

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1237**

Kenneth Salway,
Relator,

vs.

Tandem Products, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 14, 2021
Affirmed
Jesson, Judge**

Department of Employment and Economic Development
File No. 38072458-2

Kenneth Henry Salway, Minneapolis, Minnesota (pro se relator)

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

Tandem Products, Inc., Minneapolis, Minnesota (respondent employer)

Considered and decided by Jesson, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

After respondent-employer Tandem Products Inc. received complaints from clients about relator-employee Kenneth Salway’s lack of professionalism—and after Salway

allegedly brought marijuana edibles to the company's trade show booth—Salway was fired. He applied for and received unemployment benefits, but Tandem appealed the decision. An unemployment-law judge (ULJ) heard the appeal and determined that Salway had been discharged for employment misconduct and, as such, was ineligible for unemployment benefits. Salway appeals. Because the determination was supported by substantial evidence, and because the ULJ did not rely on conduct that occurred after Salway was discharged and otherwise correctly applied the relevant law, we affirm.

FACTS

In April 2019, respondent Tandem Products Inc. hired relator Kenneth Salway to work as one of the company's territory managers. Salway's job was to sell Tandem's polyurethane products, foster relationships with distributors, and train distributors on the technical aspects of the products. But in early 2020, Tandem began receiving complaints from clients about Salway's lack of professionalism. Still, Tandem sent Salway to represent the company at a trade show in Las Vegas in February 2020. While there, Salway failed to show up for one of his shifts, and allegedly spoke unprofessionally to a client and brought marijuana edibles to the company booth.

Shortly thereafter, Tandem fired Salway. According to Salway's discharge documents, he was dismissed because of his poor performance, policy violations, lack of product knowledge, poor attendance, suspected use of marijuana, and improper and inaccurate travel expense reporting. Following his dismissal, Salway applied for unemployment benefits and respondent Minnesota Department of Employment and Economic Development (DEED) issued a determination of eligibility. Tandem then

appealed and a ULJ heard the parties' claims. At the hearing, Salway, Tandem's assistant director of human resources and finance, and a Tandem sales manager—who was Salway's direct supervisor and had also attended the trade show—testified to the circumstances leading to Salway's discharge.

Supervisor testified to both his personal knowledge of Salway's conduct at the trade show as well as some of the complaints Tandem received from clients. According to supervisor, Salway had a "highly unprofessional" phone conversation with an important client while working at Tandem's booth. Salway also missed a shift at the booth without notifying his coworkers. And later that week, supervisor testified, Salway brought a container of marijuana edibles to the booth during work hours, violating Tandem's drug policy.

As for the clients' complaints, one distributor reported that Salway showed up to a meeting with his wife and father-in-law in the car and texted them throughout the meeting. Another told Tandem that Salway's car smelled like marijuana. And a third client did not want Salway to come back to their plant because he had given them incorrect information about Tandem's products. Supervisor testified that, because of these interactions, the clients no longer wanted to work with Salway. Finally, supervisor told the ULJ that he had received threatening text messages from Salway after he was discharged.¹

¹ Supervisor explained that while he was at another trade show, Salway sent a text saying "nobody F's with my money or my family, I better get paid." Salway then asked supervisor if he was currently in Las Vegas before listing supervisor's address.

Testimony from the assistant director followed, and included a statement from the company's vice president. According to the statement, clients claimed that Salway missed several meetings, discussed marijuana and other drugs with clients, and stayed in hotels far from where clients were located "so that he could party." The statement also alleged that Salway "went around the distributor" and sold Tandem products to the end user, which negatively impacted Tandem's relationship with that distributor and violated Tandem's policy of working exclusively with distributors.

When Salway testified, he denied most of Tandem's claims. He contended that he could not have been bad at his job or disliked by clients because his sales numbers were among the company's best. Nor did he use marijuana while working, cause his car to smell like marijuana, or discuss marijuana with clients. He always stayed within a 45-minute drive of where clients were located, and although he did show up to a meeting with his wife and father-in-law in the car, he did not text them during the meeting.

With regard to his conduct at the trade show, Salway admitted to having a marijuana edibles container, but claimed that it held toothpicks, not edibles. Salway also conceded that he missed his shift at the booth, but said that it was because his back hurt, which he told supervisor about the night before. And although he remembered calling a client during the trade show, he stated that he was not rude during the conversation. As for the text messages to supervisor, Salway admitted to sending the texts, but denied intending to threaten supervisor.

Based on the parties' testimony, the ULJ determined that "Salway repeatedly violated the basic expectation of behaving professionally and respectfully with customers

multiple times, damaging Tandem’s relationship with those customers. Salway’s conduct was intentional or indifferent, and amounts to employment misconduct.” Therefore, Salway was not eligible for unemployment benefits.² In providing the reason for her determination, the ULJ acknowledged that while the parties disputed some facts, her findings were based on the testimony of Tandem’s witnesses, “which was credible because it was sincere, logical, and detailed.” Salway’s testimony, on the other hand, “was not credible because it was illogical.” This was especially true, the ULJ found, with regard to Salway’s testimony about the text messages he sent to his supervisor.

Salway requested reconsideration of the decision, arguing that it was erroneously based on the text messages he sent to his supervisor, which occurred *after* he was fired. The ULJ affirmed the decision and explained that the text messages were not considered in determining whether Salway had committed employment misconduct, but only in determining whether Salway’s testimony was credible.

Salway appeals by certiorari.³

DECISION

Salway argues that the ULJ erred by finding him ineligible for unemployment benefits due to employment misconduct. Specifically, he asserts that the decision was not supported by evidence and that the ULJ improperly based her determination on an event which occurred after Salway was fired and incorrectly applied the Minnesota

² The ULJ also determined that the decision resulted in the overpayment of unemployment benefits in the amount of \$6,804.

³ Minn. Stat. § 268.105, subd. 7 (2020).

Unemployment Insurance Law (Unemployment Insurance Law). We address each argument in turn.

I. The ULJ's decision was supported by substantial evidence.

Salway argues that testimony from Tandem's employees, without additional evidence, was insufficient to allow the ULJ to find by a preponderance of the evidence that he committed employment misconduct. As such, Salway claims, the ULJ could not determine that he was ineligible for unemployment benefits.

An individual discharged for employment misconduct is not eligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2020). Whether an employee's actions qualify as employment misconduct is a mixed question of law and fact. *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). Whether the employee committed a certain act is a question of fact, but whether that act constitutes employment misconduct is a question of law which we review de novo. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). A ULJ's factual findings are viewed in the light most favorable to the decision, and we will not disturb those findings when the evidence substantially supports them. *Id.*; see also Minn. Stat. § 286.105, subd. 7(d) (2020). In reviewing Salway's claim, we first consider whether the ULJ's findings of fact are supported by substantial evidence before determining whether those acts constitute employment misconduct.

Here, the ULJ found that Salway brought marijuana edibles to the trade show booth during work hours, failed to show up for one of his shifts at the booth, and spoke disrespectfully to a client while at the trade show. The ULJ also found that Salway had

“soured” Tandem’s relationships with some of its biggest customers by texting family members during a meeting, talking about marijuana with a client, discussing a discount with an end user, and smoking marijuana in a car the client was about to get into. These findings were based on the Tandem employees’ testimony, which the ULJ found credible. Because credibility determinations are the exclusive province of the ULJ, we defer to those findings.⁴ *Skarhus*, 721 N.W.2d at 344. Accordingly, the Tandem employees’ testimony substantially supports the ULJ’s findings of fact.

Having determined that there is substantial support for the ULJ’s findings that Salway did in fact commit the alleged acts, we now consider de novo whether those acts constitute employment misconduct. Employment misconduct is “any intentional, negligent, or indifferent conduct, on the job or off the job, that is 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 (2020). An employee’s refusal to abide by his or her employer’s reasonable policies constitutes employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Tandem has a company drug and alcohol policy which states that it is “against company policy for any employee to be under the influence of, or to use, sell, transfer, or possess alcohol, or . . . marijuana . . . when reporting to work, while working, or while on or about company premises.” Tandem also has a policy of selling its products only to

⁴ Salway also asserts that Tandem misled and lied to the ULJ during the hearing, and that his own sales report proved as much. But the ULJ did not find Salway’s testimony credible, and we defer to that determination. *Skarhus*, 721 N.W.2d at 344.

distributors, who then provide the product to end users. Salway violated these policies when he brought marijuana edibles to the trade show and discussed a discount with an end user instead of Tandem’s distributor.

Furthermore, Salway’s failure to show up for his shift at the trade show and his lack of professionalism with clients was a serious violation of the standards of behavior Tandem reasonably expects of its employees. That conduct undermined Tandem’s ability to “assign the essential functions of the job” to Salway. *Skarhus*, 721 N.W.2d at 344. We conclude that Salway’s actions constituted employment misconduct.

In sum, substantial evidence supports the ULJ’s determination that Salway’s actions violated Tandem’s reasonable policies and expectations and constituted employment misconduct. As such, we will not disturb the ULJ’s determination that Salway was ineligible for unemployment benefits.

II. The ULJ did not rely on text messages sent after Salway was discharged to determine that his actions were employment misconduct.

Next, Salway contends that the ULJ improperly based her decision on the text messages Salway sent to supervisor—*after* he was fired. Doing so, Salway asserts, violates the statute directing that actions occurring after dismissal should not be considered in determining eligibility.

Where a ULJ’s decision exceeds statutory authority we may overturn that determination. Minn. Stat. § 268.105, subd. 7(d)(2). In considering whether such error occurred here, we first look to the statutory provision at issue. Minnesota Statutes section 268.095, subdivision 7 (2020), establishes that individuals “may not be held ineligible for

unemployment benefits . . . for any acts or omissions occurring *after* the applicant’s separation from employment with the employer.” (Emphasis added.) Applying this rule to the ULJ’s conduct in this case, we conclude that the ULJ did not erroneously rely on the text messages to reach her decision.

Although the ULJ mentioned the text messages in her determination of Salway’s ineligibility, the decision makes clear that the messages were only used to ascertain Salway’s credibility: “[Salway’s] testimony about his text messages to [supervisor] *after the termination*, especially, was implausible on its face *and weakens his credibility overall*.” (Emphasis added.) And, when affirming her decision, the ULJ reiterated that she considered “Salway’s testimony about his conduct *after the termination only* when deciding whether Salway’s testimony was believable overall. *Salway was not held ineligible because of his acts after the termination*.” (Emphasis added.) In short, the ULJ did not rely on the text messages to determine that Salway committed employment misconduct. Her reference to the text messages was for the limited purpose of ascertaining Salway’s credibility.

III. The ULJ correctly applied the Minnesota Unemployment Insurance Law.

Salway also asserts that the ULJ failed to apply the Unemployment Insurance Law as intended—that is, in favor of awarding unemployment benefits. To support his claim, Salway cites to Minnesota Statutes section 268.031, subdivision 2 (2020), which provides instruction as to how the Unemployment Insurance Law should be applied:

This chapter is remedial in nature and must be applied in favor of awarding unemployment benefits. Any legal conclusion

that results in an applicant being ineligible for unemployment benefits must be *fully supported* by the facts.

(Emphasis added.) Salway leans on the first sentence of the statutory application provision to support his claim. But because we view the statute as a whole, we must also consider the sentence that immediately follows. *State v. Henderson*, 907 N.W.2d 623, 625 (Minn. 2018) (“We read a statute as a whole and give effect to all of its provisions.”).

Here, as described above, the record fully supports the ULJ’s determination of ineligibility. The ULJ determined that Salway was ineligible for unemployment benefits because of his conduct at the trade show and his interactions with Tandem’s clients. That determination was fully supported by the ULJ’s findings of fact, which in turn, were substantially supported by the Tandem employees’ credible testimony. We discern no error in the ULJ’s application of the law to the facts in this case.

In sum, there was substantial evidence to support the ULJ’s determination that Salway committed employment misconduct and was ineligible for unemployment benefits. In reaching this decision, the ULJ relied only on conduct occurring *before* Salway’s discharge and correctly applied the Unemployment Insurance Law.⁵

Affirmed.

⁵ Salway further argues that he did not receive a fair hearing. He does not provide any specific examples of prejudice or error, but characterizes the hearing as “very one sided.” But we do not consider assignments of error based on mere assertion. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971). And our review of the transcript does not reveal any prejudicial errors committed by the ULJ. *Id.* As a result, Salway’s unfair-hearing claim fails.