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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1515**

Ryan Wille,
Relator,

vs.

Pan-O-Gold Baking Co (Corp),
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 21, 2018
Affirmed
Larkin, Judge**

Department of Employment and Economic Development
File No. 35609758-3

Ryan T. Wille, Shafer, Minnesota (pro se relator)

Pan-O-Gold Baking Co., St. Cloud, Minnesota (respondent)

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

Considered and decided by Larkin, Presiding Judge; Bjorkman, Judge; and Randall,
Judge.*

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

UNPUBLISHED OPINION

LARKIN, Judge

Pro se relator challenges an unemployment-law judge's (ULJ) determination that he is ineligible for unemployment benefits because his employment was terminated for employment misconduct. We affirm.

FACTS

Relator Ryan Wille worked full-time as a bread route salesperson for respondent Pan-O-Gold Baking Corporation from October 15, 2001, through April 28, 2017. Pan-O-Gold instructed Wille to return stale or damaged bread to Pan-O-Gold's depot, because Pan-O-Gold sold its stale and damaged bread at a thrift store.

In February 2017, Wille gave a Pan-O-Gold customer credit for damaged and stale bread. Wille informed the customer that it could keep the bread and donate it to a food shelf. On April 27, 2017, Wille disposed of approximately one dozen damaged loaves of bread in a dumpster instead of taking them to Pan-O-Gold's depot. On April 28, 2017, Pan-O-Gold discharged Wille for throwing away and giving away bread, which Pan-O-Gold considered theft.

Wille applied for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development (DEED) denied his request on the ground that he was discharged for employment misconduct. Wille appealed DEED's ineligibility determination, and a ULJ conducted an evidentiary hearing. Wille testified at the hearing, as well as Pan-O-Gold's vice president of sales, Mark Ubl, and director of human resources, Curt Jenson.

The ULJ found that Wille was discharged for employment misconduct. The ULJ reasoned that Wille “was aware that the stale and damaged bread should be returned to [Pan-O-Gold’s] depot,” that “[o]n at least two occasions he intentionally threw away or gave away stale or damaged bread,” and that those actions had “an adverse financial effect on [Pan-O-Gold]” and “display[ed] clearly a serious violation of the standard of behavior that Pan-O-Gold . . . had the right to expect of its employee.” Wille requested reconsideration, and a second ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

An employee who is discharged from employment because of employment misconduct is ineligible to receive 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) (Supp. 2017). “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).

“The question of whether an employee engaged in conduct that disqualifies him or her from unemployment benefits 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 a particular act is a question of fact.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court reviews factual findings “in the light most favorable to the

decision.” *Wilson*, 888 N.W.2d at 460 (quotation omitted). This court will not disturb factual findings “as long as there is evidence in the record that reasonably tends to sustain them.” *Id.* (quotation omitted). Whether a particular act constitutes disqualifying misconduct is a question of law, which this court reviews de novo. *Id.*

The ULJ who conducted the hearing found that Wille “was aware that the stale or damaged bread should be returned to the depot” and aware “that stale and damaged bread was sold by Pan-O-Gold . . . at a thrift store.” The ULJ also found that Wille allowed a Pan-O-Gold customer to keep stale and damaged bread in February 2017 and disposed of damaged loaves of bread in a dumpster in April 2017.

These findings are supported by the record. Ubl testified that when Wille was trained, he was told to return stale and damaged bread to the depot. Wille’s testimony was consistent with Ubl’s on this point. Wille testified that he had been trained to “haul [stale bread] back” to the depot. When the ULJ asked Wille if it was his “understanding that the policy of the employer was to return stale bread to the depot so that it could go to the thrift store,” Wille replied, “Yeah.” And when the ULJ asked Wille whether on most of the occasions when he received stale bread he brought it back to the depot, Wille responded, “Oh yeah. I mean, what else would you do with it?” Thus, Wille’s testimony establishes that he was aware of Pan-O-Gold’s expectation that he return stale bread to the depot.

Wille’s testimony also establishes that he failed to comply with Pan-O-Gold’s expectation. Wille testified that he allowed a customer to keep stale bread in February 2017 and that he placed 12 to 15 loaves of damaged bread in a dumpster outside a grocery store in April 2017. Wille testified that he placed the damaged bread in the dumpster

because “it was just convenient,” “[t]here was just a small amount [of damaged bread],” and the damaged bread was “of no use.”

Pan-O-Gold’s request that Wille return stale and damaged bread back to the depot was reasonable because Pan-O-Gold sold such bread at a thrift store. Wille failed to comply with that reasonable request when he allowed a customer to keep damaged and stale bread in February 2017 and disposed of damaged loaves of bread in a dumpster in April 2017. The ULJ did not err by concluding that those acts constituted employment misconduct. *See Schmidgall*, 644 N.W.2d at 804 (stating that refusing to abide by an employer’s reasonable requests is disqualifying misconduct).

Wille argues that Pan-O-Gold “has no policy in place” stating that his conduct regarding the stale and damaged bread was wrong. Wille argues that he therefore did not commit employment misconduct. Whether an act qualifies as employment misconduct does not depend on whether an employer has an express “policy” regarding that behavior. *See Brown v. Nat’l Am. Univ.*, 686 N.W.2d 329, 333 (Minn. App. 2004) (“We are aware of no law that requires that an employer have an express ‘policy’ regarding prohibited behavior for employees.”), *review denied* (Minn. Nov. 16, 2004). Instead, the question is whether the employee’s actions constitute 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); *Brown*, 686 N.W.2d at 333. And, as noted above, Wille’s own testimony establishes that he had been trained to return stale and damaged bread to Pan-O-Gold’s depot and that he failed to comply with that reasonable expectation in February and April 2017.

Wille also argues that he acted in good faith and that “he had no intent to hurt or defraud [Pan-O-Gold].” “[G]ood faith errors in judgment” do not constitute employment misconduct “if judgment was required.” Minn. Stat. § 268.095, subd. 6(b)(6) (Supp. 2017). This exception is inapplicable because Wille was not required to exercise judgment regarding what to do with stale and damaged bread. Pan-O-Gold trained Wille to return stale and damaged bread to the depot, and Wille admits he was aware of that expectation.

Wille argues that his conduct was inadvertent because he did not know his behavior was wrong. “[C]onduct that was a consequence of the [employee’s] inefficiency or inadvertence” is not employment misconduct. Minn. Stat. § 268.095, subd. 6(b)(2) (Supp. 2017). Wille’s testimony establishes that he deliberately failed to comply with Pan-O-Gold’s instruction regarding stale and damaged bread and that his conduct was therefore not a consequence of inadvertence.

Wille argues that “[m]any employees at [Pan-O-Gold]” have given away or thrown away stale and damaged bread rather than return the bread to the depot. “Violation of an employer’s rules by other employees is not a valid defense to a claim of misconduct.” *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986). Nor is selective enforcement of an employer’s rules a defense to a misconduct claim. *Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 869 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986).

Wille also argues that Pan-O-Gold “condoned [his] actions by ignoring or accepting [his] behavior and by not informing [him] that continuing the conduct may result in termination.” Wille argues that “[m]anagement admitted in many ways that they had prior knowledge of [his] actions and did nothing about it,” relying on the testimony of Ubl and

Jenson.

On one hand, “[a]n employer’s condonation of an employee’s wrongful conduct is a mitigating factor which may cause the employer to waive its right to discharge the employee on the basis of such misconduct.” *Bautch v. Red Owl Stores, Inc.*, 278 N.W.2d 328, 331 (Minn. 1979). On the other hand, an employer is not required to warn an employee before discharging the employee for employment misconduct. *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981).

Wille’s argument that Pan-O-Gold condoned his behavior is not supported by the record. Ubl testified that he discovered that Wille was not bringing stale bread back to the depot after seeing “a picture of . . . bread in a dumpster” and when “one of his accounts informed [Pan-O-Gold] that Ryan Wille was giving him bread and . . . not charging him for it.” Ubl testified that “*according to* [the receiver], it’s been happening for a long time.” Jenson testified that he found out about Wille’s conduct from Ubl and that Ubl took the picture of the bread in the dumpster after learning at a meeting regarding Wille’s performance that he had thrown out product. This testimony does not establish that Pan-O-Gold had prior knowledge of Wille’s actions. Instead, it indicates that Pan-O-Gold discovered that the February 2017 incident was not an isolated incident when the receiver at the store told Pan-O-Gold that “it’s been happening for a long time.”

Finally, Wille argues that his “action was not adverse to the company,” “did not put the business at risk,” and “in fact, helped advertise the business.” Again, the key issue is whether the employee’s actions clearly displayed “(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,” and not whether the actions adversely affected the employer. Minn. Stat. § 268.095, subd. 6(a). Wille’s admitted, intentional refusal to honor Pan-O-Gold’s instruction regarding the return of stale or damaged bread undermines Pan-O-Gold’s ability to assign the essential functions of the job to Wille and is sufficiently serious to constitute employment misconduct under Minn. Stat. § 268.095, subd. 6(a). The ULJ therefore did not err by concluding that Wille was discharged for employment misconduct and that he is therefore ineligible for unemployment benefits.

Affirmed.