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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0108**

Daniel A. Vogel,
Relator,

vs.

Order of St. Benedict,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed October 21, 2019
Affirmed in part and reversed in part
Bratvold, Judge**

Department of Employment and Economic Development
File No. 36479582-6

Daniel A. Vogel, Avon, Minnesota (pro se relator)

Order of St. Benedict, Collegeville, Minnesota (respondent employer)

Anne Froelich, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Bjorkman, Presiding Judge; Jesson, Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this certiorari appeal, relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible for benefits because he was discharged for aggravated employment misconduct. Relator asserts that his conduct was not misconduct or aggravated misconduct because he possessed and used marijuana off the job for religious purposes. We conclude that the record includes substantial evidence of employment misconduct. But because we also conclude that relator's off-duty possession and use of marijuana was not aggravated employment misconduct, we affirm in part and reverse in part.

FACTS

The following summary is based on the ULJ's written findings after an evidentiary hearing. Relator Daniel A. Vogel worked as a forest technician for respondent-employer Order of St. Benedict (OSB) from November 17, 1995, until his discharge on April 11, 2018. OSB is an "umbrella organization for a variety of religious sub-organizations," including St. John's Abbey, the Liturgical Press, and St. John's Preparatory School, which has 300 students in grades six through twelve. OSB covers 3,000 "acres of grounds" in Collegeville, Stearns County. As a forest technician, Vogel was responsible for wildlife and timber management, trail maintenance, snow removal, and other grounds-related activities. When Vogel was hired in 1995, he disclosed on his application that he had been convicted in 1985 of selling controlled substances, and had served one year in prison.

Vogel has used marijuana “most of his adult life,” is not chemically dependent, and does not use marijuana for medical purposes. For nearly 30 years, Vogel has lived three miles from OSB on about 30 acres, and has grown marijuana on his land and in his home. In August 2016, the National Guard Counter Drug Division flew over Vogel’s property and “observed probable marijuana grows.” In September 2016, law enforcement obtained a warrant and searched Vogel’s property and discovered: “a) two outdoor grows of marijuana totaling 84 plants, b) two indoor grows of marijuana totaling 186 plants, c) 103.58 ounces (6.47 pounds, or, 2,936 grams) of loose marijuana, d) packing materials, scales, paraphernalia, and other items associated with the cultivation, manufacturing, and distribution of marijuana, and e) numerous trays of drying marijuana buds.” While executing the search warrant, law enforcement “came across” an individual, T.H., who stated that Vogel “would give him marijuana” in exchange for doing outdoor work related to the “marijuana grows.”

On January 17, 2017, the state charged Vogel with fifth-degree sale of marijuana and fifth-degree possession of marijuana. OSB learned about Vogel’s criminal charges in March 2017. On March 8, 2017, J.J., OSB’s human-resources manager, and B.L., the OSB treasurer, met with Vogel, who declined to discuss the criminal charges.

J.J. and B.L. met with an employment lawyer, and discussed OSB’s policy, which provides that: “The unlawful involvement with alcohol or drugs on or off the job is a serious conduct breach. Each employee has an obligation to advise the employer of any known

violations of these requirements. Violations of these requirements will result in disciplinary action up to and including termination.” B.L. and J.J. decided not to fire Vogel at that time and “to wait and see” what happened with Vogel’s criminal charges.

Later in March 2018, Vogel pleaded guilty to fifth-degree felony possession of marijuana. Vogel received a stay of adjudication, and was placed on probation for five years. On April 11, 2018, B.L. and J.J. met with Vogel, and discharged him. Vogel applied for unemployment benefits with respondent Department of Employment and Economic Development (DEED). DEED determined that Vogel was ineligible and Vogel appealed.

A ULJ conducted an evidentiary hearing and J.J. and Vogel provided testimony. J.J. testified to the facts described above; in addition, J.J. testified that OSB was concerned that Vogel was growing and distributing drugs close to campus, where minor students lived during the school year.

Vogel testified and admitted that he grew marijuana at his home and that he had a prior criminal conviction for selling controlled substances. But Vogel testified that he did not sell or distribute the marijuana that he grew; instead, Vogel testified that he used the marijuana for “religious purposes.” Vogel did not provide details about his religious beliefs but testified that “the plant was given to us by God.” Vogel also testified that he was a good employee and had received “favorable” reviews.

In June 2018, the ULJ issued a written decision and concluded that Vogel was ineligible to receive unemployment benefits because he was discharged for employment misconduct. The ULJ determined that OSB had “the right to reasonably expect that Vogel not engage in behavior that constitutes a felony; in this case, marijuana possession

justifying a fifth-degree felony.” The ULJ concluded that Vogel seriously and intentionally violated these expectations, but determined that the employment misconduct was not aggravated.

Vogel requested reconsideration and argued that OSB learned of his criminal charges in March 2017, but did not fire him until April 2018, which made him “wonder why it took over a year to discharge [him] if this was a serious violation of standards of behavior the employer has the right to reasonably expect.” Vogel also asserted that he believed, based on OSB’s mission and values statements, that his “marijuana possession for religious purposes was [acceptable] behavior and not a serious violation of their standards.” Vogel also provided more details about his marijuana use as a “religious belief,” stating that he believed “God gave us marijuana to use in any way we see fit.” The ULJ granted Vogel’s request for reconsideration, set aside the June decision and findings of fact, and scheduled a second evidentiary hearing.

A second evidentiary hearing was conducted and J.J. and B.L. both appeared for OSB. B.L. testified that OSB decided to discharge Vogel because they operated a school and it would “not make any sense” to employ someone who “plead[ed] guilty to significant . . . drug[] possession.” B.L. testified that they did not have any evidence that Vogel had distributed drugs to students, but that such significant drug possession “close to campus” affected his ability to trust Vogel. B.L. also testified that Vogel violated OSB’s drug policy. Vogel testified regarding his marijuana grows and usage, the law enforcement search, and his criminal proceedings. Vogel also testified regarding his religious beliefs

and marijuana usage and argued that his marijuana use was part of his religious beliefs and practices. Vogel again denied that he had sold or distributed the marijuana he grew at his home.

In October 2018, the ULJ issued a written decision and again determined that Vogel was ineligible for benefits. The ULJ found that Vogel did not engage in any religious rituals relating to marijuana, his distribution and possession of marijuana was “not part of [his] religious beliefs,” and during his criminal proceedings, Vogel did not argue that “his activity was protected because it was part of his religious beliefs and practices.” The ULJ thus rejected Vogel’s constitutional argument for two reasons: (1) the large amount of marijuana in Vogel’s possession at the time of his arrest and T.H.’s statements to officers made it “more likely than not” that Vogel was selling or distributing marijuana; and (2) Vogel did not claim that selling or distributing marijuana was a religious belief or practice. The ULJ concluded that Vogel was discharged for misconduct, the misconduct was aggravated, and Vogel was, therefore, ineligible to receive benefits.

Vogel again filed a request for reconsideration. On December 14, 2018, the ULJ affirmed his prior ineligibility decision, but modified the findings of fact and reasons. The ULJ specifically found that Vogel distributed marijuana to others based on evidence that his outdoor marijuana plants could yield “a total of 672 ounces (42 pounds).” The ULJ reasoned that, based on the “large amount” of marijuana in Vogel’s possession, he “more

likely than not” was selling or distributing marijuana.¹ The ULJ found that Vogel was “not credible” when he denied sale or distribution because the amount of “loose marijuana” found in Vogel’s home by law enforcement amounted to a two-year’s supply for Vogel and his wife, and Vogel also had items, such as packing materials and scales, that are used for distribution.

The ULJ also determined that OSB’s testimony was more credible than Vogel’s testimony because it was “more logical, detailed, and persuasive than Vogel[’s].” The ULJ found that OSB discharged Vogel because he violated the employer’s drug policy, Vogel’s behavior was “a violation of trust between Vogel and OSB,” and OSB was concerned about “the proximity” between Vogel’s home and OSB and the “possibility” that Vogel “was selling or distributing marijuana to OSB’s students.” Accordingly, the ULJ concluded that Vogel was discharged for aggravated employment misconduct and was ineligible for benefits. This certiorari appeal follows.

¹ The ULJ rejected Vogel’s argument that OSB’s alcohol and drug policy infringed on Vogel’s religious liberty and found that Vogel’s “sincerely held religious beliefs are not at issue here.” The ULJ stated that:

The amount Vogel possessed (along with other factors, such as Vogel’s prior criminal distribution, and [T.H.’s] statement to police), made it more likely than not Vogel was selling or distributing marijuana. Vogel did not argue that selling or distributing marijuana was part of his religious belief. Likewise, Vogel did not argue that the amount he possessed was part of his religious beliefs. Vogel provided no evidence establishing a connection between the practice of his religion and the substantial amount of marijuana he possessed. Vogel’s ineligibility for unemployment benefits is based on the criminal amount of marijuana he possessed, and not his religious belief.

DECISION

I. Substantial evidence supports the ULJ's decision that Vogel was discharged for employment misconduct.

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, an employee generally is ineligible for unemployment benefits if they were “discharged because of employment misconduct.” Minn. Stat. § 268.095, subd. 4(1) (2018). Employment misconduct is defined, in part, 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) (2018). This court has held that “[a]n employee’s refusal to abide by the employer’s reasonable policies ordinarily constitutes employment misconduct.” *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011).

This court may reverse or modify the ULJ’s decision “if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are . . . unsupported by substantial evidence in view of the entire record as submitted.” *See* Minn. Stat. § 268.105, subd. 7(d)(5) (2018). “Whether an employee engaged in employment misconduct presents a mixed question of fact and law.” *Cunningham*, 809 N.W.2d at 235. 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*, 796 N.W.2d at 315. Whether the factual findings establish employee misconduct is a question of law, which is reviewed de novo. *Cunningham*, 809 N.W.2d at 235.

We defer to the ULJ’s credibility determinations when they are supported by substantial evidence, and when the ULJ sets forth a valid reason for crediting or discrediting the witness. *See Yswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532-33 (Minn. App. 2007); *see also* Minn. Stat. § 268.105, subd. 1a(a) (2018) (“When the credibility of a witness testifying in a hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony.”).

On appeal, Vogel asserts the ULJ’s determination that he committed employment misconduct was not supported by the evidence, and that the denial of unemployment benefits is a violation of the “freedom-of-conscience clause” in the Minnesota Constitution because he was discharged for using marijuana in accordance with his religious beliefs.

The Minnesota and United States Constitutions protect the right to free exercise of religion. U.S. Const. amend. I; Minn. Const. art. I, § 16. “The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.” *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877, 110 S. Ct. 1595, 1599 (1990).² The United States Supreme Court has held that a state

² *Smith* has been superseded by statute as stated in *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853, 859 (2015). While *Holt* is correct that Congress passed the Religion Freedom

cannot deny unemployment benefits to an applicant who is forced to choose between religious beliefs and employment; such a denial would violate the Free Exercise Clause of the First Amendment to the United States Constitution. *See, e.g., Frazee v. Ill. Dep’t of Emp’t Sec.*, 489 U.S. 829, 834-35, 109 S. Ct. 1514, 1517-18 (1989) (holding that applicant could not be disqualified from receiving unemployment benefits for refusing a position that would require him to work on Sundays, which was contrary to his religious beliefs). Additionally, the Minnesota Supreme Court has interpreted the freedom-of-conscience clause of the Minnesota Constitution to afford even greater protection than the Free Exercise Clause of the United States Constitution. *See State v. Hershberger*, 462 N.W.2d 393, 397-98 (Minn. 1990); Minn. Const. art. I, § 16. Generally, an unemployment-benefits applicant must demonstrate sincerely held religious beliefs to succeed on a free-exercise theory. *See Hill-Murray Fed’n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 865 (Minn. 1992) (providing that a successful free-exercise challenge under the Minnesota Constitution requires a party to establish, among other things, that state action violated sincerely held religious beliefs).

Here, the ULJ determined, and DEED argues on appeal, that we need not consider whether Vogel’s religious beliefs regarding marijuana *use* were “sincerely held” because his *distribution* of marijuana alone supports the misconduct finding. We agree. Vogel specifically testified that distributing marijuana was not part of his religious beliefs or

Restoration Act three years after *Smith* was decided, *Smith* nonetheless accurately states the fundamental principles of free exercise of religion. *See In re Kemp*, 894 F.3d 900, 907 (8th Cir. 2018) (citing and relying on *Smith* in its analysis of a free exercise of religion claim).

practices. And substantial evidence supports the ULJ's finding that Vogel had distributed marijuana. The ULJ expressly found Vogel's testimony not credible on this point and we will defer to the ULJ's credibility determination. *See Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Thus, even assuming the sincerity of Vogel's testimony that his religious beliefs include *using* marijuana, the record supports the ULJ's determination that Vogel violated state law and OSB's drug policy by distributing marijuana, unrelated to his religious practices. *Cunningham*, 809 N.W.2d at 235 ("An employee's refusal to abide by the employer's reasonable policies ordinarily constitutes employment misconduct."). Accordingly, we affirm the ULJ's determination that Vogel was discharged for employment misconduct and is ineligible for unemployment benefits.

Still, Vogel argues that his misconduct did not occur during working hours or at work, and did not interfere "in any way with his employment" or his "commitment to his job duties and responsibilities," thus, it was not employment misconduct. But whether or not the criminal conduct occurred during working hours is immaterial. Minn. Stat. § 268.095, subd. 6(a), specifically states "[e]mployment misconduct means any intentional, negligent, or indifferent conduct, on the job or *off the job*." (Emphasis added.) This statutory language is clear and unambiguous, thus the plain language controls. *See Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). Because Vogel violated OSB's reasonable expectations when he distributed marijuana in violation of state law and the employer's policy, he committed employment misconduct. *See Cunningham*, 809 N.W.2d at 235.

II. Substantial evidence does not support the ULJ’s decision that Vogel was discharged for aggravated employment misconduct.

Vogel also argues that his conduct did not constitute aggravated employment misconduct. An employee who is discharged because of either “employment misconduct” or “aggravated employment misconduct” is not eligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1)-(2) (2018). Aggravated employment misconduct is defined as “the commission of any act, on the job or off the job, that would amount to a gross misdemeanor or felony if the act substantially interfered with the employment or had a significant adverse effect on the employment.” Minn. Stat. § 268.095, subd. 6a(a)(1) (2018). Here, Vogel pleaded guilty to felony fifth-degree possession of marijuana and received a stay of adjudication.³

We disagree that substantial evidence establishes that Vogel’s misconduct “substantially interfered with the employment” or had “a significant adverse effect on the employment.” *Id.* In its reconsideration decision, the ULJ found that “Vogel’s off the job illegal acts, and the relatively close proximity of these acts to a vulnerable population that OSB has responsibility [of] caring for and ensuring the safety of . . . had a significant adverse impact on the employment.” But the ULJ cites to no record evidence and we can find no evidence supporting this determination. To the contrary, the record establishes that Vogel did not use marijuana at work and did not bring marijuana to the work place. In fact,

³ A stay of adjudication “is a procedure whereby the district court, upon a defendant’s guilty plea or a fact-finder’s determination of guilt, does not adjudicate the defendant guilty but imposes conditions of probation.” *State v. Martin*, 849 N.W.2d 99, 102 (Minn. App. 2014) (quotation omitted), *review denied* (Minn. Sept. 24, 2014). If Vogel successfully completes probation, he “avoids a criminal conviction.” *Id.*

B.L. specifically testified that they did not have any evidence that Vogel had distributed drugs to students or on campus. B.L. and J.J. also testified that OSB did not have any issues with Vogel's conduct at work.

Accordingly, substantial evidence does not support the ULJ's finding on reconsideration that Vogel committed aggravated employment misconduct. Thus, we reverse the ULJ's determination of aggravated employment misconduct. We nonetheless affirm the ineligibility determination on the grounds of employment misconduct because Vogel was discharged for distributing marijuana in violation of OSB's reasonable policy and state laws. *See* Minn. Stat. § 268.095, subd. 4(1) (stating that an employee who is discharged for employment misconduct is ineligible for all unemployment benefits).

Affirmed in part and reversed in part.