**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-1575**

Robert W. Garves,
Relator,

vs.

VFW - Coon Rapids - Post 9625 of U.S.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 5, 2014**
**Affirmed**
**Rodenberg, Judge**
**Dissenting, Cleary, Chief Judge**

Department of Employment and Economic Development
File No. 31101978-3

Robert W. Garves, Andover, Minnesota (pro se relator)

VFW – Coon Rapids – Post 9625 of U.S., Coon Rapids, Minnesota (respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Johnson, Judge.

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

**RODENBERG**, Judge

Relator Robert W. Garves challenges the denial of his claim for unemployment benefits based on the unemployment law judge's (ULJ) determination that he committed employment misconduct. We affirm.

## FACTS

Relator began working as a bartender for respondent VFW of Coon Rapids in November 1981. He also performed some managerial duties as part of his employment, including cleaning the bar and balancing the tills at the end of the night. Relator signed an acknowledgement indicating his understanding of the policy that employees must be out of the building by 2:00 a.m. Monday through Saturday, and by 1:00 a.m. on Sundays. Relator had the same supervisor for most of the term of his employment, but that supervisor did not consistently enforce the policy. That supervisor retired in 2012 and was replaced by a new supervisor in February of 2013.

Relator developed the habit of staying at the VFW building later than the policy allowed. When the new supervisor took over in early 2013, she started enforcing the policy concerning when employees must leave the VFW building. She testified that the purpose behind the policy is to ensure that the building is secure and that employees are safe. The new supervisor testified that she verbally warned relator regarding the policy on the following dates: February 23, 2013; March 7, 2013; and April 5, 2013. Each time that she asked relator why he stayed in the building so late on a particular occasion, he responded that he could not remember. Despite these verbal warnings regarding the

policy, relator stayed later than allowed by the policy on the following dates in 2013: February 24; and March 3, 10, 16, and 17. He stayed in the building until approximately 4:00 a.m. a few nights, and until 5:47 a.m. on March 10. As a result of his repeated violations of the policy, relator was discharged on April 8, 2013. Relator applied for unemployment benefits, but his application was denied because he was found to have committed employment misconduct by violating the policy.

Relator appealed and testified before the ULJ that he would stay in the building to complete his duties of cleaning the bar and balancing the tills. He testified that he would clock out around 2:30 a.m. so that his employer would not have to pay him for overtime but then he would stay in the bar to complete his tasks. Some nights, balancing the tills would take longer because there were a lot of credit card transactions. He testified that there were also times he had to call someone in order to troubleshoot issues with the credit card machine. Another employee of the bar testified that balancing the tills at the end of a night generally takes between 20 and 45 minutes, even if there were issues with the credit card machine.

The ULJ found the employer's testimony more credible than relator's testimony because it "was more plausible." The ULJ found by a preponderance of the evidence:

> Although [relator] argued that it would frequently take him longer than 45 minutes to do the cleaning and the tills at closing because of the new credit card machine and being required to call the company that operates the machine, the [ULJ] does not find it credible that it took [relator] as long as five hours to perform these tasks because it is not plausible.[1]

[1] There is no evidence in the record that relator ever stayed five hours after he was allowed to be in the bar. On the night of March 9 and the morning of March 10, he

The ULJ determined that relator is not eligible for unemployment benefits because he committed employment misconduct. Relator requested reconsideration of his denial of benefits, arguing that the ULJ should have taken testimony from the old supervisor and another current employee of the bar. The ULJ affirmed the denial of benefits on reconsideration, reasoning that these witnesses would have provided redundant testimony because the ULJ already made a finding that the old supervisor did not consistently enforce the policy regarding when employees had to leave the VFW building. This certiorari appeal followed.

## D E C I S I O N

When reviewing a ULJ's eligibility determination, we may affirm, remand 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 affected by an error of law or are unsupported by substantial evidence. 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. *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.*

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stayed until 5:47 a.m. Because this was a Saturday night, he was supposed to have left by 2:00 a.m. Therefore, he stayed three hours and 47 minutes longer than he should have. But resolution of the issue is not dependent upon a precise computation of how long relator stayed at the VFW building beyond what the policy allowed.

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." *Id.*, subd. 6(a) (2012). "Whether an employee committed employment misconduct is a mixed question of fact and law." *Peterson*, 753 N.W.2d at 774. 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.*

Relator essentially argues that his duties often required him to stay in the building later than the policy allowed, and that the previous supervisor permitted relator to take the time he needed to finish his duties. He argues that "[t]here seems to have been a lot of misunderstanding and miscommunication with the new [supervisor], but in no way was it intentional, negligent, or indifferent." Respondent argues that relator consistently disobeyed clear policy, despite several verbal warnings from his new supervisor reminding him that he needed to adhere to the policy.

While relator's discharge may have been the result of miscommunication between relator and his new supervisor, "[a]s 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). "[A]n employee's decision to violate knowingly a reasonable policy of the employer is misconduct" and "[t]his is particularly true when there are multiple violations of the same rule involving warnings

or progressive discipline." *Id.* at 806 (citations omitted). Here, relator repeatedly stayed in the building later than he was allowed to be there. The new supervisor gave relator verbal warnings regarding this conduct three separate times, and reminded relator of the written policy clearly stating when he must leave the building each night. Because relator continued to knowingly violate this policy after the new supervisor warned him, he committed employment misconduct.

Relator also argues that he did not think his behavior would lead to his discharge because the warnings he was given were not in writing. But the law does not require the warnings to be in writing. *Cf. Brown v. Nat'l Am. Univ.*, 686 N.W.2d 329, 333 (Minn. App. 2004) ("We are aware of no law that requires that an employer have an express policy regarding prohibited behavior for employees." (quotation marks omitted)), *review denied* (Minn. Nov. 16, 2004). And the record establishes that relator signed an acknowledgement earlier in his employment indicating that he understood his employer's policy regarding when employees must be out of the building. Relator continued to violate the policy despite multiple warnings, and those warnings not having been in writing is of no legal consequence.

Relator also makes several factual assertions, such as: (1) relator did not apply for the supervisor position when it became available, (2) he agreed to "go out of his way" to help the new supervisor, (3) the new supervisor asked relator to do the tills "as he had done for the old manager," and (4) all of the other bartenders have been fired or have quit for fear of being fired since the new supervisor was hired. But because "appellate review is limited to the record," and because these assertions are unsupported by the record, we

decline to address them. *Thorp Loan & Thrift Co. v. Morse*, 451 N.W.2d 361, 362 (Minn. App. 1990), *review denied* (Minn. Apr. 13, 1990).

The record amply supports the ULJ's finding that relator consistently violated the employer's reasonable written policy, despite receiving several verbal warnings reminding him to follow the policy. The ULJ did not err in concluding that relator committed employment misconduct and is therefore ineligible for unemployment benefits.

**Affirmed.**

**CLEARY**, Chief Judge (dissenting)

I respectfully dissent from the majority's opinion. Although respondent may have been justified in discharging relator, I do not believe that relator's actions constitute employment misconduct under the statute such that relator is ineligible for unemployment benefits. As a result, the ULJ's decision denying relator unemployment benefits should be reversed.

In addition to defining what actions constitute employment misconduct, section 268.095 also enumerates categories of conduct that do not constitute employment misconduct. Minn. Stat. § 268.095, subd. 6(b) (2012). Employment misconduct does not include "simple unsatisfactory conduct." *Id.*, subd. 6(b)(3). Section 268.095 must be read in light of the well-established principle that the unemployment-benefits statute "is remedial in nature and must be applied in favor of awarding unemployment benefits." Minn. Stat. § 268.031, subd. 2 (2012). Additionally, "[i]n determining eligibility or ineligibility for benefits, any statutory provision that would preclude an applicant from receiving benefits must be narrowly construed." *Id.*

For over 31 years, relator worked for respondent in various capacities and was allowed to do so at his own pace. A policy requiring relator to leave the building at the end of his shift was not consistently enforced. In 2013, a new supervisor attempted to teach a long-term employee new tricks, and it did not take.

The majority reasons that by staying at work later than he was instructed, relator knowingly violated respondent's policy that employees leave work by a set time, and that such conduct amounts to disqualifying misconduct. *See Schmidgall v. FilmTec Corp.*,

644 N.W.2d 801, 804 (Minn. 2002) (stating that "[a]s a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct"). However, a previous supervisor had allowed relator to stay late in contravention of that policy. Furthermore, although the majority states that relator was given several warnings against further violations, he was apparently not told that failure to comply would result in discipline, much less discharge. No violations occurred after the last of these warnings, which suggests that the third warning was not a warning at all, having been given only three days before relator's employment was terminated.

In light of relator's extensive employment history with respondent and the remedial nature of the unemployment-benefits statute, relator's actions amount to no more than "simple unsatisfactory conduct," and do not rise to the level of employment misconduct contemplated under the statute. Therefore, I would reverse the ULJ's decision that relator committed employment misconduct and hold that relator is eligible for unemployment benefits.