STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0638

Keri Dustrud,
Relator,

vs.

Tires Proz LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed February 10, 2014
Affirmed
Connolly, Judge

Department of Employment and Economic Development
File No. 30506664-3

Keri Dustrud, Little Canada, Minnesota (pro se relator)

Jennifer A. Nodes, Best & Flanagan, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Larkin, Judge.

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

CONNOLLY, Judge

In this certiorari appeal, relator challenges the unemployment-law judge's (ULJ) conclusion that she was discharged for employment misconduct and ineligible for unemployment benefits. We affirm.

FACTS

Relator Keri Dustrud worked at respondent Tire Proz LLC (Tire Proz) from July 30, 2012 to November 20, 2012. Tire Proz is a retail tire and automotive service repair business. Relator's primary duties at Tire Proz included mounting and dismounting tires.

Tire Proz has an employee manual that outlines its policies. The manual contains a policy that prohibits employees from using profanity at work. Relator did not comply with this policy and was verbally warned multiple times about her use of profanity in the workplace.

Tire Proz also has a policy that requires employees to perform a "torque check" any time a wheel is removed from a vehicle to ensure that the lug nuts on the wheel are tightened. If the lug nuts are not properly tightened, the wheel could come loose or even fall off the vehicle. Employees are required to initial a worksheet whenever they perform a torque check. A second employee must then initial the worksheet to confirm that the torque check was performed. Tire Proz considers this policy to be of the utmost importance because a customer was once killed when a wheel was not correctly mounted

on a vehicle. An employee who fails to perform a torque check is therefore subject to immediate termination.

On November 16, 2012, relator mounted tires on a customer's vehicle. Later that day, the customer called the store and explained that he felt a vibration while driving. When he stopped to inspect his vehicle, he discovered that the lug nuts on his wheel were loose. A Tire Proz manager investigated the incident by reviewing video footage from the shop and discovered that relator failed to perform a torque check on the vehicle.

On November 20, Tire Proz discharged relator. Relator sought unemployment benefits from the Minnesota Department of Employment and Economic Development (DEED). A DEED administrative clerk issued a determination that relator was discharged for reasons other than misconduct and was eligible for unemployment benefits. Tire Proz appealed the determination and a ULJ conducted a de novo telephone hearing. The ULJ concluded that relator was discharged for employment misconduct and ineligible for benefits. Relator requested reconsideration and the ULJ affirmed.

D E C I S I O N

Relator argues that the ULJ erred in determining that she is ineligible for unemployment benefits. We disagree. We may modify, reverse, or remand a ULJ's unemployment-benefits determination if relator's substantial rights 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). We review the ULJ's factual findings in the light most favorable to the decision and defer to the judge's credibility determinations. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). "[T]his court will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id.*

The ULJ found that relator was discharged for employment misconduct. "Whether an employee committed employment misconduct is a mixed question of fact and law." *Id.* Whether an act was committed 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 to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Employee misconduct includes "any intentional, negligent, or indifferent conduct . . . 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." Minn. Stat. § 268.095, subd. 6(a) (2012). This court has determined that "[a]n employee's refusal to abide by the employer's reasonable policies ordinarily constitutes employment misconduct." *Cunningham v. Wal-Mart Assocs.*, 809 N.W.2d 231, 235 (Minn. App. 2011) (citation omitted).

The ULJ found that relator routinely used profanity in the workplace, in violation of company policy. The ULJ also found that relator knew that she was required to perform a torque check any time a wheel was removed from a vehicle but that relator failed to do so on November 16. The ULJ concluded that relator was discharged for

employment misconduct because this behavior "amounted to a serious violation of the standards of behavior an employer has a right to reasonably expect of an employee."

We conclude that the record substantially supports the ULJ's findings. The Tire Proz employee manual contains a policy that prohibits profanity and offensive conduct in the workplace. Relator admitted that she signed the manual and knew about the policy but still used profanity at work. She also admitted to being warned multiple times about using profanity in the workplace. The employer testified that relator would receive verbal warnings about using profanity "regularly" and that there were two instances where relator and the employer sat down to specifically discuss this issue.

The Tire Proz employee manual also contains the torque check policy. Relator admitted to knowing about this requirement and that it is the "most sacred safety policy" of the employer. At the hearing, relator could not remember if she performed a torque check on November 16, but stated that even if she did, she used a "torque stick" and did not have another employee check her work, which violates the torque check protocol. The employer testified that using a torque stick does not eliminate the need for a torque check with a torque wrench. Additionally, video footage from the shop showed that relator did not perform a torque check on November 16, which resulted in a customer leaving Tire Proz with a loose wheel.

However, relator argues that the evidence does not support the ULJ's conclusion that she is ineligible for unemployment benefits because the employer's testimony was not credible. "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Bangtson v. Allina Med. Grp.*, 766 N.W.2d 328, 332 (Minn.

App. 2009) (quotation omitted). At the hearing, relator and her employer were the only witnesses who testified about relator's employment with Tire Proz. The ULJ noted that the employer was credible because he provided earnest and detailed testimony and sounded genuine. *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 ULJ's decision to believe the employer's testimony. *See Peterson*, 753 N.W.2d at 774.

Lastly, relator argues that she is entitled to unemployment benefits because male employees violated the no-profanity and torque check policies, but were not discharged. However, "[t]he issue is not whether the employee[s] should have been terminated" but rather, now that the employee is terminated, whether there should be unemployment compensation. *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981). This court has decided that a violation of rules by other employees is not necessarily a defense to a finding of misconduct. *See Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986) (stating that a violation of employer's rules by other employees is not a valid defense to a claim of misconduct); *see also Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986) (stating that whether or not other employees violated the same policies and were disciplined is not relevant to the issue of whether relator's violation of employer's rules constituted misconduct), *review denied* (Minn. Aug. 20, 1986).

We conclude that the evidence supports the ULJ's determination that relator's actions demonstrate employment misconduct; the ULJ did not err in determining that relator is ineligible for unemployment benefits. *See* Minn. Stat. § 268.095, subd. 6(a); *Cunningham*, 809 N.W.2d at 235.

Affirmed.