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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2133**

Jane Butler,
Relator,

vs.

Independent School District No. 728,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 15, 2011
Affirmed
Wright, Judge**

Minnesota Department of Employment and Economic Development
File No. 25623599-3

Jane Butler, Nowthen, Minnesota (pro se relator)

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Minnesota (for respondent Independent School District No. 728)

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Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Worke, Presiding Judge; Wright, Judge; and Willis,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WRIGHT, Judge

In this certiorari appeal from the denial of unemployment benefits, relator argues that the unemployment law judge (ULJ) erred by concluding that relator was discharged for employment misconduct and is, therefore, ineligible to receive unemployment benefits. We affirm.

FACTS

Relator Jane Butler worked part-time as a building supervisor for Independent School District No. 728 from November 2008 until she was discharged on June 28, 2010. Butler worked approximately three hours weekly supervising the activities of community groups using the school district's building during nonschool hours. Her job duties included personally monitoring the activities of community groups by remaining in the areas used by groups, assisting groups as requested, and securing the buildings at the beginning and end of group activities.

On Sunday, April 4, 2010, Butler was assigned to supervise the Lincoln Elementary School building, where a church group was scheduled to meet in the east end of the building. A security camera recorded Butler lingering in the west end of the building throughout her shift. At one point, Butler entered a locked custodial storage area on the west end of the building, placed a floor mat in a trash can, and moved the trash can containing the floor mat into a men's restroom near an exit at the southwest end of the building. Several minutes later, Butler removed the trash can containing the mat from the restroom and deposited the mat in a recessed wall area near an exit at the northwest end

of the building. She later carried the mat into the foyer of the exit. According to the school district policy included in the building-supervisor training manual, building supervisors are permitted to retrieve items from custodial areas at the request of community groups; but building supervisors may not perform custodial duties.

Also during her shift that morning, Butler left the building and smoked a cigarette in her vehicle even though she knew that school district policy prohibits tobacco use on school property.

The next day, the school district discovered that the floor mat, which was new and had an estimated value of \$275, was missing. After reviewing the security-camera footage of Butler's activities, Butler's supervisor and the school district's police liaison interviewed Butler about the missing floor mat. Butler could not recall or explain several of her actions. But she stated that she moved the floor mat because its label indicated that it belonged at the southwest exit and she wished to help by placing it in the correct location. Butler also explained that she monitored activity near the southwest exit because members of the church group used the restrooms at that end of the building. Butler admitted leaving the building to smoke and deposit something in her car.

The school district suspended Butler from work on April 15, 2010, pending its investigation of the missing floor mat. On June 28, the school district discharged Butler for (1) theft, or causing the theft, of the floor mat; (2) violating the school district's policy prohibiting the use of a tobacco product on school district property; (3) failing to comply with work rules and job expectations by failing to properly supervise the church group in

the east end of the building; and (4) falsely stating that she was in the west end of the building to open restrooms for the church group.

Butler applied for unemployment benefits. A Minnesota Department of Employment and Economic Development adjudicator determined that the evidence is insufficient to demonstrate that Butler committed employment misconduct by committing theft. Therefore, the adjudicator concluded, Butler is eligible to receive unemployment benefits. The school district appealed. After a hearing, the ULJ agreed that the evidence is insufficient to establish that Butler committed theft. But because Butler failed to comply with her job duty to supervise the church group, violated the school district's policy against tobacco use on school premises, and moved the floor mat without good reason, the ULJ determined that Butler seriously violated the standards of behavior her employer has the right to expect of its employees. In doing so, the ULJ concluded, Butler committed employment misconduct and is ineligible to receive unemployment benefits. Following Butler's request for reconsideration, the ULJ affirmed his decision. This certiorari appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the conclusion, decision, findings, or inferences 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 entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2010).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct is “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2010). But conduct that is a consequence of the applicant’s inefficiency or inadvertence, simple unsatisfactory conduct, or conduct an average reasonable employee would have engaged in under the circumstances does not constitute employment misconduct. *Id.*, subd. 6(b)(2)-(4) (2010).

Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an 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 a ULJ’s factual findings in the light most favorable to the decision. *Schmidgall*, 644 N.W.2d at 804. They will not be disturbed on appeal if there is evidence that substantially tends to sustain those findings. *Skarhus*, 721 N.W.2d at 344. Whether a particular act constitutes employment misconduct, however, is a question of law, which we review de novo. *Schmidgall*, 644 N.W. 2d at 804.

An employee commits employment misconduct when the employee intends to engage in, or actually engages in, conduct that “evinces an intent to ignore or pay no

attention to . . . the standards of behavior the employer ha[s] a right to expect.” *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004) (citing *Houston v. Int’l Data Transfer Corp.*, 645 N.W.2d 144, 150 (Minn. 2002)), *review denied* (Minn. Mar. 30, 2004). A knowing violation of an employer’s directives, policies, or procedures constitutes employment misconduct because it demonstrates a willful disregard of the employer’s interests. *Schmidgall*, 644 N.W.2d at 804, 806-07. “If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct under [Minn. Stat. § 268.095, subd. 6(a)].” Minn. Stat. § 268.095, subd. 6(d).

The ULJ found that Butler’s primary employment duties were to supervise and assist the church group that was meeting on the east end of the building and to ensure that the building was secure at the start and end of her shift. The ULJ also found that Butler repeatedly entered the west end of the building, removed the floor mat from the custodial storage area without an employment-related purpose for doing so, placed the floor mat in the west end, and later exited the inner southwest door with the mat, which may have contributed to its disappearance. In addition, the ULJ found that Butler violated the school district’s policy by leaving the building to smoke a cigarette in her vehicle. There is substantial evidentiary support for each of these findings.

Although the ULJ determined that the evidence was insufficient to establish by a preponderance of the evidence that Butler stole the floor mat, the ULJ concluded that Butler’s conduct nonetheless “displayed clearly a serious violation of the standards of behavior the employer has the right to expect of an employee and [rises] to the level of

employment misconduct.” In addition, when Butler left the building to smoke, she both violated the school district’s no-smoking policy and neglected her assigned duties to monitor and be available to assist the group. She also disregarded these duties by repeatedly lingering in the west end of the building. Although Butler argues that her absences from the east end of the building were brief and she was able to observe the east end of the building from her location in the west end, the school district expected Butler to closely supervise and be available to the church group by remaining in the vicinity of the group at all times. The ULJ found, and the record reflects, that Butler had no legitimate employment-related purpose for her absences, her presence in the unoccupied part of the building, or her activities in the custodial storage area. Because the school district had the right to expect Butler to conduct her assigned job duties and comply with reasonable policies, the ULJ did not err by concluding that Butler’s conduct is a serious violation of the standards of behavior that the school district has the right to expect of its employees. *See* Minn. Stat. § 268.095, subd. 6(a)(1).

Although Butler contends that she did not intend to facilitate the theft of the floor mat, she lacked any employment-related purpose for entering the custodial area and moving the floor mat. Indeed, she had been specifically directed to refrain from such custodial activities. Because Butler engaged in conduct that directly violated her employer’s instructions when she moved the floor mat to an unauthorized location, her argument that she did not commit employment misconduct is unavailing. *See id.*, subd. 6(a). Likewise, Butler’s argument that the school district selectively enforces its tobacco policy and its requirement that building supervisors remain near the group being

supervised is an inadequate challenge to the ULJ's determination that Butler committed employment misconduct. *See Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986) (stating that violation of an employer's rules by other employees is not a valid defense to employment misconduct).

We also reject Butler's contention that her conduct constitutes a single incident, which mitigates a finding of employment misconduct. *See Minn. Stat. § 268.095*, subd. 6(d). The record establishes that Butler committed multiple, discrete violations of the standards of behavior that her employer has the right to expect of its employees, each of which constitutes employment misconduct. Moreover, her conduct may be considered as a whole to determine whether she is eligible to receive unemployment benefits. *Drellack v. Inter-Cnty. Cmty. Council, Inc.*, 366 N.W.2d 671, 674 (Minn. App. 1985). The record amply supports the ULJ's conclusion that Butler's conduct surpassed simple inadvertence, unsatisfactory conduct, or conduct that an average, reasonable employee would have engaged in under the circumstances and displayed clearly a serious violation of standards of behavior the employer has the right to reasonably expect. *See Minn. Stat. § 268.095*, subd. 6(a)(1), (b)(2)-(4).

Accordingly, the ULJ correctly concluded that Butler is ineligible to receive unemployment benefits because she was discharged for employment misconduct.

Affirmed.