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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0339**

Walter Nachtigall,
Relator,

vs.

Marriott International, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed December 10, 2018
Affirmed
Reilly, Judge**

Department of Employment and Economic Development
File No. 35891541-3

Walter E. Nachtigall, III, Minneapolis, Minnesota (pro se appellant)

Lee B. Nelson, St. Paul, Minnesota (for respondent department)

Considered and decided by Schellhas, Presiding Judge; Reilly, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

REILLY, Judge

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

misconduct. Because substantial evidence supports the ULJ's determination that relator committed employment misconduct by being dishonest, we affirm.

FACTS

Relator Walter Nachtigall III worked as a full-time bartender at Cedar and Stone, a bar located in a JW Marriott hotel (Marriott), from November 2015 until August 2017. Marriott uses the Micros point-of-sale system (Micros) in order to process and track sales of food and beverage. To access Micros, Marriott employees must swipe their individually issued access cards. Relator was not a manager and his access card did not allow him to void transactions or review co-workers' financial transactions. Marriott required its employees to request a manager's assistance to void transactions in Micros. Relator knew about this policy, and, at times, relator requested a manager to void transactions for him.

However, during a 2015 training, Marriott provided employees with a training code, which allowed the employees to void transactions during training. The training code inadvertently remained active after the conclusion of the training, and relator admittedly used the training code to perform unauthorized activities in Micros. In 2017, one of relator's co-workers informed management that relator had manager-level access to Micros. This allegation prompted an internal investigation.

During its investigation, Marriott determined that relator voided numerous transactions in Micros. Marriott's human resources staff confronted relator with print-outs from Micros, which showed void transactions, using code: "MSPJW MGR TRAINER," on relator's customers' bills. But relator denied having any access that would allow him to void transactions. Marriott discharged relator for providing untruthful information

during the course of its investigation. Upon relator's discharge, relator met with Marriott's general manager and admitted to using the training code in unauthorized ways.

Relator applied for unemployment benefits with the Minnesota Department of Employment and Economic Development (DEED). DEED determined that relator is ineligible for unemployment benefits because he was discharged for employment misconduct. Relator appealed DEED's determination and the ULJ conducted a telephone hearing. Relator and a former Marriott employee testified on relator's behalf and Marriott's hearing representative, director of human resources, human resources supervisor, and restaurant manager testified on behalf of Marriott. The ULJ determined that relator was discharged for employment misconduct and is therefore ineligible to receive unemployment benefits. Upon relator's request for reconsideration, the ULJ reviewed and affirmed its prior decision.

This certiorari appeal follows.

D E C I S I O N

Unemployment benefits are intended to provide financial assistance to persons who have been discharged from employment "through no fault of their own." *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). Accordingly, a person who has been discharged from employment based on "employment misconduct" is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2016); *Stagg*, 796 N.W.2d at 314. Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law. *Stagg*, 796 N.W.2d at 315.

I. The ULJ Did Not Err In Its Determination That Relator Was Dishonest.

Whether an employee committed a particular act is a question of fact viewed in the light most favorable to the ULJ's decision and affirmed if supported by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court will not disturb the ULJ's factual findings when the evidence reasonably tends to support those findings. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Relator argues that he was honest during the Marriott investigation.¹ This court defers to the ULJ's credibility determinations when they are supported by substantial evidence and the ULJ sets forth a valid reason for crediting or discrediting the witness. See *Yswsf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007); see also Minn. Stat. § 268.105, subd. 1a (a) (2016) (stating that the ULJ must set forth the reason for crediting or discrediting testimony when credibility "has a significant effect on the outcome of a decision"). During the hearing, relator testified that he "use[d] the code maybe once a month," but denied using it for the transactions human resources identified. Relator further argued that Marriott food and beverage director, Keith Meadows, could have "gained access to the information on the computer and has altered it or deleted or

¹ Relator distinguishes the code he used as a "training code," not a "manager's code," and therefore asserts that he answered "no" honestly in response to questions regarding his access to a manager code. However, Marriott's director of human resources testified that during Marriott's investigation relator denied having or using "a code, a manager code, or a manager card or any sort to make voids or any other transactions in the system as a manager [would] ordinarily do." We agree with the ULJ's finding that "[t]he difference between a 'manager's code,' and a 'training code' or 'trainee's code' continues to be a distinction without a difference for purposes of establishing whether [relator] was discharged for employment misconduct."

destroyed information.” The ULJ was not persuaded by relator’s version of events and found:

To the extent that parties disagreed as to important facts, the employer was more credible because it was logical, believable, detailed and reasonable. For example, the employer produced detailed computer records from its Micros system showing Nachtigall’s use of the manager trainer codes on June 23, 29 and July 7, 2017. In contrast Nachtigall stated he could not account for how his name was associated with the code usage on these dates. Yet, he offered no specific evidence to dispute those records, and so, he had no good faith reason to question or otherwise deny the employer’s computer records. Nachtigall admitted he used the code after the end of the training period on numerous occasions. He also stated that the code “was probably meant to be shut down.” This shows that Nachtigall knew he should not have been using the code when he did.

The ULJ’s credibility determination is supported by substantial evidence in the record and we affirm.

II. Relator’s Dishonesty Constitutes Employment Misconduct.

An applicant who is discharged by an employer for employment misconduct is ineligible for unemployment benefits. See Minn. Stat. § 268.095, subd. 4. Employment misconduct is defined as “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) (2016). The legal question of whether the particular act committed by the employee constitutes employment misconduct is reviewed de novo. *Skarhus*, 721 N.W.2d at 344.

The ULJ determined that relator was discharged for employment misconduct because the “employer also has the right to expect that [relator] answer its questions with full disclosure.” The ULJ further reasoned that honesty is “very important in the workplace, especially regarding the conducting of financial transactions.” Dishonesty during an employer’s investigation can be a deliberate violation of “standards of behavior which the employer has a right to expect of his employee.” *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981); *see also Baron v. Lens Crafters, Inc.*, 514 N.W.2d 305, 307-08 (Minn. App. 1994) (“Dishonesty that is connected with employment may constitute misconduct.”). Honesty was particularly important in this investigation because, according to Marriott, financial documentation within Micros could be easily falsified using the training code. Marriott had the right to reasonably expect that relator would answer its questions honestly. Therefore, we affirm the ULJ’s determination that relator’s dishonesty during Marriott’s investigation constitutes misconduct.

III. Relator Is Not Otherwise Entitled To Relief.

Relator’s pro se brief challenges the ULJ’s ineligibility determination on numerous additional grounds. Relator fails to support his arguments with relevant facts or legal authority. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (deeming arguments that include “no citation to any relevant legal authority” waived). However, in the interests of justice, we analyze the arguments below.

First, relator argues that Marriott did not have a “specific policy” detailing that the use of the training code should not be continued after training. Whether an act qualifies as employment misconduct is not dependent on whether an employee 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 key 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.

Second, relator argues that his use of the code was in good faith. Under the good-faith-judgment exception, if judgment is required, a good-faith error in judgment is not employment misconduct. Minn. Stat. § 268.095, subd. 6(b)(6) (2016). Because Marriott terminated relator for dishonesty during the investigation, rather than continued use of the training code, the good-faith-judgment exception does not apply. See *Black’s Law Dictionary* 808 (10th ed. 2014) (defining “good faith” as honesty and the absence of intent to defraud). However, even if we analyzed the continued use of the training code for good-faith judgment, relator’s argument is not persuasive. “When an employee’s refusal to carry out a directive of the employer is deliberate, calculated, and intentional, then the refusal is misconduct.” *Schmidgall*, 644 N.W.2d at 806. Here, the record establishes that relator was aware of the policy requiring employees to find a manager to void transactions and that relator followed this policy at times. Relator testified that the training code “was meant probably to be shut down” and created a “possibility for abuse.” Additionally, the ULJ found that relator first “denied to the employer that he used the code at all” and then later “admitted he had” used the code. Relator’s “deliberate, calculated, and intentional” use of

the training code in direct contradiction of relator's knowledge of the employer's reasonable expectation constitutes misconduct. *See id.*

Third, relator argues that other employees continued to use the training code, which he seems to assert is the same behavior for which he was discharged. However, relator was discharged for being untruthful during the investigation, not for continued use of the training code. Moreover, whether other employees violated the same rules is irrelevant to the "sole question" of whether the specific employee violated the employer's rules. *Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986).

We affirm the ULJ's decision that relator was discharged for employment misconduct and is therefore ineligible to receive unemployment benefits.

Affirmed.