STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1744

Mark McAllister,
Relator,

vs.

Veolia Es Midwest LLC - Veolia Environmental Services,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 21, 2014
Affirmed
Harten, Judge[*]

Department of Employment and Economic Development
File No. 30716771-5

Mark McAllister, Rochester, Minnesota (pro se relator)

Veolia Es Midwest LLC - Veolia Environmental Services, St. Louis, Missouri (respondent)

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

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Harten, Judge.

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[*] 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

HARTEN, Judge

Relator challenges the determination of the unemployment-law judge (ULJ) that relator was discharged for misconduct and not discharged in retaliation for filing an age-discrimination complaint. Because relator committed and was discharged for misconduct, and his employer was unaware of his age-discrimination complaint at the time of his discharge, we affirm.

FACTS

In January 2011, relator Mark McAllister began to work for respondent Veolia Environmental Services Midwest, LLC (Veolia), a trash-removal company. Veolia provided its employees with a manual that indicated, in relevant part:

> The use of seat belts is required when operating a vehicle or riding in a vehicle as a passenger, while the vehicle is in motion.
> . . . .
> All employees are prohibited from the unauthorized use of cell phones in Company vehicles. You should never be distracted or impaired while driving, operating equipment or working around equipment. Smoking, eating, drinking, loud music or using devices requiring ear phones are prohibited while operating Company vehicles or equipment.

Relator also received and signed that he had read, understood, and agreed to abide by policies including the "**Driver Operator Distraction Policy**. Prohibitions: **All employees** are prohibited from the unauthorized use of cell phones and communication devices while operating **Company vehicles/equipment**. Smoking, eating, drinking, loud music or using devices requiring earphones are also prohibited."

Relator's job was driving a truck to deliver trash receptacles to new customers. In March 2012, the camera in relator's truck filmed him eating while driving, in violation of the policy. He received, signed, and dated a "Progressive Discipline Form" that had the "Reckless Driving" box checked; in the space labeled "Corrective action to be taken by the employee," the form indicated, "Employee will immediately refrain from eating while operating a company vehicle in accordance with the Veolia Distracted Driving policy. Continuation of this practice will result in suspension."

In May 2012, the camera in relator's truck cab filmed him not wearing a seatbelt and holding a cell phone and a cigarette while driving, all in violation of the policy. He received, signed, and dated a "2nd and final" Progressive Discipline Form that had three boxes checked: "Violation of '10 Primary Safety Rules'"; "Failure to wear personal safety equipment"; and "Violation of Distraction Policy." The space in the form labeled "Corrective action to be taken by the employee," mandated that:

> Driver will immediately refrain from violating Veolia Distraction policy while driving and will wear his seat belt in accordance with the Veolia Seat Belt policy. Driver will receive a two day suspension and copies of the distraction and seat belt policy as well as the 10 Primary [S]afety Rules. Failure to comply will result in termination.

On 4 January 2013, the camera in relator's truck filmed him failing to stop at a stop sign and holding and looking at his route sheets while making a turn. On 7 January 2013, Veolia terminated relator's employment because of his three violations of company policies.

The next day, 8 January 2013, relator went to the office of the Equal Employment Opportunity Commission (EEOC) to add a charge of retaliation to the age-discrimination complaint he had filed by mail at the office on 24 December 2013. He found that his complaint had not been opened.

Relator applied for unemployment benefits. A representative of respondent Minnesota Department of Employment and Economic Development (DEED) determined that relator was discharged for reasons other than employment misconduct and was eligible for benefits. Veolia appealed this determination.

In March 2013, a telephone hearing before a ULJ was held on the issue of whether relator was discharged for employment misconduct. Neither Veolia nor relator produced as evidence the videotape generated by the camera in relator's truck. The ULJ found that relator committed misconduct in May 2012 by not wearing a seatbelt and holding a cell phone and a cigarette while driving and in January 2013 by not stopping at a stop sign. The ULJ decided that relator was discharged for employment misconduct and had been overpaid $2,826 in DEED benefits.

Upon relator's request for reconsideration, the ULJ set aside these findings and decisions and ordered another telephone hearing at which Veolia would present the film from relator's truck of the January 2013 incident. In June 2013, a second hearing was held. After viewing the film of the January 2013 incident at the second hearing, the ULJ found that:

> [Relator's arguments] really support [Veolia's] contention that the camera showed that [relator] was many yards ahead of the stop sign, had not stopped, and drove through the

> intersection without stopping. He argued that he stopped before the stop sign and then accelerated to get through the intersection, with no oncoming traffic from either direction. The video does not show this. [Relator] was not believable that he did come to a full stop. In any event, [relator] was to stop at the stop sign, not well ahead of it. He stated that he was in complete control of the truck when he came to a complete stop 20 yards before the stop sign. [He] was asked why at that point he could not slowly ease the vehicle up to the stop sign and stop again, but could not provide an adequate explanation.
>
> [Relator] claimed that he grabbed the route sheets because they were falling. This was not believable. The video does not show how the route sheets came into his hands, but it does show them plainly being held in both of [relator's hands] and he glances down at them twice, appearing to read them. This undercuts his contention that he simply caught them while [they were] falling. The video shows he continued to hold or shuffle them from one hand to the next as he makes the turn first with his legs, then with one hand, and finally has two hands on the wheel at the end of the [video] clip. For these reasons and facts, [relator's] version was not believable regarding the January [2013] incident.

The ULJ's second decision found that: (1) relator committed misconduct in March 2012 when he was filmed eating while driving, for which he was issued a written warning; (2) relator committed misconduct in May 2012 when he was filmed holding a cell phone and a cigarette while driving, for which he received a second and final written warning and a suspension; (3) relator committed misconduct in January 2013 when he failed to stop at a stop sign and looked at route sheets while driving; (4) relator was discharged for these three instances of employment misconduct; (5) relator was not discharged for raising an age-discrimination complaint; and (6) relator had been overpaid $2,826.

Relator requested reconsideration; the ULJ affirmed the decision. By writ of certiorari, relator challenges the decision, arguing that he did not commit misconduct and was discharged in retaliation for filing an age-discrimination complaint.

D E C I S I O N

1. Misconduct

The purpose of chapter 268 is to assist those who are unemployed through no fault of their own; however, the chapter is remedial, and any provision precluding receipt of benefits must be narrowly construed. Minn. Stat. §§ 268.03, subd. 1, .031, subd. 2 (2012). Whether an employee committed employment misconduct is a mixed question of law and fact: whether the employee committed a particular act is a fact question, but whether that act amounts to employment misconduct is a question of law. *Stagg v. Vintage Place*, 796 N.W.2d 312, 315 (Minn. 2011). Employment misconduct is "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." Minn. Stat. § 268.095, subd. 6(a) (2012).

Relator argues that his March 2012 incident was not misconduct because, "if he had been truly distracted, [the incident] would have resulted in an accident." A Veolia representative who had viewed the incident on videotape testified, "[Relator] appeared to be distracted and was almost involved in an accident where he failed to be aware of his surroundings," and "it looked like he . . . was working on getting his lunch rather than paying attention to his driving." The fact that relator avoided an accident did not prevent his violation of the policy from being misconduct.

Relator argues that the May 2013 incident was not misconduct because having the cell phone in his hand "was a good faith error in judgment [because he was] . . . attempting to answer Veolia's phone call . . . and the cigarette [was] simple unsatisfactory conduct." The Veolia representative testified that the film showed "[Relator] . . . not wearing his seatbelt and driving with a cellphone in his hand and smoking a cigarette." Relator testified that he was not wearing his seatbelt and was smoking a cigarette in this incident; both were violations of Veolia's policies and "of the standards of behavior [Veolia] ha[d] the right to reasonably expect of [relator]" and therefore employment misconduct.[1] *See* Minn. Stat. § 268.095, subd. 6(a).

Relator argues that, in the January 2013 incident, he came to a complete stop well before he arrived at the intersection. But the Veolia representative testified that the videotape "showed [relator] going, failing to stop at a stop sign and while he was reading his route sheet." The ULJ asked if "[t]he route sheet was in his hand" and the representative answered, "Yes"; the representative also said that relator "came up to the T [intersection], he was making a left hand turn and . . . [it] did not appear that he ever completely stopped at the stop sign." "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's Inc*., 721

[1]Veolia's "Driver Distraction Policy" also provided that Veolia management "will . . . ensure compliance though education and observation." Relator argues that Veolia did not follow this policy because it did not attempt to educate him after each incident, but he does not identify anything Veolia could have done to further clarify its policies prohibiting eating, smoking, or using a cell phone while driving and requiring drivers to wear seatbelts and comply with traffic laws, nor does he suggest that he was not fully aware of those policies.

N.W.2d 340, 345 (Minn. App. 2006). After the second hearing, the ULJ found that the film supported the Veolia representative's account rather than relator's account.

Relator relies on *Nelson v. Hartz Truckline*, 401 N.W.2d 436, 439 (Minn. App. 1987) (employee driver who received four speeding tickets in eight months committed employment misconduct), *review denied* (Minn. 29 Apr. 1987), but his reliance is misplaced. The employee in *Hartz*, like relator, received two warnings from the employer and had been driving the employer's vehicle on the employer's time when he received the ticket. *Id.* at 437, 439. *Hartz* does not support relator's view that he did not commit employment misconduct.

Relator also relies on two cases that did not find employment misconduct, *Swanson v. Columbia Transit Corp.*, 311 Minn. 538, 248 N.W.2d 732 (1976), and *Eddins v. Chippewa Springs Corp.*, 388 N.W.2d 434 (Minn. App. 1896), but these cases are readily distinguishable. *Swanson* concluded that a school bus driver's three accidents in 47 days were not misconduct because they "only represent incidents of inadvertence or negligence." 311 Minn. at 539, 248 N.W.2d at 733. Relator does not argue that his acts—eating, smoking, using a cell phone, reading route sheets, failing to stop at a stop sign—were inadvertence or negligence; they were all intentional. *Eddins* concluded that a driver who received six traffic tickets for minor offenses in two and a half years had not committed employment misconduct because only one ticket was related to his employment; the other five tickets occurred when he was driving his own vehicle on his own time, and he "was otherwise considered a good employee." 388 N.W.2d at 436.

Here, all the acts that led to relator's discharge occurred in Veolia's vehicle and on Veolia's time.

The ULJ lawfully concluded that relator committed and was discharged for three instances of employment misconduct.

2. Age-Discrimination Complaint

Relator argues his discharge was retaliatory because he complained to Veolia that younger employees were being paid more and because he filed a complaint with the EEOC. But relator's EEOC complaint had not even been opened, nor did Veolia know it existed, at the time Veolia decided to terminate relator's employment. When relator filed his complaint, he had two violations and knew that a third would result in his discharge; his third violation, not retaliation for a complaint that Veolia was unaware of, was Veolia's reason for the discharge.

Affirmed.