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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2364**

Dale Schiestl, Relator,

vs.

Furniture Outlets USA, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 14, 2010
Affirmed
Peterson, Judge**

Department of Employment and Economic Development
File No. 23227802-3

Dale R. Schiestl, Elk River, Minnesota (pro se relator)

Furniture Outlets USA, Inc., Elk River, Minnesota (respondent employer)

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

Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Willis,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

PETERSON, Judge

Relator Dale Schiestl challenges the determination of an unemployment-law judge (ULJ) that relator was discharged for employment misconduct. Because evidence substantially sustains the finding that relator violated his employer's reasonable policy on splitting commissions and because a violation of an employer's reasonable policy is within the definition of employment misconduct, we affirm.

FACTS

Relator worked as a sales associate for respondent Furniture Outlets USA, Inc. Respondent had a policy that, when a customer requested a particular sales associate, that sales associate was entitled to a split of the commission earned by any other sales associate on a sale to that customer. A sales associate who was in the store when requested could choose either to make the sale to the customer and earn the entire commission or refer the matter to another sales associate, who would split the commission. A sales associate who was not in the store when requested by a customer was also entitled to a split of the commission on a sale made to that customer.

Respondent terminated relator's employment on August 13, 2009, for violating this policy. Relator applied for unemployment benefits and was determined to be eligible because he had been discharged for unsatisfactory work performance, which is not employment misconduct.¹

¹See Minn. Stat. § 268.095, subd. 6(b)(3), (5) (Supp. 2009) (excluding "simple unsatisfactory conduct" and "poor performance because of inability or incapacity").

Respondent appealed the determination, alleging that relator had been terminated for misconduct. Following a telephone hearing, the ULJ determined that relator was ineligible for benefits because his violations of respondent's commission-splitting policy were a serious violation of the standards of behavior respondent had a right to expect and were, therefore, employment misconduct. Relator requested reconsideration; the ULJ affirmed the prior decision.

DECISION

Whether an employee's acts are employment misconduct is a question of law, on which this court exercises its independent judgment, but whether an employee committed an act alleged to be employment misconduct is a fact question. *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19-20 (Minn. App. 2003). "This court views the ULJ's factual findings in the light most favorable to the decision. This court also gives deference to the credibility determinations made by the ULJ. As a result, this court will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citations omitted), *review denied* (Minn. Oct. 1, 2008).

Employment misconduct includes conduct that seriously violates "the standards of behavior the employer has the right to reasonably expect of the employee." Minn. Stat. § 268.095, subd. 6(a)(1) (Supp. 2009); *see also Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002) (stating that misconduct includes violation of employer's reasonable policy). Testimony from three of respondent's employees supports the finding that relator violated respondent's policy on splitting commissions.

First, another sales associate testified that, in February or March 2009, she “witnessed [relator] not split a sale when the customer specifically told [relator] she was working with another sales associate. . . . And the next day, the same customer came back to the other sales associate and said[,] ‘I bought something yesterday[. Did you get [the commission ?’], because she understood how the commission thing works. . . . And of course, the answer was no, [the other sales associate] did not get it.”

Second, respondent’s sales director testified that, on June 25, he had warned relator about not splitting commissions and that, on the day relator was discharged, a customer came into the store and said she had “told [relator] she worked with [another]sales associate of ours. The sale was never split. And that was witnessed by . . . an office staff person and . . . an assistant manager.” The sales director also testified about an instance when a customer told relator he wanted another sales associate, who was in the store. Relator did not notify that sales associate; he made the sale himself and did not split the commission. The customer later called the sales director, who testified further that this “customer absolutely made me believe that there was no confusion[,] that this person had worked with [the other sales associate], wanted to work with [the other sales associate, who] knew the situation, and [relator] still wrote the sale.”

The ULJ asked the sales director, “[H]ow do you know [that the other sales associate] was not actually busy at the date and time this occurred?” The sales director explained that, under respondent’s policy, the question was irrelevant because the other sales associate had the option to either go to the customer who requested him and make the sale himself or say he could not go and ask relator to make the sale, in which case

relator would split the commission. The policy did not permit relator to “make the judgment call” of whether another sales associate was too busy to see a customer who asked for him. Relator testified that he later went back into the computer and split the commission on this sale; the sales director testified that relator did so only after the other sales associate confronted him.

Finally, a human-resources person read into the record notes in relator’s file concerning another instance. “[C]ustomer came in and asked for [another sales associate, who] was off. [Relator] wrote the sale and later went back in and split the sale after other salespeople mentioned that they heard the customer ask for [the other sales associate]. So basically, only after [relator] was confronted about it did he then go back in and split the sale, but he did not [split it] initially as he was supposed to.” The ULJ’s finding that relator “only split transactions when he believed a co-worker was aware that the customer asked for another associate” is supported by the evidence.

Relator testified that it was not convenient to split the commission when making a sale because the computer system was old and not user-friendly, so his “standard procedure . . . was to go back then and put the split in when . . . [I] could go to that field and . . . have the time and have the information that [I] needed.” But another sales associate testified that splitting a commission by entering another sales associate’s code in the computer was “very easy.” Also, the record shows no instance when relator split a commission without having been told that someone else was aware that the commission should have been split and at least one instance when relator did not split a commission that should have been split. Thus, the ULJ’s finding that relator’s “explanation as to why

it was easier to process the split after the fact is not consistent with how easy it was to process at the time of checkout” is also supported.

Relator’s failures to split commissions violated respondent’s reasonable policy as well as the standard of behavior respondent had a right to reasonably expect of employees. Relator was discharged for employment misconduct within the meaning of Minn. Stat. § 268.095, subd. 6(a)(1).

Affirmed.