

*This opinion is nonprecedential except as provided by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
A21-1070**

Timothy J. Rosenberger,
Relator,

vs.

South-Town, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 2, 2022
Affirmed
Worke, Judge**

Department of Employment and Economic Development
File No. 42380652-3

Peter B. Knapp, Lucas J. Wallace (certified student attorney), Mitchell Hamline Law Clinic, St. Paul, Minnesota (for relator)

South-Town, Inc., Brooklyn Park, Minnesota (respondent employer)

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

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Ross,
Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he was ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

On June 24, 2020, respondent-employer South-Town Inc. hired relator Timothy J. Rosenberger as an HVAC technician to work specifically for its client Great Lakes Coca-Cola Eagan (Great Lakes). Rosenberger was a third-year apprentice with five years of training. One month later, South-Town discharged Rosenberger after receiving complaints from Great Lakes about Rosenberger's performance.

Rosenberger applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development (DEED) issued a determination of eligibility, stating that Rosenberger's conduct did not amount to employment misconduct. South-Town appealed.

At a hearing before the ULJ, Joe Kurke, South-Town's general manager, testified that on or around July 7, 2020, a Great Lakes facilities manager complained that Rosenberger showed up without tools and was "standing around." The manager told Rosenberger that he needed his tools, and Rosenberger retrieved his tools from his truck. Around the same time, Kurke received a similar complaint—that Rosenberger was at a job without tools—from another technician. A second technician notified Kurke that he was

not satisfied with Rosenberger's cleaning of condenser coils and told Rosenberger to continue cleaning. Rosenberger replied, "nah, they're good enough."

Kurke warned Rosenberger about these three issues and read his note from the meeting at the hearing before the ULJ: "Date, 7/9/20, Joe Kurke spoke to Timothy Rosenberger regarding performance issues. This was a result from customer feedback, ah, Great Lakes Coca-Cola in parentheses, and two . . . South-Town . . . technicians."

On July 24, Great Lakes again complained about Rosenberger. The manager was "livid" and stated: "I hired you guys to come out and do this work, and I end up doing most of it while [Rosenberger] stands around and watches." South-Town was warned that if Rosenberger returned to Great Lakes, South-Town risked losing Great Lakes, which was an account worth \$250,000. Kurke discharged Rosenberger that day.

Rosenberger testified that he was not warned about a complaint from Great Lakes. He testified that Kurke discussed with him only the issue with cleaning the coils and Rosenberger not "taking initiative." Rosenberger admitted that he did not arrive with his tools because he first wanted to see what tools he needed, and he believed that the Great Lakes manager would have basic tools. Rosenberger admitted that he stood around and watched the Great Lakes manager work on a fan because he was not sure how to help. He admitted that he was told to continue cleaning the coils, which he did. Rosenberger testified that there was an issue with his schedule because he was not available on Sundays. He also testified that he tried his best but needed more direction.

The ULJ determined that Rosenberger was discharged for employment misconduct because South-Town had the right to reasonably expect that Rosenberger's performance

would not result in complaints. The ULJ determined that Rosenberger was not credible, and South-Town was more credible because “it gave more information, and its version was more plausible.” The ULJ stated: “Kurke read into the record a relevant contemporaneous note. Complaints came in from the employer’s business client and from two of [its] employees, who had no reason to either lie or be mistaken. The complaints were consistent with each other and came in a very short period.”

Rosenberger requested reconsideration. In affirming the decision, the ULJ restated the issues Rosenberger raised in his request for reconsideration:

1) he could not have been negligent because the employer never communicated its expectations of him, 2) he was aware of only one complaint by his employer which related to Rosenberger’s unavailability to work on Sundays because of [his] religion, and this was not made part of the [f]indings of [f]act, 3) the employer did not inform him of a complaint from customer Lyon, 4) as a journeyman he relies on the employer to tell him what tools he will need, 5) the [f]indings of [f]act relied on Joe Kurke’s testimony and were not independently verified, 6) the employer had financial incentive to misstate the truth about him, and 7) he has two character witnesses.

The ULJ decided that Rosenberger made most, if not all, of these arguments during the hearing and provided no new evidence. The ULJ also determined that testimony about Rosenberger’s character would not address the issues with his work performance and would not change the outcome. This certiorari appeal followed.

DECISION

When reviewing the decision of the ULJ, this court may remand the decision for further proceedings, or reverse or modify it if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are “(1) in violation of

constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the hearing record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2020).

This court views “the ULJ’s factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ. In doing so, we will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (citations omitted). We review de novo whether an employee is eligible to receive benefits. *Menyweather v. Fedtech, Inc.*, 872 N.W.2d 543, 545 (Minn. App. 2015).

An employee is ineligible for benefits if he “was discharged because of employment misconduct.” Minn. Stat. § 268.095, subd. 4(1) (2020). “Employment misconduct means 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.” *Id.*, subd. 6(a) (2020). “Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). The finding that the employee committed a particular act is reviewed in the light most favorable to the decision and will not be disturbed when it is reasonably supported by the evidence. *Id.* Whether a particular act constitutes disqualifying misconduct is reviewed de novo. *Id.*

“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). When an employee knowingly violates an employer’s instructions and directives, such action amounts to employment misconduct because it is a willful disregard of the employer’s interests. *Id.* at 806. “This is particularly true when there are multiple violations of the same rule involving warnings or progressive discipline.” *Id.*

The ULJ found that South-Town received complaints from Great Lakes that Rosenberger showed up to work without his tools and was not working. South-Town also received complaints from its employees that Rosenberger did not sufficiently clean coils and showed up to work without his tools. The findings that Rosenberger committed these acts are substantially supported by the evidence in the record. *See Skarhus*, 721 N.W.2d at 344. We must now determine whether these acts constitute disqualifying misconduct. *See Stagg*, 796 N.W.2d at 315.

The first complaint regarding Rosenberger’s work performance related to his insufficient cleaning of the coils. DEED concedes that this was merely poor performance and not misconduct. Second, while Rosenberger’s “standing around” could just be laziness, the fact that he did not seek advice on how to do something violates the reasonable expectations that his employer would have for a third-year apprentice with five years of training. Finally, Rosenberger’s failure to bring his tools to work at the direction of his employer was a knowing violation of his employer’s directive and amounts to employment misconduct. *See Schmidgall*, 644 N.W.2d 806. This is especially true because South-Town warned Rosenberger about this conduct, and he repeated it. *See id.* The ULJ

appropriately concluded that Rosenberger's conduct was employment misconduct because it was "intentional, negligent, or indifferent conduct . . . that is a serious violation of the standards of behavior" that South-Town had the right to reasonably expect. *See* Minn. Stat. § 268.095, subd. 6(a).

Rosenberger argues that he was discharged for "poor work performance," which is not misconduct. But we agree with the ULJ that this was not simply unsatisfactory conduct. It was conduct that occurred in a short period and was repeated. Rosenberger also claims that, as an apprentice, he needs direction, but a technician with five years of experience should be able to follow his employer's directive to arrive prepared with tools.

Finally, Rosenberger argues that his conduct was conduct an average reasonable apprentice would have engaged in under the circumstances. Under this argument, Rosenberger explains the difference between a journeyman and an apprentice and claims that the ULJ misclassified him as a journeyman in the order of affirmation, which allegedly affected the decision.

But the ULJ did not mischaracterize Rosenberger as a journeyman. In the order of affirmation, the ULJ used the term "journeyman" in restating the issues Rosenberger raised in his request for reconsideration. Nowhere in the decision or the order of affirmation did the ULJ find that Rosenberger was a journeyman. This is simply a typographical error. And it had no effect on the decision. The record supports the ULJ's decision that Rosenberger was discharged for employment misconduct and was ineligible for unemployment benefits.

Affirmed.