This opinion is nonprecedential except as provided by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
A22-1080

Justin D. Shackelford,
Relator,

vs.

University of Minnesota,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed March 13, 2023
Affirmed
Slieter, Judge

Department of Employment and Economic Development
File No. 48656828-3

Justin Shackelford, Crystal, Minnesota (*pro se* relator)

University of Minnesota, c/o Corporate Cost Control, Inc., Londonderry, New Hampshire (respondent employer)

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

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Relator challenges the order of an unemployment-law judge (ULJ) determining that he is ineligible to receive unemployment benefits. Because the ULJ did not err in determining that relator's actions were employment misconduct, we affirm.

FACTS

On March 28, 2022, relator Justin D. Shackelford was discharged from employment as a veterinary technician assistant by respondent University of Minnesota. The events leading to his discharge began approximately two years earlier.

In late 2020, the university began requiring its employees to wear eye coverings as part of its COVID-19 mitigation measures. Near the same time, Shackelford's supervisor created a "workflow document," which included Shackelford's input, to guide his daily tasks and address concerns about his productivity. In December 2020, Shackelford began filing complaints related to the eye-coverings policy with state and federal agencies.

In December 2021, Shackelford received a negative performance evaluation from his supervisor, who cited concerns about Shackelford's inability to stay on-task and use of computers for non-work activities. Shackelford petitioned for a harassment restraining order (HRO) against his supervisor for alleged "retaliatory behaviors and harassment."

On February 4, 2022, the university gave Shackelford a "letter of expectations" explaining that, although Shackelford had the right to pursue "lawsuits" against the university, he could not do so "on work time." The letter also explained that he must minimize use of university equipment to pursue the "lawsuits," must not allow pursuit of

the "lawsuits" to interfere with "assigned work tasks," and must treat the "lawsuits" as "personal endeavors" and "request[] the appropriate time off . . . through the normal departmental time off request process."

On February 15, Shackelford requested time off to participate in a remote mediation session on February 23, related to his HRO petition. Despite not having received a response to his time-off request, Shackelford participated in the three-hour mediation on February 23. He "punched out" for the first 92 minutes then "punched in" and attempted to complete some of his work duties with one hand while holding his phone with his other hand for the remainder of the mediation.

On March 28, the university discharged Shackelford for violating the expectations set forth in the February 4 letter by taking time off on February 23 without the proper approval and participating in the mediation "for an extended period of time while punched in [which] interfered with work activities."

Shackelford applied for unemployment benefits and was denied based on an administrative determination that he was discharged for employment misconduct. He appealed this determination of ineligibility, and a ULJ conducted a hearing. Shackelford submitted evidence related to his employment and legal actions to the ULJ. At the hearing, Shackelford and his supervisor testified. The ULJ concluded that Shackelford had been discharged for employment misconduct and affirmed this conclusion when Shackelford requested reconsideration. Shackelford takes this certiorari appeal.

DECISION

An unemployment-benefits applicant is ineligible for benefits if "the applicant was discharged because of employment misconduct." Minn. Stat. § 268.095, subd. 4(1) (2022). "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) (2022). "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).

"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). We review whether a particular act constitutes disqualifying misconduct *de novo*. *Id.* We review whether the applicant engaged in the conduct "in the light most favorable to the decision and should not disturb those findings as long as there is evidence in the record that reasonably tends to sustain them." *Id.* (quotation omitted). "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Bangtson v. Allina Med. Grp.*, 766 N.W.2d 328, 332 (Minn. App. 2009) (quoting *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006)); *see also Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (remanding "[b]ecause the ULJ did not make findings addressing credibility and the ULJ's finding of employment misconduct relies on a credibility assessment").

The ULJ determined "that Shackelford was discharged because of 'persistent off task behavior' and violating the February 4 letter of expectations on February 23." This determination was based on testimony from Shackelford's supervisor, whom the ULJ found credible.

Shackelford argues that his actions do not constitute employment misconduct, are not a serious violation of the university's reasonable expectations, and fit within at least one exception to employment misconduct. We are not persuaded.

Employment Misconduct

The statutory "definition of 'employment misconduct' is 'exclusive and no other definition applies.'" *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 458 (Minn. 2016) (quoting Minn. Stat. § 268.095, subd. 6(e) (2016)). "Because the statutory definition is exclusive, a prior common law standard that is incompatible with the statutory language is inapplicable." *Id.* The statutory definition of employment misconduct encompasses "any intentional, negligent, or indifferent conduct." Minn. Stat. § 268.095, subd. 6(a).

Shackelford relies on the definition of employment misconduct from *In re Tilseth's Claim*, which limited employment misconduct to conduct evincing "wilful or wanton disregard of an employer's interests . . . carelessness or negligence to such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or . . . intentional and substantial disregard of the employer's interests or the employee's duties and obligations." 204 N.W.2d 644, 646-47 (Minn. 1973) (quoting *Boynton Cab. Co. v. Neubeck*, 296 N.W.2d 636, 640 (Wis. 1941)). The common-law definition considers the employee's intent, which the exclusive statutory definition does not and, thus, the

common-law definition in *Tilseth* "no longer applies in light of statutory amendments." *Hanson v. Crestliner Inc.*, 772 N.W.2d 539, 543 (Minn. App. 2009); *see also Wilson*, 888 N.W.2d at 458

The ULJ relied on the statutory definition of employment misconduct and, thus, did not err.

Serious Violation

Shackelford argues that his conduct was not a serious violation of the university's reasonable expectations because the university failed to follow its own disciplinary procedures.

The statutory definition of employment misconduct focuses on "the employee's conduct, not that of the employer," so considering the actions of the employer "fails to comport with the exclusive definition of employment misconduct set forth in Minn. Stat. § 268.095, subd. 6(e)." *Stagg*, 796 N.W.2d at 316 (quotation omitted). Shackelford relies on *Hoemberg v. Watco Publishers, Inc.*, 343 N.W.2d 676, 679 (Minn. App. 1984), *overruled by Stagg*, 796 N.W.2d at 316, to support his argument that employer misconduct affects whether an employee engaged in misconduct to preclude unemployment benefits, but *Hoemberg* was explicitly overruled by *Stagg* and is no longer good law.

Therefore, the ULJ did not err by declining to consider the university's conduct.

Statutory Exceptions

Shackelford argues that, even if his actions constituted employment misconduct, they fit within five of the ten statutory exceptions to employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(2) (inefficiency or inadvertence), (3) (unsatisfactory conduct), (4) (conduct an average reasonable employee would have engaged in under the circumstances), (6) (good faith errors in judgment), (10) (conduct that was the result of harassment or stalking) (2022).

These arguments were not presented to the ULJ, and we generally do not consider issues not first presented to a fact-finder. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But even if we were to consider each, we would not be persuaded.

The ULJ found Shackelford's supervisor credible and determined, based on that credible testimony, that Shackelford was discharged for failing to abide by the university's reasonable request that he not conduct his lawsuits on work time. *Bangtson*, 766 N.W.2d at 332. Shackelford's actions were a direct violation of that reasonable request, not inefficiency, inadvertence, or simply unsatisfactory conduct, and an average reasonable employee would have taken steps to follow up on his time-off request when he did not receive a response. Meeting this clearly communicated expectation did not require an exercise in judgment. *Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 877 (Minn. App. 2011) (noting an employee need not exercise judgment in deciding whether to comply with a known policy but is "to simply follow the policy without having any discretion to choose otherwise"). The definition of harassment or stalking exempts conduct performed "to carry

out a specific lawful commercial purpose or employment duty." Minn. Stat. §§ 609.749, subd. 7, 268.095, subds. 6(b)(10), 1(9)(iii) (2022).

Finally, Shackelford argues that there is a single-incident exception, which the ULJ should have applied. If the conduct alleged to support discharge was a single incident, the ULJ is required to consider that fact in determining if the conduct rose to the level of employment misconduct, but this is a fact the ULJ must consider, not an exception. Minn. Stat. § 268.095, subd. 6(d) (2022); *Potter*, 805 N.W.2d at 875. The ULJ inquired about whether there were multiple instances of misconduct, and, thus, properly considered whether it was a single incident.[1]

Affirmed.

[1] Shackelford also argues that the ULJ misapplied the burden of proof by crediting his supervisor's testimony over his "hard evidence" and not construing the evidence in favor of awarding benefits. The ULJ found Shackelford's supervisor credible, and we will not overturn that determination. *Bangtson*, 766 N.W.2d at 332. And, as discussed, the record read in the light most favorable to the ULJ's decision reasonably tends to support the decision. *Wilson*, 888 N.W.2d at 460.