

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 06/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

CYNTHIA MARTORANO,) No. 1 CA-UB 11-0167
)
Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
)
ARIZONA DEPARTMENT OF ECONOMIC) (Not for Publication -
SECURITY, an Agency,) Rule 28, Arizona Rules
) of Civil Appellate
and) Procedure)
)
HOST INTERNATIONAL INC.)
)
Appellees.)

Appeal from the A.D.E.S. Appeals Board

No. U-1226963-BR

AFFIRMED

Cynthia Martorano
Appellant *in propria persona*

Phoenix

Thomas C. Horne, Arizona Attorney General
By Dawn Rachelle Williams, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic
Security

Tucson

D O W N I E, Judge

¶1 Cynthia Martorano appeals from an Arizona Department
of Economic Security ("ADES") decision denying her claim for

unemployment benefits. She presents one issue on appeal: whether the Appeals Board ("Board") erred by finding she was discharged for work-connected misconduct. Because we find the record susceptible to an interpretation that supports the Board's decision, we affirm.

¶2 This Court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 41-1993(B). We view the evidence in the light most favorable to upholding the Board's decision and will affirm the decision if any reasonable interpretation of the record supports it. *Baca v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (App. 1997) (citation omitted). We are bound by the Board's findings of fact unless they are arbitrary, capricious, or an abuse of discretion. *Avila v. Ariz. Dep't of Econ. Sec.*, 160 Ariz. 246, 248, 772 P.2d 600, 602 (App. 1989) (citations omitted). We review legal conclusions *de novo*. *Empire W. Co. v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 95, 97, 893 P.2d 746, 748 (App. 1995).

FACTS AND PROCEDURAL HISTORY

¶3 Martorano worked as a server at a lounge operated by Host International, Inc. ("Host") at Sky Harbor Airport. On August 4, 2010, she was involved in an incident with a customer who did not leave her a tip. The customer called the lounge manager, Jessica Samuel, regarding the incident:

Customer was out-raged [sic] that after paying his tab, but not tipping, and leaving the bar with his wife and sitting down at C17 gate, Cindy approached them and asked why they had not tipped her. The man, Michael Henderson, told her gratuity was an option and he didn't have to explain himself. She persisted in asking about the tip. Michael said she was making it seem like he hadn't paid his bill or something and wouldn't accept that she wasn't getting a tip. He felt embarrassed and humiliated.

Samuell spoke with Martorano's coworkers, and reported the incident to Host's senior human resources manager, Patricia Hurtado.

¶4 Hurtado continued the investigation by speaking to Henderson and reviewing videotapes from lounge cameras. She discharged Martorano on August 9, 2010, for violating a company policy through "[m]isconduct with disrespectful treatment of customer on 8/4/10 and removal of company property (investigation statement) from premises without proper authorization." The employer supported the discharge with several documents signed and acknowledged by Martorano regarding Host's service standards.

¶5 A department deputy found Martorano eligible for unemployment benefits. Host timely protested and requested a hearing. The Appeal Tribunal held a hearing and heard testimony from Martorano and Hurtado. Martorano testified that Henderson and his wife were in the lounge for an hour and that there were no problems with their order or her service. They paid their

\$66 bill on a credit card and left without leaving a tip. After discussing the situation with another server and her shift supervisor, Martorano followed the couple into the concourse and approached them at their gate.¹ She asked if there had been a problem and "told [them] that [she] took it personally and that [she] equate no gratuity as there been a problem [sic]." The wife responded that everything had been fine, but the bill seemed high, and based on the economy, they chose not to leave a tip. Martorano testified that the conversation was respectful and courteous, and afterward, she returned to the lounge.

¶16 Martorano testified that shortly thereafter, the man "stormed into the lounge and started yelling at me," saying she had embarrassed him. The shift supervisor went outside with the customer and spoke to him. The customer later returned to the restaurant and left a note with the cook. Because Martorano felt the incident was not the cook's business, she took the note. She stated the note did not have contact information for the customer, so she assumed the shift supervisor was merely allowing him to vent.² She threw the note in the trash.

¹ Although Martorano stated that she had the shift supervisor's permission, his written statement was that she "took it upon herself to leave the bar," and Hurtado testified the shift supervisor's "statement did not match [her] allegations."

² This is inconsistent with information recorded by Samuell after her initial conversation with Martorano; " [Martorano]

¶17 Upon questioning by the ALJ, Martorano conceded it was not her note and she did not have permission to discard it. Further, because the note contained a customer complaint, Martorano agreed that throwing it away was not a good idea and she regretted doing so. She explained that she did not understand an investigation was in progress when she discarded the note. Martorano also agreed that it was against company policy to follow a customer out of the lounge to ask about a tip. She distinguished this incident, stating she was only asking about the quality of her service.

¶18 Hurtado testified that she discharged Martorano for taking investigation documents, i.e., removing company property without authorization, and disrespectful treatment of a customer. As part of her investigation, Hurtado spoke to the customer, Martorano's coworkers, and the shift supervisor, and she reviewed lounge camera videotapes. The customer told Hurtado that Martorano followed him onto the concourse to ask about her tip, and when he followed her back to the lounge, she threatened to call the police. Hurtado also testified that Martorano admitted leaving the lounge, confronting the customer, and throwing away the customer's written complaint.

also told [the shift supervisor] that she called her family attorney and that she has the customers [sic] name and phone number from the note."

¶9 Following the hearing, the Appeal Tribunal entered its decision denying unemployment benefits because Martorano was discharged for work-connected misconduct. Martorano timely requested review, but the Board affirmed the Tribunal's decision. Martorano requested review of the Board's decision, but the Board affirmed. Martorano next brought an application for appeal to this Court, which was granted.

DISCUSSION

¶10 The Board applied Arizona Administrative Code R6-3-5105, which provides:

A. Misconduct.

1. The following constitute misconduct sufficient to disqualify a worker from receipt of unemployment insurance benefits pursuant to A.R.S. § 23-775(2):

. . . .

b. A deliberate violation of the employer's rules;

c. A disregard of standards of behavior that the employer has the right to expect of an employee;

. . . .

2. A worker does not need to have intended to wrong the employer for the Department to find misconduct connected with the work. Misconduct may be established if there is:

a. Indifference to and neglect of the duties required of the worker by the contract or terms of employment; or

b. A material breach of any material lawful duty

required under the employment contract or terms of employment, when the employer expressly or impliedly sets forth the duty to the worker and the facts show the worker should have reasonably been able to avoid the situation that brought about the discharge. . . .

¶11 In this case, the employer introduced the following written expectations for employee behavior into evidence:

COMMITMENT TO HMS SERVICE STANDARDS

1. Promptly Greet the Customer
2. Smile - Be Friendly
3. Provide Fast, Correct Service
4. Sell Benefits
5. Thank the Customer
6. Handle Complaints Professionally

CUSTOMER GUARANTEE OF FAIR TREATMENT

Every customer is entitled to be treated with dignity and respect. All of our customers are guaranteed fair treatment by every person at HMSHost.³

¶12 The Board found that Martorano's behavior constituted work-connected misconduct because it disregarded standards of behavior that Host had a right to expect. The evidence established that Martorano knew it was against Host's policies to pursue a customer outside the lounge with regard to a tip, but she did so anyway. This caused the customer to return to the lounge, where a disruption occurred in front of the other customers. After the shift supervisor allowed the customer to

³ These company policies were signed and acknowledged by Martorano on October 23, 2002.

