

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1669**

Thomas Kutschke,
Relator,

vs.

O'Reilly Automotive, Inc.,
Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed June 4, 2018
Affirmed
Reyes, Judge**

Department of Employment and Economic Development
File No. 35634299-3

Thomas Kutschke, Cottage Grove, Minnesota (pro se relator)

O'Reilly Automotive, Inc., Springfield, Missouri (respondent employer)

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

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

REYES, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) determining that relator was discharged from employment for misconduct for repeatedly using his cell phone at work in violation of respondent-employer's policies. We affirm.

FACTS

Relator Thomas Kutschke worked as a sales clerk with respondent-employer O'Reilly Automotive, Inc., from January 29, 2017 until May 9, 2017. Respondent-employer discharged relator for five reasons: (1) using his personal cell phone during working hours, despite repeated reminders that it is against company policy; (2) sitting on a stool at the counter, often texting on his cell phone and not performing other store duties; (3) exceeding expected delivery times; (4) asking for an unscheduled fifteen minute break, leaving the store, and returning 45 minutes later; and (5) unsatisfactory work performance.

Shortly thereafter, relator applied for unemployment benefits with respondent Minnesota Department of Employment and Economic Development (DEED). DEED determined relator to be eligible, and respondent-employer appealed. Relator and respondent-employer's district manager testified at a hearing with a ULJ. The ULJ found that respondent-employer discharged relator for reasons other than employment misconduct and concluded that relator was eligible for unemployment benefits.

Respondent-employer requested reconsideration and a second ULJ reversed, concluding that a preponderance of the evidence showed that relator violated respondent-employer's reasonable employment expectations by repeatedly using his cell phone while

on the clock despite weekly coachings by the store manager. The ULJ noted that, although relator may have been addressing family emergencies on some occasions, the evidence showed that relator often used his cell phone for non-emergency reasons, such as looking for a new job. The ULJ also determined that relator violated respondent-employer's reasonable expectations by leaving work for 45 minutes without approval. The ULJ determined that relator's misconduct was intentional and indifferent and concluded that relator is not entitled to unemployment benefits because he was discharged for employment misconduct. This certiorari appeal follows.

DECISION

Relator argues that his cell-phone use did not constitute misconduct because his cell-phone use did not interfere with his job performance, and his co-workers used their cell phones while on the clock. We are not persuaded.

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016).¹ Whether an employee engaged in misconduct is a mixed question of fact and law, and “[w]hether a particular act constitutes disqualifying conduct is a question of law that we review de novo.” *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). We will not disturb the ULJ's factual findings if the evidence substantially sustains them. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

¹ Portions of Chapter 268 were amended between the time relator applied for unemployment benefits and the time of this appeal. However, because those amendments are immaterial to the resolution of this case, we cite the 2016 version of the statute here.

Employment misconduct includes “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)(1) (2016). An employee’s refusal to abide by an employer’s reasonable policies and requests amounts to misconduct that disqualifies a person from unemployment benefits. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Here, respondent-employer’s policy manual clearly states that the “unauthorized use of a cell phone or other electronic device[s] while on duty” is one of the “more serious violations of the Rules of Conduct, which may result in disciplinary action up to and including discharge.” Relator acknowledged this policy when he digitally signed the “New Team Member Acknowledgment Agreement,” stating that he had “read and agree[d] to all of the policies and notifications.” Relator admitted that his supervisor spoke with him about his cell-phone use “maybe once a week,” or over ten times in the span of three months. He admitted that he used his cell phone to receive phone calls from recruiters and prospective employers and to communicate with family members, among other things.

Relator argues that his cell-phone use did not violate the expectation of his employer because his other co-workers used their cell phones at work. But a “[v]iolation 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. 1986). Whether relator’s co-workers were disciplined or discharged for using their cell phones is “not relevant” to our review. *Siverston v. Sims Security*, 390 N.W.2d 868, 871 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986). Relator’s actions were in direct contravention of respondent-employer’s cell-phone policy. We discern no error in the ULJ’s determination that relator

engaged in employment misconduct disqualifying him from receiving unemployment benefits.

Affirmed.