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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1208**

Lukas Tornquist,
Respondent,

vs.

Mimedx Group, Inc.,
Relator,

Department of Employment and Economic Development,
Co-Relator.

**Filed May 7, 2018
Reversed
Halbrooks, Judge**

Department of Employment and Economic Development
File No. 35472662-3

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relator MiMedx Group, Inc.)

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

UNPUBLISHED OPINION

HALBROOKS, Judge

Relators challenge the decision of an unemployment-law judge (ULJ) that respondent was discharged for reasons other than misconduct and is eligible for unemployment benefits. Relators argue that respondent's conduct was serious and was not conduct that an average reasonable employee would engage in under the circumstances. We reverse.

FACTS

Respondent Lukas Tornquist worked as an account executive at relator MiMedx Group Inc., a biotechnology company that processes and delivers medical applications for wound care. Tornquist sold medical applications for MiMedx within his assigned territory. In 2016, Tornquist's annual compensation, including base salary and commissions, exceeded \$880,000.

When Tornquist began working at MiMedx, he signed a non-solicitation agreement stating that while employed, he would not "directly or indirectly solicit or attempt to solicit from any of the Customers with whom Employee had Material Contact . . . any business in competition with the Business of the Company." Tornquist also signed a noncompete agreement, stating that he would not sell competing products or services that were not provided by MiMedx. MiMedx also had a corporate compliance plan that prevented employees from maintaining relationships that create a conflict of interest between the employee and the company.

On two occasions in 2016, Tornquist sold a competing wound-care product to a physician he worked with through his employment at MiMedx. The physician had informed Tornquist that MiMedx's product was not effectively healing a patient's wound and requested advice on how to proceed. Tornquist's direct supervisor advised Tornquist that a wound-care application product that the supervisor offered through his own personal business would jumpstart the patient's healing process. Tornquist twice sold the product to the physician through his supervisor's personal business and received a total of \$1,162 in commissions.

After discovering that Tornquist sold a competing product, MiMedx terminated Tornquist's employment for violating his noncompete agreement, nonsolicitation agreement, the corporate compliance plan, and his duty of loyalty. Tornquist sought unemployment benefits and was initially determined to be ineligible because he was discharged for employment misconduct. Tornquist requested an evidentiary hearing, and the ULJ reversed the ineligibility determination, concluding that Tornquist was discharged for reasons other than employment misconduct. MiMedx requested reconsideration, and the ULJ affirmed. MiMedx and co-relator Minnesota Department of Employment and Economic Development (DEED) now appeal.

D E C I S I O N

MiMedx and DEED argue that the ULJ erred as a matter of law in determining that Tornquist's sales of a competing product did not amount to employment misconduct under Minn. Stat. § 268.095, subd. 6 (Supp. 2017). Whether an employee engaged in misconduct is a mixed question of fact and law. *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460

(Minn. 2016). Whether the employee committed the act is a question of fact. *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether a particular act constitutes disqualifying conduct is a question of law that we review de novo. *Wilson*, 888 N.W.2d at 460.

An employee 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.” *Id.*, subd. 6(a). Employment misconduct is not “simple unsatisfactory conduct” or “conduct an average reasonable employee would have engaged in under the circumstances.” *Id.*, subd. 6(b)(3), (4). Generally, an employee’s refusal “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).

The ULJ determined that, although Tornquist had sold a competing product, he was not discharged for employment misconduct because his conduct was reasonable under the circumstances and was not serious. MiMedx’s policies prohibited Tornquist from soliciting MiMedx’s customers, from selling competing products or services, and from maintaining relationships that created a conflict of interest with the company. The parties do not dispute, and the ULJ correctly determined, that Tornquist violated MiMedx’s policies by selling a competing product.

An employee may commit misconduct by breaching his duty of loyalty to the company. *Marn v. Fairview Pharmacy Servs.*, 756 N.W.2d 117, 121 (Minn. App. 2008), review denied (Minn. Dec. 16, 2008). An employee's duty of loyalty prohibits him from soliciting his employer's customers or from otherwise competing with his employer. *Rehab. Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304 (Minn. App. 1987). An employer has a legitimate interest in protecting itself against "the deflection of trade or customers by the employee by means of the opportunity which the employment has given him." *Webb Publ'g Co. v. Fosshage*, 426 N.W.2d 445, 450 (Minn. App. 1988) (quotation omitted). Tornquist, a highly compensated sales executive, violated his duty of loyalty to MiMedx by selling a competing product to a customer he obtained through the opportunities provided to him by MiMedx.

The ULJ nevertheless determined that Tornquist was not discharged for employment misconduct because "an average reasonable employee would have engaged in [the same conduct] under the circumstances." The ULJ reasoned that "Tornquist was trying to do what was best for the patients and following the recommendation of his supervisor. This, despite any obligations to MIMEDX, was reasonable under the circumstances." In affirming his earlier order, the ULJ concluded that "it was reasonable for Tornquist to follow the suggestions of his supervisor when asked by physicians about alternate treatments. . . . [P]ersonal gain was not Tornquist's motive."

MiMedx argues that the ULJ erred because an average reasonable employee would not have sold a competing product, even at the direction of his supervisor, if he knew that

his supervisor conducted a personal business competing with MiMedx and knew that his supervisor's actions violated MiMedx's policies. We agree.

At the hearing, Tornquist testified that he was aware that his direct supervisor operated a personal business that sold medical products and that the competing product at issue in this matter was sold through that personal business. Tornquist's commissions from the competing sales were paid from his direct supervisor's personal business. An average reasonable employee would not have sold a competing product to a customer, even if his supervisor had advised it, if he was aware that his supervisor had a conflict of interest in the sale.

Under these circumstances, Tornquist should have pursued other options with his employer before selling a competing product. At the hearing, a MiMedx employee testified that an account executive may utilize many options to resolve issues that may arise with their customers. The account executive can refer to MiMedx's sales materials, its online sales network, or ask a staff medical doctor for advice. The employee also stated that an account executive should take his questions up the chain of command if he receives advice from a supervisor who has a conflict of interest. An average reasonable employee would have explored one of these options before competing with his employer and personally benefiting from the sale.

By twice selling a competing product to a MiMedx customer, Tornquist blatantly disregarded his company's policies and violated his duty of loyalty to MiMedx. His conduct was not reasonable under the circumstances. We conclude that this conduct

amounts to employment misconduct under Minn. Stat. § 268.095, subd. 6(a), and does not satisfy a statutory exception under Minn. Stat. § 268.095, subd. 6(b).

The ULJ also determined that Tornquist's competing sales did not amount to a *serious* violation of the employer's standards, as required by Minn. Stat. § 268.095, subd. 6(a), because Tornquist only received \$1,162 in commissions, a small percentage of his total compensation. The ULJ's reasoning is not supported by caselaw. In *Skarhus*, we considered whether an employee engaged in employment misconduct by stealing less than four dollars' worth of food from her employer. 721 N.W.2d at 344. We did not focus on the amount that the employee stole but instead analyzed whether the theft had a significant adverse impact on the employer. *Id.* (explaining that "the value of the stolen items is not the dispositive factor in our analysis"). We determined that it had a significant adverse impact because the employer could no longer entrust the employee with her responsibilities as a cashier. *Id.*

Likewise, we need not analyze the economic value of Tornquist's commissions. Instead, we consider whether Tornquist's sales of a competing product significantly impacted MiMedx. As a MiMedx account executive, Tornquist's position required him to sell MiMedx products to physicians and hospitals. He was required to strictly comply with his noncompete and nonsolicitation agreements to ensure that MiMedx could protect its customer base. MiMedx could no longer entrust Tornquist with protecting its customer base after Tornquist used his access to a MiMedx customer to sell a competing product. Tornquist's conduct was a serious violation of the standards of behavior an employer has

the right to reasonably expect of an employee and therefore constitutes employment misconduct under Minn. Stat. § 268.095, subd. 6(a).

Reversed.