STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1669

Alan Sargent,
Relator,

vs.

Manny Moe & Jack of California, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent

Filed May 19, 2014
Reversed
Randall, Judge[*]
Dissenting, Johnson, Judge

Department of Employment and Economic Development
File No. 31126762-3

Alan Sargent, North St. Paul, Minnesota (pro se relator)

Manny Moe & Jack of California, Inc., c/o Talx UCM Services, Inc., St. Louis, Missouri (respondent employer)

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

Considered and decided by Rodenberg, Presiding Judge; Johnson, Judge; and Randall, Judge.

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

RANDALL, Judge

Relator Alan Sargent challenges an unemployment law judge's (ULJ) decision on reconsideration that he was ineligible to receive unemployment benefits because he had been discharged for employment misconduct. Sargent argues that he did not engage in misconduct but instead committed an unintentional mistake. Sargent's conduct was inadvertent and did not have a significant adverse impact on his employer. He is entitled to unemployment benefits. We reverse.

FACTS

Sargent worked as a full-time service manager for respondent-employer Manny Moe & Jack of California d/b/a Pep Boys of Inver Grove Heights (Pep Boys) for nearly a year-and-a-half, until respondent terminated his employment on April 4, 2013. Pep Boys sells automotive retail parts and performs automotive services.

On February 20, 2013, after his truck's engine overheated, Sargent had Pep Boys tow his truck to the Pep Boys store that he worked at. A work order for the truck was generated by another employee when the truck was brought to the shop. A coolant evaluation was performed at the request of Sargent. A mechanic performed the evaluation and determined that the engine was blown. Sargent then had another employee ring him up and close out his work order.

The $19.99 coolant evaluation charge was not included on Sargent's bill. Sargent paid his bill with his credit card. He did not realize that the coolant evaluation was not

included with the bill because he did not look at the receipt after paying. When asked about the missing coolant evaluation, Sargent explained:

> And as far as that cooling removal, I don't know who removed that, I certainly did not, and I believe they could go through their computer system and find out who removed it or who was the last one in that system. But it wasn't me.

When asked by the ULJ if it was obvious to Sargent that he was not paying enough for the work order, Sargent replied:

> You know to be honest it really didn't. I'd been through so much going on that last week and everything was, excuse my language here but everything was screwed up. I was constantly being on [sic] by Chuck, he wanted me to get this done, get that done, my daughter was in a car accident, my wife had two major surgeries, I wasn't thinking. I mean bottom line I should have taken care of this.

As a result of the blown engine, Sargent determined that it was not worth fixing his vehicle and he would trade-in his truck for a new vehicle. Sargent left the truck in one of the unoccupied Pep Boys service bays for the next week while he waited for the truck to be towed to the automotive dealership.

On February 28, 2013, the area director visited the store and reviewed open service orders for the vehicles located in the Pep Boys service bays. It was then realized that there was no service order for Sargent's truck, which was still located inside one of the open service bays. The area director contacted the asset protection manager who initiated an investigation into the missing work order.

As a result of the investigation, it was discovered that a mechanic performed the coolant evaluation on Sargent's vehicle on February 20th; a mechanic disconnected the

emergency-light harness on Sargent's vehicle on February 21st; and a mechanic removed support brackets for a snowplow and a trailer hitch from Sargent's truck on February 23rd. The removal of the truck's brackets and hitch was in preparation for it to be towed to the dealership. A work order was not initiated for this labor nor was Sargent charged for the labor costs.

When asked about the additional work performed on his truck, Sargent stated that he did not request any additional work to be performed beside the coolant evaluation. Sargent testified that he never asked Pep Boys' mechanics to remove the snowplow brackets and trailer hitch. He claimed that he only asked for an estimate as to how much it would cost to remove the hardware. Sargent further testified that he never authorized the actual work, and that most of the work was performed on his day off. It was the asset-protection manager's understanding that Sargent was terminated for violating company policy by having a vehicle in the shop with no work order and having work performed that was not paid for.

Sargent applied for unemployment insurance benefits. The Minnesota Department of Employment and Economic Development (Department) initially determined that he was eligible for unemployment benefits. Unemployment benefits were paid in the amount of $2,790. Pep Boys appealed the determination, and a ULJ conducted an evidentiary hearing. The ULJ found Sargent ineligible for unemployment benefits. Sargent requested a reconsideration of the ULJ's determination, and the ULJ affirmed, finding that his actions demonstrated a substantial lack of concern for the employment.

The ULJ also determined that additional evidence was not necessary nor would it change the outcome of the case. This certiorari appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand it for further proceedings, reverse, or modify it if the substantial rights of the relator have been prejudiced because the findings, conclusion, or decision is "affected by [an] error of law." Minn. Stat. § 268.105, subd. 7(d)(4) (2012). There is no burden of proof in unemployment-insurance proceedings. Minn. Stat. § 268.069, subd. 2 (2012). The purpose of the unemployment-insurance program is to assist those who are unemployed through no fault of their own. Minn. Stat. § 268.03, subd. 1 (2012). The chapter is remedial in nature and must be applied in favor of awarding benefits, and any provision precluding receipt of benefits must be narrowly construed. Minn. Stat. § 268.031, subd. 2 (2012).

Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). While we defer to the ULJ's findings of fact if reasonably supported by the record, whether an employee's acts constitute misconduct is a question of law on which we are free to exercise our independent judgment. *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989).

Sargent makes multiple arguments disputing the reasons for his discharge: there was only a single incident; the incident was a mistake; and his supervisor had underlying motives for firing him. But the question before us is not whether Sargent should have

been discharged. Rather, the question is whether he should receive unemployment benefits.

An employee discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). To fit under the statutory definition of employment misconduct, an employee must (1) engage in "intentional, negligent, or indifferent conduct" (2) that is a "serious violation" of (3) the employer's reasonable standards of behavior. Minn. Stat. § 268.095, subd. 6(a) (2012). This is the exclusive definition of misconduct. *Id.* subd. 6(e). What constitutes misconduct varies depending on the job in question. *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981). Inadvertent behavior, simple unsatisfactory conduct, or conduct a reasonable employee would engage in under the circumstances is not misconduct. Minn. Stat. § 268.095, subd. 6(b)(2)-(4).

Here, Sargent's conduct satisfies the third element and arguably the second element of the employment-misconduct definition. Sargent was a service manager at an auto-repair shop. As to be expected, when his vehicle broke down, he had it towed and worked on at the shop he managed. The truck stayed in the shop for the following week until it could be towed away. During this time, minor work was performed on Sargent's truck without an active work order.

Additionally, testimony from Sargent establishes that his conduct was inadvertent and not intentional. Although the applicable statues do not define "inadvertence," Black's Law Dictionary defines "inadvertence" as "[a]n accidental oversight; a result of carelessness." *Black's Law Dictionary* 827 (9th ed. 2009). After reviewing the record on

the whole, we conclude that the two incidents that served as the basis for Sargent's termination are not serious enough to rise to the requisite "intentional, negligent, or indifferent conduct" required to disqualify him for unemployment benefits. Rather, considering the job in question, Sargent's conduct amounted to an unintentional oversight.

DEED argues that because the ULJ made the requisite credibility assessment, the ULJ's findings that Sargent deleted the coolant evaluation from the work order and directed the mechanics to remove the hardware from his truck, must be upheld. We are troubled by this assertion. Although we do defer to the ULJ's factual determinations, *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006), we will not rubber-stamp all factual findings made by the ULJ simply because it implicates a credibility determination. *See* Minn. Stat. § 268.105, subd. 1(c) (2012) (requiring the ULJ to provide reasons for crediting or discrediting testimony). If this were the case, then an appeal to this court would be frivolous. After reviewing the record, the facts do not support the ULJ's finding that Sargent committed willful and intentional conduct. We reverse the ULJ's determination that Sargent is not eligible for unemployment benefits.

We observe in closing that Sargent may well owe $132.29 to Pep Boys (the cost of the coolant evaluation and the monetary value of the labor performed on his truck). That, like the issue of whether Pep Boys could lawfully terminate Sargent, is not at issue in this unemployment appeal.

Reversed.

JOHNSON, Judge (dissenting)

I respectfully dissent from the opinion of the court. The findings of the unemployment law judge (ULJ) are amply supported by the evidence, and the relator's conduct is well within the statutory definition of employment misconduct. A straightforward application of this court's standard of review should result in affirmance.

A.

The ULJ found that Sargent violated Pep Boys' company policies in two ways. First, on February 20, 2013, Sargent requested and received a diagnostic service on his truck (specifically, a coolant evaluation) but did not pay for that service. The ULJ found that Sargent wanted the coolant evaluation and relied on it but "removed the coolant evaluation from the work order and paid only for the tow." The ULJ also found, in the alternative, that Sargent was, at the least, negligent in failing to pay for the coolant evaluation. These findings are supported by the testimony of two company representatives, who testified that the company's records show that the coolant evaluation initially was included in the work order but later was removed, and that Sargent was the person who removed it when he closed out the work order and paid for the other services.

Second, between February 20 and February 28, 2013, Sargent allowed his truck to continuously occupy a bay of the service shop without an open work order, which allowed him to receive certain services during that time period (specifically, the removal of accessories such as roof-top lights, a snowplow, and a hitch) without making any payment for them. The ULJ found that Sargent "kept his vehicle in a bay all week," "had the mechanics do other work on it," "did not have any work order for it while it was in

the bay all week," and "did not pay . . . for the work [the mechanics] did." These findings also are supported by the testimony of the company representatives. They testified that Sargent's supervisor, the area director, visited the store without prior notice on February 28, saw Sargent's truck in a bay, checked the open work orders, and could not find a work order for Sargent's truck because none had been opened. The company's asset-protection manager testified that he reviewed video-recordings of the service area and saw that Sargent's truck was in the same bay continuously for a week and that other service employees worked on the truck on several occasions during the week. He also interviewed other service employees, one of whom provided a written statement that Sargent had asked him to perform work on the truck after February 20. The asset-protection manager further testified that the video-recording shows that, on one occasion, Sargent and another employee simultaneously cleaned out the inside of Sargent's truck.

Sargent told a different story to the ULJ, but she did not believe him. Sargent admitted violating company policies but claimed that he did not do so intentionally. For example, he testified that he did not know that he had not paid for the coolant evaluation because he never looked at the amount of the work order or invoice before or after making payment and also did not know how the coolant evaluation was removed from the work order. But the ULJ's written decision states that the company representatives' testimony is "more credible than Sargent's testimony, because it is a more believable and likely explanation of events." This statement of reasons is adequate. *See* Minn. Stat. § 268.105, subd. 1(c) (2012); *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007). "Credibility determinations are the exclusive province of the

ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). The majority opinion seems to reject this well-established standard of review, without citing contrary authority or explaining how appellate judges are in a better position than the ULJ from which to judge the credibility of the witnesses who testified to the ULJ. *See Even v. Kraft, Inc.*, 445 N.W.2d 831, 834-35 (Minn. 1989) (reversing opinion of workers' compensation court of appeals because it "failed to give due weight to the compensation judge's opportunity to determine the credibility of the witnesses, substituted its own view on that issue, and also failed to accept inferences the compensation judge had reasonably drawn from the evidence").

I would uphold the ULJ's findings of fact because they are supported by evidence in the record. Given those facts, Sargent's conduct plainly is within the statutory definition of employment misconduct, which includes "intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." 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). In determining whether an employee committed employment misconduct, the employee's conduct "must be considered in the context of [his] job responsibilities." *Frank v. Heartland Auto. Servs., Inc.*, 743 N.W.2d 626, 630 (Minn. App. 2008) (citing *Skarhus*, 721 N.W.2d at 344). Given the ULJ's findings and the agency record, the reasonableness of the company policies at issue, and Sargent's position as manager of the service shop, I

have no difficulty concluding that Sargent's conduct is employment misconduct, regardless whether it was intentional or negligent. *See* Minn. Stat. § 268.095, subd. 6(a).

B.

The majority opinion reasons that Sargent's conduct is not misconduct because it falls within an exception for "inadvertence." *See id.*, subd. 6(b)(2). This conclusion is based on the majority's alternative interpretation of the factual record, which I cannot accept for the reasons stated above. Furthermore, the inadvertence issue is not properly before this court because it was not presented to or considered by the ULJ and is being considered for the first time on appeal. *See Peterson v. Northeast Bank*, 805 N.W.2d 878, 883 (Minn. App. 2011) (declining to consider new issue in unemployment compensation appeal).

In any event, this court's caselaw indicates that the inadvertence exception applies if an employee forgets to perform a required task on one brief occasion. *See Dourney v. CMAK Corp.*, 796 N.W.2d 537, 540-41 (Minn. App. 2011) (affirming ULJ's finding of inadvertence by bar waitress who forgot once to check identification of customer when serving alcoholic beverages). Sargent cannot benefit from the inadvertence exception because his conduct, according to both the ULJ's findings and his own testimony, did not consist of a single, brief moment of forgetfulness. Sargent testified that he not only was aware of the company's policies when he paid the work order on February 20 but also that he purposefully waved his payment in front of the video-camera "so they can see that I am paying for it." It seems unlikely that Sargent was so conscious of his obligation to pay for services received but yet "inadvertently" unaware that he was paying for only

some of the services that he received. Similarly, Sargent testified that he noticed on February 23 that certain accessories had been removed from his truck, even though, according to his testimony, he had not asked for any services to be performed but merely had asked for an estimate of the cost of additional services. That testimony begs the question why Sargent did not promptly insist that a work order be prepared to accurately reflect the work performed and the amount due. In fact, the asset-protection manager testified that, during his internal investigation, Sargent admitted that he should have had a work order opened no later than when he saw that some work had been performed on the truck. Thus, Sargent's own testimony undermines the majority's conclusion that his conduct was inadvertent.

The opinion of the court also reasons that Sargent's conduct "did not have a significant adverse impact on his employer," *supra* at 2, and is "not serious enough to rise to the requisite 'intentional, negligent, or indifferent conduct'" standard, *supra* at 7. Our caselaw says otherwise. In *Skarhus*, an employee of a restaurant undercharged herself for a food order by four dollars. 721 N.W.2d at 342-43. We rejected the employee's argument that her conduct did not have a significant adverse impact on her employer, and we affirmed the ULJ's finding of misconduct, because her responsibilities included handling money but her employer "could no longer entrust her with those responsibilities." *Id.* at 344. In *Frank*, the manager of an automotive service shop fraudulently charged a customer for services that were not performed. 743 N.W.2d at 628-29. We applied *Skarhus* and affirmed the ULJ's determination of misconduct, reasoning, "Regardless of the amount or frequency of the employee's fiduciary failing,

this sort of integrity-measuring conduct will always constitute an act that has a significant adverse impact on the employer, who can no longer reasonably rely on the employee to manage the business's financial transactions." *Id.* at 631.

The same principle applies to this case. A company representative testified that Pep Boys terminated Sargent because it no longer could trust him. The representative testified that "we're really not talking about a huge amount of money" but that Sargent "should be the one who's setting the example" and that his conduct raised an issue of "integrity." The company representative also testified emphatically that Sargent's conduct was not only noncompliant but, in the context of the company's operations, remarkably so:

> [A]ctually when I found out about how this happened, I was befuddled. I thought, "Oh my god, how could Al do this, how could he do this?" It's such a, a clear-cut – I mean, it's just like, wow – it's like, "dude, are you trying to get yourself fired?" It was just unreal. I just couldn't – it was almost unfathomable to me how this even happened. And I'm always a glass-half-full kind of guy.

The company policies at issue in this case are not empty formalities. They help ensure the financial integrity of a business. Such policies may not exist in a small automotive service shop in which the owner is present and able to personally monitor the use of company resources. But a large company must rely on different means to protect itself from loss and is permitted to adopt formal policies to achieve that goal.

In sum, the evidence in the agency record supports the ULJ's findings of fact, and those findings compel the conclusion that Sargent engaged in employment misconduct.

Thus, I would affirm the ULJ's determination that Sargent is ineligible for unemployment benefits.