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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0437**

Gregory Smalley,
Relator,

vs.

TVI, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 2, 2018
Affirmed
Smith, Tracy M., Judge**

Department of Employment and Economic Development
File No. 34704533-6

Gregory Michael Smalley, Minneapolis, Minnesota (pro se relator)

TVI, Inc., Minneapolis, Minnesota (respondent employer)

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

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Relator Gregory Smalley challenges an unemployment-law judge's (ULJ)
determination that he is ineligible for unemployment benefits because he was discharged

due to employment misconduct. Because the record supports the ULJ's finding that Smalley was discharged for employment misconduct, and not in retaliation for filing complaints about his employer, we affirm.

FACTS

Smalley worked as a store clerk at a Savers retail store in Minneapolis from November 21, 2012, until his discharge on May 24, 2016.

Before his discharge, Smalley made two complaints about his employer. First, on April 25, 2016, Smalley filed a complaint with the Minnesota Department of Labor and Industry (DLI) alleging that respondent TVI, Inc., d/b/a Savers (Savers), had refused to provide earnings statements to him in writing upon his request, in violation of Minn. Stat. § 181.032(c) (2014). According to Savers, Smalley had the option of printing his earnings statements from a store computer or accessing them online.

Second, on May 5, 2016, Smalley contacted a Savers regional director and reported that a store manager had allowed garbage and recycling materials to pile up and block a fire exit, in violation of the local fire code. The regional director assigned a safety inspector to investigate and address any safety concerns at the store. On May 6, a coworker showed Smalley a text message that led Smalley to believe that Savers store management planned to discharge him for reporting safety issues to the regional director. Smalley contacted Savers's human-resources department and complained of retaliation.

In between his first and second complaints, Smalley received a "final counseling" warning for arguing with a supervisor during a staff meeting over the store bathroom-break

policy. The warning directed Smalley to observe the highest standards of professionalism at all times and follow reasonable supervisory instructions.

Several weeks later, on May 18, Smalley met with a human-resources manager, a district manager, and his store manager. They informed Smalley that an internal investigation had found no retaliation by store management. Smalley claimed that the investigation was fraudulent and accused the district manager of telling him a “bald-face[d] lie.” After Smalley debated the finding with the district manager, the district manager told Smalley that no further inappropriate or insubordinate behavior would be tolerated and asked Smalley if he could act professionally upon returning to work. Smalley agreed to return to work and act professionally.

Six days later, on May 24, Smalley requested assistance from a store supervisor to help stock and display new merchandise. After receiving assistance, Smalley told the supervisor that she did not understand how to do the job and accused the supervisor of creating a staffing shortage by forcing out another employee. After learning of the incident, the Savers store manager talked to the supervisor and observed her visibly upset reaction. The supervisor requested that she not have to work with Smalley for the rest of the day. Following the incident, the store manager, in consultation with human resources, discharged Smalley effective May 24, 2016.

Smalley applied for unemployment benefits and was initially determined eligible by respondent Minnesota Department of Employment and Economic Development (DEED) unemployment-insurance program. Savers appealed the determination for a de novo

hearing before a ULJ pursuant to Minn. Stat. § 268.105, subd. 1(a) (2016).¹ The ULJ conducted an unemployment hearing at which Smalley failed to appear. The ULJ determined that Savers discharged Smalley because of employment misconduct. Smalley requested reconsideration of the determination because his failure to appear was the result of car problems. The ULJ granted Smalley's request, set aside the previous determination, and scheduled an additional hearing. Smalley and Savers each appeared at the rescheduled hearing.

Following the hearing, the ULJ determined that Smalley had been discharged for employment misconduct and was therefore ineligible to receive unemployment benefits. The ULJ found that, despite Smalley's potentially legitimate complaints, Smalley received a final warning on April 29 that he act professionally after he argued with a supervisor, that the expectation was reiterated to Smalley on May 18, and that Smalley engaged in argumentative and disrespectful behavior toward a supervisor on May 24, resulting in his discharge.

Smalley requested reconsideration of the ULJ's determination pursuant to Minn. Stat. § 268.105, subd. 2 (2016). The ULJ affirmed his prior decision.

Smalley appeals.

¹ Portions of Chapter 268 were amended between the time Smalley applied for unemployment benefits and the time of this appeal. Because those amendments are immaterial to the resolution of this case, we cite the 2016 version of that chapter in this opinion.

DECISION

Smalley challenges the ULJ's determination that he was discharged due to employment misconduct. An employee generally is ineligible for unemployment benefits if he "was discharged because of employment misconduct." Minn. Stat. § 268.095, subd. 4(1) (2016). Employment misconduct is defined, in part, as "any 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." *Id.*, subd. 6(a) (2016).

We may reverse or modify a ULJ's decision if the relator's substantial rights have been prejudiced because the ULJ's findings, inferences, conclusions, or decision are unsupported by the record, arbitrary, or capricious. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2017). "Whether an employee engaged in employment misconduct presents a mixed question of fact and law." *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011). The determination of whether an employee committed a particular act is a question of fact. *Id.* We review the ULJ's findings of fact in the light most favorable to the decision and will not disturb the findings if "there is evidence in the record that reasonably tends to sustain them." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether the factual findings establish employee misconduct is a question of law, which we review de novo. *Cunningham*, 809 N.W.2d at 235.

The ULJ determined that Smalley had been discharged for employment misconduct because Smalley engaged in argumentative and disrespectful behavior after being warned not to do so. Smalley argues that the ULJ's finding is not supported by the record. Smalley

contends that he was discharged in retaliation for (1) filing a complaint with DLI concerning his earnings statements and (2) reporting safety concerns to a regional director.

Here, the parties' testimony and record evidence supports the ULJ's finding that three incidents led to Smalley's discharge for unprofessional conduct. At the evidentiary hearing, Smalley admitted that he received a "final counseling" warning on April 29 for arguing with supervisors at a staff meeting and acknowledged that he was directed to observe the highest standards of professionalism at all times. Although Smalley believed that his conduct at the meeting was reasonable, he admitted that he "did strongly object" to the announced policy. Smalley acknowledged that he attended a meeting on May 18 and admitted that he accused the district manager of telling a "bald-face[d] lie" and that he was again asked to act professionally. Smalley further admitted that, on May 24, he told a supervisor that she did not know how to do the job and accused the supervisor of forcing out another employee. The store manager testified that he observed the supervisor's visibly upset reaction to Smalley's behavior on May 24 and was advised by human resources to discharge Smalley following the incident. Smalley's own testimony corroborates the employer's account of the incidents that led to his discharge and supports the ULJ's finding. To the extent that the parties disputed the nature of Smalley's conduct, the ULJ found the store manager's testimony to be more credible, and we defer to the ULJ's credibility determination. *Stagg*, 796 N.W.2d at 315.

With regard to Smalley's first claim of retaliation, we conclude that the record supports the ULJ's finding that the employer discharged him for employment misconduct. In April 2016, Smalley complained to DLI that Savers had refused to provide him with

written earnings statements. On May 19, 2016, DLI addressed a letter to the store manager, requesting a response to the complaint. According to Smalley, a software issue prevented him from accessing his paystubs through his home computer and he requested that the store provide written statements to him. The store manager testified that he was aware of Smalley's complaint and had offered Smalley the option of printing his paystub from a store computer at any time. Despite Smalley's dissatisfaction with the option of printing his own paystubs and his complaint to DLI, the record does not support the claim that Savers discharged Smalley because of his complaint.

With regard to Smalley's second claim of retaliation, we conclude that the record supports the ULJ's finding that the employer discharged him for employment misconduct. Smalley reported potential fire-code violations to the regional director on May 5. The next day, after viewing a coworker's text message, Smalley complained to his manager and to human resources about retaliation. The manager provided Smalley's handwritten copy of the text message to human resources. After conducting an investigation, the employer informed Smalley on May 18 that his complaint of retaliation was unsubstantiated. The text messages may indicate that some employees speculated about Smalley being terminated. However, Smalley was on "final counseling" status before contacting the regional director. The employer did not discharge Smalley following his report to the regional director on May 5. Rather, the employer investigated Smalley's complaint of retaliation and discharged him only after the separate incident on May 24.

Unemployment benefits are intended to support workers who have been discharged from employment "through no fault of their own." *Stagg*, 796 N.W.2d at 315 (quotation

omitted). Employment misconduct includes conduct in “violation of the standards of behavior the employer has the right to reasonably expect.” Minn. Stat. § 268.095, subd. 6(a)(1). Even a single incident may constitute employment misconduct if the employee sufficiently disregards his or her employer’s expectations. *Nieszner v. Minn. Dep’t of Jobs & Training*, 499 N.W.2d 832, 838 (Minn. App. 1993) (citing *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 524 (Minn. 1989)). Here, the employer provided multiple warnings to Smalley that he act professionally. We conclude that the ULJ’s findings of Smalley’s unprofessional conduct, which have support in the record, establish disqualifying employment misconduct.

Affirmed.