STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2125

Thomas Ayres,
Relator,

vs.

Wal-Mart Associates Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 3, 2010
Affirmed
Shumaker, Judge

Department of Employment and Economic Development
File No. 22957264-3

Michael B. Healey, Michael Healey Law, Minneapolis, Minnesota (for relator)

Stephanie D. Sarantopoulos, Littler Mendelson, Minneapolis, Minnesota (for 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 Bjorkman, Presiding Judge; Shumaker, Judge; and Larkin, Judge.

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

SHUMAKER, Judge

By writ of certiorari, relator challenges the decision of the unemployment-law judge (ULJ) that he engaged in conduct that amounted to employment misconduct. Because relator's conduct was contrary to reasonable, common-sense safety rules, and because he was previously warned about engaging in such conduct, we affirm.

FACTS

Relator Thomas Ayres was employed full time by Wal-Mart Stores, Inc. from May 14, 2007, until his discharge on February 20, 2009. He was issued warnings (or, as Wal-Mart calls them, "coachings") several times for rule violations during his employment with Wal-Mart. When Ayres received a third coaching from Wal-Mart, he was also given a "decision day," which is the final stage in Wal-Mart's progressive discipline policy. An employee who violates any policy after receiving a decision day is automatically terminated. Wal-Mart has a policy prohibiting "practices as may be inconsistent with ordinary and reasonable common sense safety rules," such as "horseplay."

Sometime in the fall of 2008, Ayres engaged in an activity he called "surfing," which involved riding pieces of cardboard on gravity roller conveyors. Although this incident did not result in an official coaching, an assistant manager verbally warned Ayres that this activity was against policy, Ayres could get hurt doing it, and anyone who was caught doing it would be disciplined. Ayres acknowledged that this type of conduct was an "unsafe procedure."

On February 11, 2009, around 5:00 p.m., Ayres dropped a wooden pallet on his toe, and two hours later he reported the injury to Wal-Mart. While investigating the injury report, Wal-Mart managers viewed a videotape of Ayres's work area on the night he was injured. On the video, Ayres and several of his coworkers can be seen attempting to jump over two stacks of wooden pallets. The stacks were approximately eight feet long and three feet high. Ayres started running toward the pallets from about twenty feet away, and then tried to jump on the pallets. He attempted this three or four times, succeeded once, and then did a cartwheel off the side of the stack of pallets. This happened around 6:30 p.m., about an hour or so after Ayres injured his foot. Ayres's stated reason for doing this was that he was "simply just following the crowd." On February 20, Ayres was discharged for engaging in horseplay, which amounted to employment misconduct, after having received previous coachings and a decision day.

Ayers established a benefit account with the Minnesota Department of Employment and Economic Development (DEED). Upon application for unemployment benefits, a DEED adjudicator determined that Ayres was ineligible because he was discharged from Wal-Mart for employment misconduct. He appealed the determination and participated in a telephone hearing before a ULJ. The ULJ determined that Ayres was discharged for employment misconduct and was therefore ineligible for benefits. Ayres filed a request for reconsideration with the ULJ, who affirmed, and he now appeals.

D E C I S I O N

This court may reverse or modify the decision of a ULJ if the substantial rights of the petitioner may have been prejudiced because the ULJ's findings, inferences, conclusions, or decisions are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008).

An employee discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). 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." *Id.*, subd. 6(a) (2008). The statute exempts from the purview of employment misconduct poor performance because of inability or incapacity, good-faith errors in judgment, and absence due to illness or injury, with proper notice, among other things. *Id.* 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 804, 806-07.

"Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Id.* at 804. Whether an employee committed the alleged act is a fact question. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court defers to the ULJ's credibility

determinations and findings of fact. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But "[w]hether a particular act constitutes disqualifying misconduct is a question of law, which this court reviews de novo." *Schmidgall*, 644 N.W.2d at 804.

Here, Ayres does not dispute that he engaged in the activity in question; rather, he argues that it did not amount to employment misconduct. Accordingly, there is no factual question as to whether Ayres committed the act for which he was ultimately discharged. The only question on appeal is whether Ayres's actions amounted to employment misconduct, which is reviewed de novo.

Wal-Mart has a policy that requires employees to refrain from engaging in activities that are "inconsistent with ordinary and reasonable common sense safety rules," such as "horseplay." The workplace safety policy was covered at the employees' initial training, and the rules are laid out clearly on *The Wire*, Wal-Mart's online reference. Ayres was warned after the "surfing" incident that such behavior was unsafe and against Wal-Mart's rules and policies. It was reasonable for Wal-Mart to expect that employees, and Ayres in particular, would refrain from any dangerous or unsafe conduct at the workplace. Any reasonable employee would recognize running and jumping onto three-feet-high stacks of wooden pallets as an unsafe activity. This behavior is similar to the "surfing" Ayres engaged in previously that resulted in a warning from his supervisor. Therefore, Ayres's actions constituted employment misconduct.

Ayres cites an unpublished decision, *Petelin v. U.S. Parcel Serv., Inc.*, No. A06-41, 2006 WL 2053430 (Minn. App. July 25, 2006), to support his assertion that his

conduct did not constitute employment misconduct because his horseplay was "limited and reciprocal." However, "[u]npublished opinions of the Court of Appeals are not precedential." Minn. Stat. § 480A.08, subd. 3 (2008). Furthermore, *Petelin* is distinguishable on its facts. In *Petelin*, the relator's coworker initiated a playful "sparring" interaction in which he jabbed at the relator, who responded by lightly punching his coworker in the collarbone. 2006 WL 205340, at *1. On appeal, this court compared the relator's actions to other cases involving physical acts between employees and determined that the relator did not commit employment misconduct because his actions were "limited and reciprocal." *Id*. at *1, 3. In contrast, this case does not involve physical acts between employees. And Ayres's argument that his actions were "limited" is not convincing. Ayres approached the stack of pallets not just once, but four times, hitting the stack hard one time, and actually jumping on and doing a cartwheel off of the stack another time. He argues that his actions were "reciprocal" because other employees were also taking part in the jumps. However, the actions of the other employee were not directed toward Ayres, so his action of "simply following the crowd" and jumping on the stacks was not reciprocal. Moreover, this court has held previously that a violation of an employer's rules by other employees is not a valid defense to a claim of misconduct. *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986).

Ayres also cites *Wilson v. Comfort Bus Co, Inc.*, 491 N.W.2d 908 (Minn. App. 1992), *review denied* (Minn. Jan. 15, 1993), for the proposition that his horseplay was not employment misconduct because it did not create danger for a coworker and did not result in physical injury. However, as Ayres acknowledges, in *Wilson* we indicated that

horseplay *could* constitute misconduct when it is the natural and probable cause of a coworker's injury, but did not hold specifically that horseplay that did not result in injury could *never* be considered employment misconduct. *Id*. at 911. Although Ayres's conduct did not result in injury to himself or others, it easily could have, and it clearly violated Wal-Mart's policy that employees refrain from engaging in activities that are "inconsistent with ordinary and reasonable common sense safety rules."

Ayres relies on *Bray v. Dogs & Cats, Ltd.*, 679 N.W.2d 182 (Minn. App. 2004), to support his assertion that he was entitled to notice of the rules and policies he was expected to follow. However, *Bray* is not applicable here. As Ayres points out, in *Bray* we held that "[i]t is not fair to hold an employee to a standard of conduct that had not been defined at the time the employee committed the alleged misconduct." *Id.* at 186 (emphasis omitted). However, this statement references an employer's attempt to hold an employee to the amended statutory definition of "employment misconduct," which became effective after the employee was discharged. *Id*. Ayres argues that the policy manual available on *The Wire* was insufficient notice of workplace policies, and that he should have received a copy of Wal-Mart's rules in print form, in particular "the rules regarding what horseplay is and what actions might constitute horseplay." But Ayres provides no legal basis to support these assertions. Ayres had sufficient notice of the safety rules and policies of Wal-Mart, and Ayres was clearly warned after the "surfing" incident that such behavior was unsafe and against Wal-Mart's rules and policies.

Finally, Ayres argues that his conduct did not demonstrate conclusively the utter disregard for his employer's interest as required under the "last straw" doctrine. The

"last straw" doctrine allows for several unrelated incidents to constitute the requisite misconduct to justify employee discharge, if together the infractions demonstrate conclusively the "employee's utter disregard for the employer's interests." *Reddmann v. Kokesch Trucking, Inc.*, 412 N.W.2d 828, 830 (Minn. App. 1987) (emphasis omitted). However, in the case at hand, the ULJ did not use the "last straw" doctrine to support his conclusion. The ULJ found that Ayres had been previously directed by management to refrain from engaging in activity that was unsafe, and yet Ayres proceeded to engage in just such activity. The record supports this finding. Furthermore, prior to the pallet-jumping incident, Ayres received a "decision day" coaching, which is essentially the "last straw" in Wal-Mart's disciplinary procedures. Ayres knew that any future violations of Wal-Mart's policies could result in termination, and he should have known that he was under close scrutiny, such that any rule infraction could result in his discharge.

Affirmed.