STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1573

David Miller,
Relator,

vs.

South Central College - North Mankato,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 28, 2014
Affirmed
Bjorkman, Judge

Department of Employment and Economic Development
File No. 31130991-3

David Miller, Mankato, Minnesota (pro se relator)

South Central College – North Mankato, North Mankato, Minnesota (respondent)

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

Considered and decided by Hooten, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that he is ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Relator David E. Miller was employed by respondent South Central College—North Mankato from December 20, 2006, until April 15, 2013, when his employment was terminated. Miller applied to respondent Minnesota Department of Employment and Economic Development (DEED) for unemployment benefits. In his application, he stated that he was discharged for violating his employer's consensual relationship policy, that he was aware of the policy, and that he violated it. DEED determined that Miller is ineligible for benefits because he was discharged for employment misconduct. Miller appealed, and a ULJ conducted an evidentiary hearing.

Evidence adduced at the hearing shows that the college has a policy against certain types of romantic relationships. The policy provides that "[a]n employee . . . shall not enter into a consensual relationship with . . . an employee over whom he or she exercises direct or otherwise significant . . . supervisory . . . authority or influence." An employee who violates this policy is "subject to disciplinary or other corrective action."

Miller was the college's director of admissions. In that capacity, he directly supervised K.S. From January through March of 2013, Miller and K.S. were involved in a romantic relationship.[1] The relationship ended on or around March 13. Miller then told his supervisor about the relationship, and an investigation followed. One month later, Miller was discharged for violating the policy.

The ULJ determined that Miller was discharged for violating college policy and is ineligible for benefits because the violation constitutes employment misconduct. Miller requested reconsideration and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

This court may reverse the decision of a ULJ "if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are . . . unsupported by substantial evidence in view of the entire record as submitted." 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 ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Whether an employee committed employment misconduct is a mixed question of law and fact. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether an employee committed a particular act is an issue of fact, which we review for substantial evidence, but whether

[1] The ULJ's findings of fact state that the relationship began in January 2012. The record is clear that the correct year is 2013.

the act constitutes employment misconduct is a legal question, which we review de novo. *Id.*; *see also* Minn. Stat. § 268.105, subd. 7(d).

I. Substantial evidence supports the ULJ's finding that Miller was discharged for violating the college's relationship policy.

The college's chief human resources officer testified about the policy, stating that online training including the consensual-relationship provision was provided to all college employees in 2009 and 2011. Miller acknowledged participating in these trainings, but could not recall whether they covered consensual relationships. He also admitted to having a relationship with a subordinate in violation of the policy.

Miller argues that the evidence does not substantially support the ULJ's finding because the ULJ did not make express findings concerning the credibility of the college's witness and considered hearsay, including testimony regarding an investigative report that was not entered into evidence. We disagree. First, Miller did not refute the witness's testimony, which was consistent with Miller's own testimony in all key respects. The ULJ was not required to make credibility findings because the witness's testimony did not have a significant effect on the decision. *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."). Second, a ULJ may rely on hearsay where, as here, "it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2013). On this record, we conclude that

substantial evidence supports the ULJ's factual determination that the college discharged Miller for violating the policy.

II. Miller's conduct constitutes employment misconduct.

Employment 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." Minn. Stat. § 268.095, subd. 6(a) (2012). "As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Miller acknowledges that the college's policy is reasonable and that he violated it. But he argues that his actions are not misconduct because he did not intend to violate the policy. He cites *McGowan v. Exec. Express Transp. Enters., Inc.*, for the proposition that "[a]n employee's conduct must be 'deliberate, calculated, and intentional,'" to constitute employment misconduct. 420 N.W.2d 592, 596 (Minn. 1988) (applying common-law definition and noting that the relator's conduct "was a deliberate, calculated and intentional refusal to carry out a directive of her employer"). This reliance is misplaced; the applicable statute defines employment misconduct to include "negligent, or indifferent conduct." *See* Minn. Stat. § 268.095, subd. 6(a).

Miller also asserts that his conduct falls under three statutory exceptions to employment misconduct. First, he argues that his failure to timely report his relationship with K.S. was inadvertent. *See id.*, subd. 6(b)(2) (2012). He focuses this argument on

the fact he reviewed the policy at the beginning of his employment and does not recall any prohibition on consensual relationships. We disagree. Miller's acts of entering into a relationship with an employee under his direct supervision and failing to report that relationship reflect conscious decisions. The relationship violated the clear policy terms on which he received training in 2009 and 2011. His failure to immediately report the relationship to his supervisor was not inadvertent.

Second, Miller argues that his conduct was the same as "an average reasonable employee would have engaged in under the circumstances." *See id.*, subd. 6(b)(4) (2012). Again, we disagree. The relationship policy clearly prohibits Miller's relationship with K.S. and he acknowledges the policy is reasonable. An average reasonable employee would have immediately complied with the reporting requirement to avoid violating the policy, rather than waiting until the relationship had ended to report it to his or her supervisors. *See Schmidgall*, 644 N.W.2d at 804 ("As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct.").

Finally, Miller contends that his conduct was a "good faith error[] in judgment." *See* Minn. Stat. § 268.095, subd. 6(b)(6) (2012). We are not persuaded. This statutory exception only applies "if judgment was required." *Id.* The policy states that an employee "*shall not* enter into a consensual relationship with . . . an employee over whom he or she exercises direct or otherwise significant . . . supervisory . . . authority or influence." (Emphasis added.) This language leaves no room for any exercise of judgment on the part of the employee. *See* Minn. Stat. § 645.44, subd. 16 (2012)

("'Shall' is mandatory."). In sum, we conclude that Miller's violation of the college's relationship policy constitutes employment misconduct.

Affirmed.