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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0302**

Neil Elavsky,
Relator,

vs.

Transport Express LLC, Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed November 18, 2013
Affirmed
Chutich, Judge**

Department of Employment and Economic Development
File No. 30375072-3

Neil Elavsky, Minneapolis, Minnesota (pro se relator)

Transport Express LLC, Eagan, Minnesota (respondent employer)

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

Considered and decided by Larkin, Presiding Judge; Rodenberg, Judge; and
Chutich, Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Relator Neil Elavsky challenges the unemployment-law judge's decision that he is ineligible for unemployment benefits because he was discharged for employment misconduct. Elavsky asserts that his actions were not employment misconduct and that the unemployment-law judge erred by not considering certain evidence. Because the judge correctly determined that Elavsky was discharged for employment misconduct and the alleged evidence would not likely have changed the outcome of the decision, we affirm.

FACTS

Relator Neil Elavsky worked at respondent Transport Express LLC (Transport Express) as a full-time freight broker and sales representative from October 1, 2012, to October 23, 2012. Transport Express is a freight brokerage company that assists businesses with their freight routing needs. Elavsky's duty was to call prospective businesses that may need help with moving freight.

During the first week of employment, Elavsky complained to Nick Schultheis, the owner of Transport Express, that his ability to make calls was being slowed down because it took seven seconds from the time he dialed a phone number to the time the call connected. Transport Express's phone vendor reviewed the issue and decreased the time to five seconds between dialing and connection.

By the end of the second week of Elavsky's employment, Schultheis noticed that he had stopped making phone calls. On October 23, 2012, Schultheis met with Elavsky

to talk about why he had stopped. Elavsky told Schultheis that his calls were being monitored and routed to “mystery callers” and “secret shoppers” and that Transport Express had promised him “a clean phone line.” After Schultheis asked what could be done so Elavsky could continue the employment, Elavsky requested a “clean copper phone line.” Schultheis asked whether “there’s any hope of this going forward as a positive relationship” when that “level of distrust exists,” and Elavsky agreed that there probably was no hope. Schultheis then told Elavsky that he was discharged for his failure to perform his job duties.

Elavsky applied for unemployment benefits from respondent Department of Employment and Economic Development (department), and the department determined that he was ineligible for benefits because he was discharged for employment misconduct. Elavsky appealed this determination, and the unemployment-law judge held a hearing at which Elavsky and Schultheis testified.

Elavsky testified that “[his] phone traffic declined,” describing the decline as significant. But he said “there were no days that I refused to make any phone calls whatsoever.” He explained that he “couldn’t make phone calls without audio interference from live call monitoring or [his] calls being routed to mystery callers” and that the reason for a company to use mystery callers and secret shoppers is “[t]o steal accounts, gain revenue for the business and to keep wages down.” But he did not believe that he was being asked by Transport Express to do anything unethical, and he did not talk to Schultheis about his concerns before their October 23 meeting.

Schultheis testified that Elavsky had stopped calling prospective customers and that Transport Express does not use call monitoring on any of its employees' calls and did not route Elavsky's calls to anyplace other than where he dialed.

The unemployment-law judge determined that Elavsky was dismissed for employment misconduct and found him ineligible for unemployment benefits. The judge affirmed her decision on reconsideration. This certiorari appeal followed.

D E C I S I O N

We review de novo an unemployment-law judge's determination that an individual is ineligible to receive unemployment benefits. *Sykes v. Nw. Airlines, Inc.*, 789 N.W.2d 253, 255 (Minn. App. 2010). We may affirm the unemployment-law judge's decision, remand it for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (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) (2012). Elavsky contends the judge erred in determining that his actions were employment misconduct and in not considering evidence of an alleged fake sale. As outlined below, we disagree.

I. Employment Misconduct

If an employee is discharged because of employment misconduct, he is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). "Employment

misconduct means 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.” *Id.*, subd. 6(a) (2012).

“Whether the employee committed a particular act is a question of fact[,]” which we review in the light most favorable to the decision. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). When the evidence substantially sustains the unemployment-law judge’s factual findings, we will not disturb them. *Id.* We review de novo “[w]hether a particular act constitutes disqualifying misconduct.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Substantial evidence supports the judge’s findings of facts regarding Elavsky’s conduct. The judge credited Schultheis’s testimony that Elavsky stopped placing the phone calls as required for his job. And Elavsky admitted that his call traffic significantly declined.

Elavsky asserts that the unemployment-law judge improperly disregarded his testimony that he placed calls every day while working at Transport Express. “Credibility determinations are the exclusive province of the [unemployment-law judge] and will not be disturbed on appeal.” *Bangtson v. Allina Med. Grp.*, 766 N.W.2d 328, 332 (Minn. App. 2009) (quotation omitted). The judge found that Schultheis’s testimony was more credible, and based on his testimony, determined that “Elavsky stopped calling customers around the second week of his employment.” The judge credited Schultheis’s

testimony because it was more plausible than Elavsky's testimony. See Minn. Stat. § 268.105, subd. 1(c) (2012) ("When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony."). We defer to the unemployment-law judge's credibility determination here.

Elavsky also argues that Transport Express was "blocking" him from doing his job "by routing [his] calls away from intended customers." The unemployment-law judge found that "even if Transport Express was engaging in the practices Elavsky claimed it was, which seems unlikely, Elavsky's behavior rose to the level of employment misconduct." "[T]he focus of the inquiry is the employee's conduct, not that of the employer." *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 316 (Minn. 2011).

"The general rule is that if the request of the employer is reasonable and does not impose an unreasonable burden on the employee, the employee's refusal to abide by the request constitutes misconduct." *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004). Elavsky was hired to make phone calls to find prospective business for Transport Express, and it was not unreasonable for Transport Express to expect Elavsky to do so. When he believed that the problem with the call routing and monitoring arose, Elavsky did not talk to his employer about his concerns; instead, he chose not to make the phone calls. These actions amounted to a substantial lack of concern for the employment. The unemployment-law judge properly found that Elavsky was discharged for employment misconduct.

II. Evidence of Fraudulent Sale

Elavsky next contends that when he attempted to show the unemployment-law judge a document evidencing how he was “blocked” from doing his job, the judge erred by refusing to enter it into evidence during the evidentiary hearing and disregarding it on reconsideration. He claims the document is a “fraudulent accounts receivable report” that proves Transport Express “issued a fraudulent accounts receivable report to cover the fraud.”

In unemployment appeals, the unemployment-law judge “must ensure that relevant facts are clearly and fully developed” and “may limit repetitious testimony and arguments.” Minn. R. 3310.2921 (2011). The judge “may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly repetitious.” Minn. R. 3310.2922 (2011).

The record shows that the unemployment-law judge properly limited Elavsky’s repetitive testimony and ensured relevant facts were developed. The document Elavsky claims he tried to offer at the evidentiary hearing was immaterial. Even if a “fake sale” had occurred, as he believes the document shows, Elavsky was discharged because his phone call traffic significantly declined.

As part of his reconsideration request, Elavsky mailed to the department the document that he wanted included as evidence. “In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing” Minn. Stat. § 268.105, subd. 2(c) (2012). If the party shows that the evidence not originally submitted “would likely

change the outcome of the decision and there was good cause for not having previously submitted that evidence[.]" the unemployment-law judge must order an additional evidentiary hearing. *Id.*

Elavsky has not shown that this document would likely change the outcome of the decision. The judge found that Elavsky did not place the required phone calls, and this was the basis for the determination that his behavior was misconduct. Documentation of an alleged fake sale would not likely change that determination.

In sum, the evidence substantially sustains the unemployment-law judge's findings. The judge properly determined that Elavsky's failure to perform his duties was employment misconduct. Thus, Elavsky is ineligible for unemployment benefits.

Affirmed.