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Minn. Stat. § 480A.08, subd. 3 (2014).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A14-0659**

DuWayne H. Fries,  
Relator,

vs.

Ozark Automotive Distributors, Inc.,  
Respondent,

Department of Employment  
and Economic Development,  
Respondent.

**Filed January 20, 2015  
Affirmed; motion denied  
Hudson, Judge**

Department of Employment  
and Economic Development  
File No. 31852309-3

DuWayne H. Fries, St. Paul, Minnesota (pro se relator)

Ozark Automotive Distributors, Inc., Springfield, Missouri (respondent employer)

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

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Larkin,  
Judge.

## **UNPUBLISHED OPINION**

**HUDSON**, Judge

Relator challenges the unemployment law judge's (ULJ) decision that he is ineligible for unemployment benefits because he was discharged for employment misconduct. He also moves to correct the record to include the corporate owner of his employer as a party to this matter. Because substantial evidence supports the ULJ's decision that relator was discharged for employment misconduct, we affirm. Because substantial evidence demonstrates that relator was employed by respondent Ozark Automotive Distributor's, Inc. (Ozark), we deny the motion to correct the record.

### **FACTS**

Relator DuWayne Fries was employed full-time as a maintenance specialist by Ozark until he was dismissed from employment on November 4, 2013. Following dismissal, relator applied for unemployment benefits, and the Minnesota Department of Employment and Economic Development (DEED) issued a determination of ineligibility. Relator sought a hearing before a ULJ.

At the hearing, relator's supervisors testified that relator was dismissed from employment because he violated Ozark's safety regulations on several occasions. The first violation occurred in July 2011, when relator operated a pallet jack incorrectly and nearly collided with a forklift because he was not paying attention. He received a warning for this incident. The second violation occurred a few months later, when relator almost collided with a co-worker while operating a manual jack. This near collision

again resulted from relator's failure to be aware of his surroundings. Relator received another warning for this violation. The third violation occurred in November 2012, when relator was observed walking under a raised load on a forklift. For this violation, relator received a final warning; he was informed that any additional safety violations would result in the termination of his employment.

Relator was dismissed from employment approximately one year later, after he committed two additional safety violations on the same day. The first violation occurred when relator walked out of an aisle without checking to see if anyone was approaching; the second violation occurred when relator operated a pallet jack incorrectly. In both instances, relator's conduct caused him to nearly collide with a forklift. Relator's supervisors testified that relator generally did not demonstrate the motivation to conduct himself according to Ozark's safety regulations and that his actions caused danger to himself and others. The supervisors also indicated that relator had been provided a training manual, which included rules and regulations governing employee conduct for Ozark. The manual required employees to operate company equipment in a safe manner and to "abide by company safety rules, policies, and procedures."

Relator testified, however, that the incidents that led to his termination were the fault of other employees. He indicated that he was a conscientious employee and stated that he always used good judgment when working. The ULJ discredited relator's testimony, finding that it was "self-serving," and credited the testimony of the supervisors as "a more logical and realistic chain of events." The ULJ determined that relator was ineligible to receive unemployment benefits because he was discharged for employment

misconduct. The ULJ affirmed his decision on reconsideration. This certiorari appeal follows.

## DECISION

### I

We review a ULJ's decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusions, or decision are unsupported by substantial evidence in view of the record as a whole or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2014). Substantial evidence is “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2014). “Employment misconduct means 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) (2014). Employment misconduct does not include inefficiency or inadvertence, simple unsatisfactory conduct, poor performance because of inability or incapacity, or good-faith errors in judgment. Minn. Stat. § 268.095, subd. 6(b) (2014).

Whether an employee committed misconduct is a mixed question of fact and law. *Stagg v. Vintage Place*, 796 N.W.2d 312, 315 (Minn. 2011). Whether the employee committed a specific act is a fact question, which we review in the light most favorable to the decision and affirm if supported by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether the employee's actions rise to the level of employment misconduct is a question of law, which we review de novo. *Stagg*, 796 N.W.2d at 315.

Relator argues that he is eligible for unemployment benefits because several of the incidents that led to his dismissal were the fault of others and that his conduct did not rise to the level of misconduct.<sup>1</sup> Relator admitted that he suffered from the occasional lapse in judgment, but testified that he was a diligent and competent employee who performed his job duties consistent with the standards expected by his employer.

But relator's supervisors testified that relator exhibited a history of unsafe behavior, that relator was informed that he needed to exercise greater caution if he wished to maintain employment at Ozark, and that relator was provided several opportunities to improve his performance before he was dismissed from employment. The supervisors admitted that other employees were partially responsible for the incidents in which relator was disciplined, but testified that relator bore equal responsibility for those incidents. The ULJ credited the supervisors' testimony and, upon

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<sup>1</sup> Relator also asserts that he was dismissed from employment because of age discrimination. But he does not cite to any evidence which supports this allegation. His employers testified that relator was discharged for numerous safety violations, which are documented by reports admitted into evidence during the hearing.

review of the record, we find no error in the ULJ's fact determinations because they are supported by substantial evidence.

We also find no error in the ULJ's conclusion that relator was dismissed for employment misconduct. Employers have the right to expect employees not to engage in conduct seriously endangering the safety of others. *See Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774–75 (Minn. App. 2008) (concluding that violation of an airline's no-alcohol policy while pilots are on flight reserve is employment misconduct because employers have a right to reasonably expect that employees will refrain from endangering others), *review denied* (Minn. Oct. 1, 2008). It is also expected that employees will abide by reasonable policies and requests. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Here, the record establishes that, on multiple occasions, relator did not act with the caution necessary to maintain a safe workplace and failed to obey Ozark's rules and regulations regarding the proper operation of heavy machinery. Relator's supervisors provided him training and several opportunities for him to improve his performance before dismissing him from employment because he committed two safety violations on the same day. Relator's conduct rises to the level that demonstrates a serious violation of the standards of behavior reasonably expected by employers. We therefore conclude that the ULJ did not err in determining that relator was dismissed for employment misconduct.

## II

Relator argues, by motion filed with this court, that the record should be amended to include O'Reilly Auto Parts, Inc., (O'Reilly) the corporate owner of Ozark, as a respondent in this matter.<sup>2</sup> He also asserts, based on his claim that the wrong employer was included as a party to this matter, that the case should be dismissed, declared a mistrial, vacated, or remanded. “Whether an employment relationship exists is a mixed question of law and fact.” *Builders Commonwealth, Inc. v. Dep’t of Emp’t & Econ. Dev.*, 814 N.W.2d 49, 56 (Minn. App. 2012). An employer is “any person that has had one or more employees during the current or the prior calendar year including any person that has elected, under section 268.042, to be subject to the Minnesota Unemployment Insurance Law and a joint venture composed of one or more employers.” Minn. Stat. § 268.035, subd. 14 (2014); *see also id.*, subd. 21(1) (2014) (defining person as “an individual or any type of organization or entity”).

The record reflects that relator worked for Ozark and that Ozark was a subsidiary of O'Reilly. Relator did not object when the ULJ referred to his employer as Ozark or otherwise testify that he was employed directly by O'Reilly. Because there is sufficient evidence to support the ULJ's finding that relator was employed by Ozark, we deny relator's motion to correct the case title and for other forms of relief.

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<sup>2</sup> Relator also alleges that he has not received service from his employer regarding this appeal and asserts that there may be a conflict of interest because the attorney for DEED also represents the employers. But DEED is the primary responding party because unemployment benefits are paid from state funds; no claim is made against the employer. Minn. Stat. § 268.069, subd. 2 (2014). Here, the employer did not participate in this certiorari review, and counsel for DEED made no claim that he was also representing the employer's interest.

**Affirmed; motion denied.**