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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1843**

Barton Winter,
Relator,

vs.

Manpower, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 17, 2017
Affirmed
Bjorkman, Judge**

Department of Employment and Economic Development
File No. 3476615-3

Barton Winter, St. Paul, Minnesota (pro se relator)

Manpower, Inc., c/o TALX UCM Services, Inc., St. Louis, Missouri (respondent employer)

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

Considered and decided by Cleary, Chief Judge; Bjorkman, Judge; and Toussaint,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

BJORKMAN, Judge

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

FACTS

Relator Barton Winter began working for respondent Manpower, Inc., a staffing service, in May 2016. From June 6-15, Manpower assigned Winter to work on a project for 3M performing light assembly work. Winter's team leader was Amos Wilson, a 3M employee. On June 14, Wilson asked Winter to count out and bring 40 boxes to the assembly area. Winter instead took an entire bundle of boxes. Wilson later noticed the extra boxes and asked Winter why he had not counted out 40 as instructed. Winter responded that he thought it was more efficient to bring the entire bundle. Winter felt Wilson was harassing him by focusing on "a minor issue" and did not believe it was necessary for Wilson to demand "absolute compliance" with instructions. And Winter expressed his dissatisfaction, telling Wilson, "This is 3M, not Africa." The following day, Manpower discharged Winter, based on the 3M supervisor's report that Winter was difficult to work with and the fact that "the comment about Africa said to your supervisor is not tolerable."

Respondent Minnesota Department of Employment and Economic Development (DEED) denied Winter's application for unemployment benefits, determining that he was discharged for employment misconduct. Winter appealed the ineligibility determination.

After an evidentiary hearing, the ULJ concluded that Winter was discharged for employment misconduct.¹ The ULJ found that Winter was discharged because he violated Manpower’s reasonable expectation that employees will not make derogatory remarks about a coworker’s national origin group. Winter sought reconsideration and the ULJ affirmed his decision. Winter appeals by writ of certiorari.

D E C I S I O N

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016). “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) (2016). 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 the act constitutes employment misconduct is a legal question, which we review de novo. *Id.* We 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)(5) (2016).

¹ Manpower did not participate in the evidentiary hearing.

“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). Manpower has an anti-discrimination policy that prohibits “any offensive or unwelcome verbal contact regarding a person’s gender, race, [or] national origin.” Winter signed a form acknowledging he read and understood the policy.² Winter concedes telling his 3M supervisor, “This is 3M, not Africa.” But he argues the statement does not constitute employment misconduct because there is no evidence that it was perceived or intended to be discriminatory. And he contends his statement should not be considered misconduct because it was a single incident. We address each argument in turn.

First, the record belies Winter’s assertion that there is no evidence that Manpower interpreted the comment as derogatory. The e-mail Manpower sent telling Winter why he was discharged stated “the comment about Africa said to your supervisor is not tolerable.” In response to Winter’s application for benefits, Manpower submitted a form to DEED indicating Winter was discharged for “using discriminatory language towards his supervisor.” Manpower referenced its anti-discrimination policy, and indicated that Winter was aware of and violated the policy.

Moreover, the record supports the ULJ’s finding that Winter made his comment with discriminatory intent.³ During the evidentiary hearing, the ULJ asked Winter if he made the statement because he believed Wilson’s work demands related to his African

² 3M also has an anti-discrimination policy, which similarly prohibits such conduct. Winter submitted a copy of the 3M policy as an exhibit.

³ We assume, without deciding, that violation of the policy requires discriminatory intent.

origin. Winter testified that he assumed Wilson was from Africa, specifically Liberia. He went on to state that he worked with Liberians in the past and in his mind “Africa would be plagued by corruption, plagued by people who act in a pompous authoritarian manner who actually don’t get things done well.” He explained that “if you take this individual who I felt was from Africa, right, he was from Liberia, you have a certain perspective.” Winter then stated that he believed “some person in [Wilson’s] perspective might like to have absolute dominion over me” and his behavior “would be somewhat analogous to what [Winter] would consider would go on in Africa.” In his brief, Winter similarly states that he knew Wilson was “from Africa originally” and, in Winter’s opinion, was acting in a “tyrannical” and “unjustified authoritarian manner.” On this record, we conclude that the evidence amply supports the ULJ’s determination that Winter violated Manpower’s reasonable anti-discrimination policy and was discharged for doing so.⁴

Second, we are not persuaded that Winter’s statement is not misconduct because Wilson’s criticism about a minor work issue provoked him and was a single incident. This court has explained that there is no single-incident exception to the statutory definition of employment misconduct. *Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 878 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011). Rather, the statute “directs that the ULJ afford weight to the fact of the single-incident nature of the conduct without directing that the conduct be construed as misconduct or not.” *Id.* at 876; *see also* Minn. Stat. § 268.095, subd. 6(d) (2016) (“If the conduct . . . involved only a single incident, that is an important

⁴ Winter does not argue the policy is unreasonable.

fact that must be considered.”). The ULJ noted that Winter’s comment to his supervisor was a single incident, but determined that it was serious enough to be considered misconduct. The record supports this determination. And we are not persuaded that Winter was provoked. Even if Winter believed Wilson’s criticism was overly harsh, it does not excuse his discriminatory comment that he knew was prohibited by both Manpower’s and 3M’s policies.

On this record, we conclude that Winter was discharged for employment misconduct. Manpower had the right to reasonably expect Winter to abide by its anti-discrimination policy, and his derogatory comment violated that policy. The ULJ therefore did not err in determining Winter is ineligible for unemployment benefits.

Affirmed.