STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0575

Richard Braegelmann,
Relator,

vs.

Hansen Flooring Gallery, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed January 11, 2021
Affirmed
Larkin, Judge

Department of Employment and Economic Development
File No. 37663451-3

John A. Abress, Franz Hultgren Evenson, P.A., St. Cloud, Minnesota (for relator)

Roger C. Justin, Rinke Noonan, St. Cloud, Minnesota (for respondent employer)

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

Considered and decided by Larkin, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that he was discharged for employment misconduct and is therefore ineligible for unemployment benefits. We affirm.

FACTS

Relator Richard Braegelmann worked for respondent Hansen Flooring Gallery, Inc. (HFG) from April 2012 to October 2019. He was discharged on October 15, 2019. He applied for unemployment benefits from respondent Minnesota Department of Employment and Economic Development (DEED). DEED determined that Braegelmann was ineligible for unemployment benefits because he was discharged for employment misconduct. Braegelmann appealed that determination.

At an ensuing evidentiary hearing before a ULJ, evidence was presented that HFG is a floorcovering business that sells and installs flooring. Braegelmann worked full time as a salesman for HFG. Braegelmann's duties included greeting customers and determining their flooring needs. He would then work with Leonard Hansen, HFG's CEO and owner, to schedule onsite visits to the customers' homes for installation measurements. Once measurements were complete, Braegelmann would prepare a quote for the customer.

Hansen was responsible for arranging installations. HFG used both employees and subcontractors for installations. HFG received a commission from its installation subcontractors. HFG required its subcontractors to register with the Minnesota Department

of Labor and to carry workers' compensation insurance. After the customer accepted the quote, Hansen determined which subcontractor would complete the project.

HFG discharged Braegelmann after Hansen learned that Braegelmann had referred customers to installers who were not employees of HFG or approved subcontractors. One customer, John, purchased carpet from HFG, and Braegelmann recommended an outside contractor, Nash, to install the carpet. John mentioned the installation to Hansen in July 2019 and was under the impression that HFG had installed the carpet. Hansen looked up the order, and there was no record that HFG had installed the carpet. Further questioning by Hansen revealed that Braegelmann had provided Nash's name and number to John.

Another customer, Courtney, purchased carpet from HFG in August 2019 and wanted installation. Before the new carpet could be installed, the old carpet had to be removed and the area had to be treated for pet stains. Braegelmann recommended his friend Nate to tear out the old carpet. He did so because the old carpet had to be removed two days before installation to treat the pet stains, and HFG normally removed old carpet and installed new carpet on the same day. Hansen learned of Braegelmann's referral when he was measuring for the installation at Courtney's home and Courtney told him that she would have Nate tear out the old carpet based on Braegelmann's recommendation.

A third customer, Yvette, purchased carpet from HFG in August 2019 after she had purchased bathroom flooring from a different company. HFG installed the carpet, but Braegelmann recommended that Nash install the bathroom flooring. He did so because HFG does not install flooring purchased from other companies. Yvette had wanted the

same company to install both the carpet and bathroom flooring. She purchased the carpet from HFG only because Braegelmann provided her Nash's name for the installation.

Braegelmann indicated that he referred customers to other installers because he believed that he was acting in HFG's best interests and that his actions would help the business. He always informed the customers that the laborers were independent contractors who did not work for HFG. And he never received any payment or other benefit for the business that he referred to other contractors.

The ULJ determined that Braegelmann was discharged for employment misconduct and therefore was ineligible for unemployment benefits. She found that Braegelmann "did not follow the general procedure of referring customers through Hansen in order to determine the customer's installation needs" and instead recommended that the customers contact installers unrelated to HFG. Although the customers that Braegelmann referred to outside contractors had unique issues, "he did not give HFG the opportunity to assess the situation and make its own determination." The ULJ further found that Braegelmann's conduct caused a "loss of revenue" and "could have led to customer complaints or an inability for HFG to address issues with customers, as the installation was done independently." Braegelmann requested reconsideration, and the ULJ affirmed her decision. This certiorari appeal follows.

DECISION

The Minnesota unemployment-insurance program provides a temporary partial wage replacement to workers who are "unemployed through no fault of their own." Minn. Stat. § 268.03, subd. 1 (2018). An applicant is ineligible for unemployment benefits if he

was discharged by an employer because of employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2018). 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." *Id.*, subd. 6(a) (Supp. 2019).

Whether an employee engaged in employment misconduct is a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). We review de novo whether an employee's particular actions constitute employment misconduct. *Id.* "Whether the employee committed a particular act is a question of fact." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We review the ULJ's factual findings in the light most favorable to the decision and give deference to the ULJ's credibility determinations. *Id.* We will not reverse the ULJ's findings "as long as there is evidence in the record that reasonably tends to sustain them." *Stagg*, 796 N.W.2d at 315.

I.

Braegelmann contends that his actions did not constitute employment misconduct because they were not "intentional, negligent, or indifferent," arguing that he always acted with HFG's best interests in mind and believed that his conduct was permissible. Minn. Stat. § 268.095, subd. 6(a). He also argues that there was insufficient evidence that he intended to violate any of HFG's established procedures. Conduct is intentional if it is "deliberate" and not "accidental." *Houston v. Int'l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002). Braegelmann acted deliberately, and therefore intentionally, when he referred customers to other contractors. And, as described in the next section of this

opinion, Braegelmann did so knowing that his actions were inconsistent with his employer's reasonable expectations, which shows that his actions were indifferent.

Braegelmann also contends that his actions did not constitute employment misconduct because they were not "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). He argues that there was no evidence that HFG had a policy prohibiting employees from referring customers to outside contractors or that such a policy was ever communicated to him.

Braegelmann is correct that the evidence does not show a written policy prohibiting salespersons from referring customers to unapproved installers. But a written policy is not necessary because misconduct may be based on the standards of behavior the employer has the right to reasonably expect of the employee. *Brown v. Nat'l Am. Univ.*, 686 N.W.2d 329, 333 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

Hansen testified that HFG had an unwritten policy that employees should not provide the names of installers to customers and that the policy was discussed at numerous sales meetings. Hansen also testified that he alone was responsible for assigning installers to projects. Although Braegelmann would assist Hansen to schedule installations, Braegelmann testified that Hansen determined which installer to assign to each project and that Hansen only used certain insured installers. Indeed, Braegelmann did not even know which subcontractors were approved by Hansen.

The record shows that HFG's established business procedure was for Hansen to select an installer for a project and for an HFG employee to assist Hansen to schedule the

installation. Braegelmann did not follow that procedure when he referred customers to unapproved installers. And the fact that Hansen learned of the referrals from customers indicates that Braegelmann never discussed the referrals with Hansen. Viewed in the light most favorable to the ULJ's decision, the evidence demonstrates that Braegelmann violated HFG's established business procedure.

"An 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). And employees have a duty of loyalty, which prohibits them from competing with their employer. *Marn v. Fairview Pharmacy Servs. LLC*, 756 N.W.2d 117, 121 (Minn. App. 2008), *review denied* (Minn. Dec. 16, 2008). An employee's violation of the duty of loyalty may be employment misconduct. *Id.* at 122. We conclude that Braegelmann violated a reasonable policy regarding the process for arranging installations, and in doing so, breached his duty of loyalty to his employer. His actions constituted employment misconduct.

II.

Braegelmann contends that even if his conduct was a serious violation of the standards of behavior that HFG had the right to reasonably expect of him, it fell within the exceptions to employment misconduct listed in Minn. Stat. § 268.095, subd. 6(b) (Supp. 2019). He points to three specific exceptions: "conduct that was a consequence of the applicant's inefficiency or inadvertence," "conduct an average reasonable employee would have engaged in under the circumstances," and "good faith errors in judgment if judgment was required." Minn. Stat. § 268.095, subd. 6(b)(2), (4), (6).

Braegelmann argues that his conduct was due to inadvertence because he believed that he was helping HFG. In the context of employment misconduct, we have defined "inadvertence" to mean "an oversight or a slip" or "not duly attentive or marked by unintentional lack of care." *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 540 (Minn. App. 2011) (quotations omitted). As discussed above, Braegelmann's referrals were deliberate, and not inadvertent.

Braegelmann next argues that his actions constituted conduct that a reasonable employee would have engaged in under the circumstances. The record establishes that Hansen was in charge of assigning installers to projects and that Braegelmann's role in that process was limited to assisting with scheduling. Given that clearly established procedure, a reasonable employee in Braegelmann's position would not have referred customers to an unapproved installer without Hansen's knowledge.

Braegelmann last argues that his conduct was a good-faith error in judgment. The relevant exception applies only "if judgment was required." Minn. Stat. § 268.095, subd. 6(b)(6). Braegelmann was not required to exercise any judgment related to the assignment of installers to projects. He was required to notify Hansen, who would assign an installer.

In sum, none of the exceptions on which Braegelmann relies is applicable.

III.

Braegelmann challenges the ULJ's finding that HFG lost revenue because of his actions, contending that the finding is not supported by sufficient evidence. Our decision that the record supports the ULJ's determination that Braegelmann engaged in employment misconduct does not depend on the lost-revenue finding. Thus, any alleged error in that

finding is harmless and not a basis to reverse. *See* Minn. Stat. § 268.105, subd. 7(d) (2018) (providing that we may reverse or modify a ULJ's decision "if the substantial rights of the petitioner may have been prejudiced"); Minn. R. Civ. P. 61 (stating that the court must disregard harmless error); *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 530 (Minn. App. 2007) (affirming ULJ's decision because relator could not show that her substantial rights were prejudiced).

Affirmed.