger v. White Earth Reservation*, No. A09-736, 2010 WL 274518, at *3-5 (Minn. App. Jan. 26, 2010) (concluding employee's absenteeism and tardiness constituted misconduct where (1) evidence did not show that employer failed to follow its procedures and (2) attendance policy expressly permitted termination of employment at employer's discretion).

"Whether an employment handbook creates a contract is a question of law, which this court reviews de novo." *Alexandria Hous. & Redevelopment Auth. v. Rost*, 756 N.W.2d 896, 904 (Minn. App. 2008). The terms in an employee handbook may constitute a binding unilateral contract when the terms are definite in form, communicated to the employee through dissemination of the handbook, and accepted by the employee through his continued employment. *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 123 (Minn. 2007). "An employer's general statements of policy are no more than that and do not meet the contractual requirements for an offer." *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983). To be sufficiently definite to form the basis for an employment contract, "handbook language must be definite enough for a court to discern with specificity what the provision requires of the employer so that if the employer's conduct . . . is challenged, it can be determined if there has been a breach." *Rost*, 756 N.W.2d at 904 (quotation omitted).

Vintage's employee handbook contains the following provision under the heading "discipline":

> Absence is the failure to report for work or to remain at work as scheduled. It includes late arrivals and early departures as well as absence for an entire day.
>
> An employee who fails to call in for three successive days to report an absence shall be considered to have voluntarily terminated employment with The Vintage Place Incorporated.
>
> Employees with above average absenteeism, as calculated by the Board may be required to document the reasons, including providing a doctor's certificate. Upon returning to work from an unexcused absence, an employee must report to the Supervisor and disclose the reasons for the absence. If the

> reason is not acceptable, *the employee may be disciplined in accordance with the following schedule*:
>
> > First unexcused absence—oral warning.
> >
> > Second unexcused absence—written warning.
> >
> > Third unexcused absence—3-day suspension.
> >
> > Fourth unexcused absence—10-day suspension.
> >
> > Fifth unexcused absence—discharge.
>
> The same schedule applies to unexcused lateness.

(Emphasis added.)

DEED makes two arguments concerning this disciplinary policy. First, it argues that this court cannot determine whether the handbook amounted to a contract because only excerpts from the handbook are in the record, and employee handbooks often contain disclaimers indicating that they are not intended to form contracts. It is true that a disclaimer in an employment handbook may render terms in the handbook unenforceable. *See Rost*, 756 N.W.2d at 906. However, as relator points out, the ULJ is required to develop the record, and our review is limited to the evidence in the record. *See* Minn. Stat. § 268.105, subds. 1(b) (requiring the ULJ to "ensure that all relevant facts are clearly and fully developed"), 7(d)(5) (viewing ULJ's decision in light of the record as a whole) (2008); Minn. R. Civ. App. P. 110.01. There is no evidence of a disclaimer in the record.

Second, DEED argues that the progressive-discipline procedure is, by its own terms, optional. DEED relies on the word "may" in the phrase, "the employee may be

disciplined in accordance with the following schedule," arguing that this makes the particular disciplinary steps optional. We disagree. By itself, the word "may" does not render employee-handbook terms per se unenforceable, and this is a counterintuitive construction of the handbook provision, which sets forth a particular schedule for disciplining the employee. This interpretation would permit Vintage to discipline employees for absenteeism in any form and in any manner whatsoever, thus rendering the progressive-discipline steps meaningless. Instead, we conclude that the better interpretation of this provision is that Vintage is permitted but not required to discipline its employees for absenteeism, and that if it does discipline them, it must do so in accordance with the five-step schedule.

Accordingly, relator could have reasonably expected Vintage to follow the disciplinary steps, and because Vintage skipped the fourth step of a ten-day suspension, relator's absenteeism does not amount to employment misconduct precluding eligibility for unemployment benefits. *See Hoemberg*, 343 N.W.2d at 679 (holding that employees' actions did not amount to misconduct because employer did not follow disciplinary procedures in handbook that employees had a right to expect employer to follow). Because we conclude that relator did not engage in employment misconduct, we do not address his alternative argument that Vintage gave up its right to reasonably expect its employees to attend work when scheduled by failing to strictly enforce its disciplinary policy with respect to absenteeism, or that a reasonable employee would therefore have engaged in the same conduct as relator.

Reversed.