STATE OF MINNESOTA
IN COURT OF APPEALS
A10-146

Adam Kehn,
Relator,

vs.

Menard, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed September 14, 2010
Affirmed
Collins, Judge[*]

Department of Employment and Economic Development
File No. 23404307-3

Adam Kehn, Princeton, Minnesota (pro se relator)

Menard, Inc., Eau Claire, Wisconsin (respondent employer)

Lee B. Nelson, Britt K. Lindsay-Waterman, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Wright, Presiding Judge; Lansing, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he was discharged for misconduct. Because we conclude that relator's knowing violation of a company policy constituted misconduct, we affirm.

FACTS

Relator Adam Kehn was employed by respondent Menard Inc. (the employer) from December 2000 through September 8, 2009. At the time he was discharged from employment, relator was an assistant manager whose job duties required him to supervise other employees, address issues with the cashiers, and complete various reports. After his discharge, relator applied for unemployment benefits and respondent Department of Employment and Economic Development (DEED) determined that relator was eligible for unemployment benefits. The employer appealed and a telephonic hearing was held before a ULJ.

The employer testified that relator was discharged for using his cell phone for a lengthy time while on duty and that any amount of cell-phone use was a violation of the employer's published policy. The employer further testified that relator was given a copy of this policy on June 8, 2005. Relator's cell-phone use was brought to the attention of the employer on September 5, 2009, after a manager observed relator on a video recording using his cell phone for a total of 162 minutes on August 29 and August 30, 2009. The employer testified that it decided to discharge relator without giving a written warning because of the severity of the incidents and the amount of time relator spent

using his cell phone and out of view of his team members and guests. The employer testified that the violation of the cell-phone policy was the sole reason for relator's discharge.

Relator testified that he knew cell-phone use was against company policy but that he occasionally used his cell phone, a "smart phone" with Internet functions, to assist guests or for other work-related purposes. When asked about August 29 and 30, relator stated that he was not using the phone function of his cell phone during the entire time the cell phone was visible on camera. Relator testified that he used his cell phone to check sports scores for other employees and to play music while he was counting cash in the back room. He testified that he never used his cell phone to make calls or text messages, but that he did use it to check his e-mail. Although he was aware of the policy, relator testified that he thought he was allowed to use his cell phone because other employees did so as well.

The ULJ determined that relator's cell-phone use was misconduct making relator ineligible to receive unemployment benefits. Relator requested reconsideration, the ULJ affirmed the ineligibility determination, and this certiorari appeal followed.

D E C I S I O N

This court will affirm the decision by the ULJ unless the decision is erroneous as a matter of law or is not supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008). Appellate courts "view the ULJ's factual findings in the light most favorable to the decision" and defer to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether a particular act

constitutes disqualifying misconduct is a question of law, which this court reviews de novo. *Id.*

Misconduct is "any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment."[1] Minn. Stat. § 268.095, subd. 6(a) (Supp. 2009). "If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct under [section 268.095, subdivision 6(a)]." *Id.*, subd. 6(d) (Supp. 2009). "The focus of the definition of misconduct is on standards of behavior the employer has the right to reasonably expect of the employee. . . ." *Brown v. Nat'l Am. Univ.*, 686 N.W.2d 329, 333 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Nov. 16, 2004). Generally, violating an employer's reasonable policies is misconduct. *Schmidgall v. Filmtec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Relator contends it was error to conclude his cell-phone use constituted misconduct. We disagree. The undisputed facts indicate that relator used his cell phone in knowing violation of the employer's policy on multiple occasions over a two-day period, while on duty, including to monitor his e-mail and play music. There is no evidence that the employer's enforcement of the cell-phone policy was a pretext for

[1] Relator also cites modifications to the definition of misconduct proposed in the 2010 legislative session that would have required misconduct to be "egregious." The Unemployment Compensation statutes were amended in 2010 but without adoption of the "egregious" language. *See* 2010 Minn. Laws ch. 347, art. 2, § 17.

termination and relator does not dispute that he violated the cell-phone policy. Because relator committed a knowing violation of the employer's policy, relator's conduct constituted misconduct under *Schmidgall*, 644 N.W.2d at 804.

Relator also argues that his cell-phone use was not misconduct because of the special considerations given to discharges resulting from a single incident. We disagree. Although Minn. Stat. § 268.095, subd. 6(a) (2008), stated that misconduct did not include "a single incident that does not have a significant adverse impact on the employer," since 2009 and applicable here, the statute provides: "If the conduct for which relator was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct under paragraph (a)." *Id*., subd. 6(d) (Supp. 2009). Moreover, as DEED asserts, it does not appear that this was a single instance of misconduct. Relator himself testified that he occasionally checked sports scores on his cell phone for other employees and the video indicates that relator used his cell phone on multiple occasions over a lengthy time on August 29 and 30 for which he was discharged.[2] Also, the record is clear that relator used his cell phone in knowing violation of the company policy.

It is not our role to evaluate whether the employee *should* have been terminated; we review the record to see whether the termination that transpired was for misconduct. *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981). And because relator's cell-

[2] Relator also challenges the introduction of an exhibit detailing his cell-phone use because it was prepared after his discharge. Because relator admitted using his cell phone, this exhibit is not necessary to the ULJ's misconduct determination. Further, relator has not challenged the accuracy of the exhibit.

phone use was in knowing violation of the employer's policy, we conclude that the ULJ did not err in determining that relator was discharged for misconduct

Affirmed.