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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-640**

Cassandra Myers,
Respondent,

vs.

Silver Tower Subs, Inc.,
Relator,
Department of Employment and Economic Development,
Respondent.

**Filed December 27, 2011
Reversed
Stoneburner, Judge**

Department of Employment and Economic Development
File No. 26505872-3

Cassandra Myers, Isanti, Minnesota (respondent employer)

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

Considered and decided by Stoneburner, Presiding Judge; Worke, Judge; and
Halbrooks, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Relator employer challenges the determination of an unemployment-law judge (ULJ) that respondent, a former employee, was discharged from employment for unsatisfactory performance rather than employment misconduct and is therefore eligible for unemployment benefits. Because the decision is not supported by substantial evidence in view of the entire record as submitted, we reverse.

FACTS

Respondent Cassandra Myers worked for relator Silver Tower Subs, Inc. d/b/a Subway from November 2004 until she was discharged on November 10, 2010. In April 2009, when Myers was the manager of a Subway in Cambridge, she received a written warning of job deficiencies. The written warning states that it follows “numerous verbal warnings.” The written warning contains a “partial list of duties not performed to company standards.” The list includes failure to meet cleanliness standards, failure to use the Store Operations Handbook as required by Subway, failure to follow cash-handling policies and procedures, being out of compliance by mishandling product, serving out-of-date product (food), incorrect product preparation, and unprofessional conduct regarding staff communication and demeanor at a manger’s meeting. Following this written warning, Myers’ performance improved.

In July 2009, Myers became the manager of the Subway in Mounds View. Subway asserts that Myers’ attitude and performance began to deteriorate. On July 20, 2010, Myers received a written warning for poor performance and not following

Subway's policies and procedures. The warning contains a partial list of duties not performed to company standards, including having low productivity, failure to use the Store Operations Handbook as required by Subway, failure to enforce the policy pertaining to uniforms, having higher-than-market-average food costs, not completing paperwork on a timely basis, and failing to address the "temp log" in violation of company policy and the health department requirements. On August 30, 2010, Myers received an oral warning, memorialized in a handwritten note listing 13 items to be corrected either the same day or the next day, including cleanliness, uniforms, food handling, and productivity. On October 22, 2010, Subway received a complaint from Myers' former assistant manager asserting that Myers was inappropriate in many respects, including inappropriate conversation and text messages, disciplining staff inappropriately, bringing guns into the store, and using out-of-date product. On October 26, 2010, Myers received a written warning for continuing to serve outdated product, failure to follow the handbook, and higher food costs than allowed per company policy. On this warning, for the first time, Myers criticized the handbook as being inaccurate and not including "prep amounts" for several food items.

On November 10, 2010, Myers' employment was terminated. The Employee Termination form cites the numerous oral and written warnings about poor management of food inventory and portion control, continuing problems, and Myers' unprofessional demeanor toward staff and senior management, resulting in a negative attitude among her staff, generating a higher-than-average number of customer complaints, and a significant sales decline.

Myers applied for unemployment benefits and was determined eligible. Subway appealed, asserting that Myers “repeatedly knowingly failed” to follow company policies and exhibited an unprofessional attitude to management and crew. Subway asserted that Myers’ failures “were the result [of] intentional failure to follow company practices that [Myers] has followed in the past.”

After a telephone hearing, the ULJ credited Myers’ denial of several allegations against her, including many of the allegations made by the former assistant manager, and found that Myers “was reasonably diligent in attempting to adhere to company expectations [regarding food inventory].” The ULJ found that “food inventory problems were obviously a significant concern, and undoubtedly a major factor in the termination.” But, noting that “[t]here was little firsthand testimony . . . that Myers intentionally violated corporate policies by doing specific things she knew to be contrary to those policies,” concluded that the greater weight of the evidence demonstrated that Myers’ “performance was unsatisfactory, but did not rise to the level of employment misconduct as defined” in the unemployment law, and that she was eligible for benefits.

Subway requested reconsideration, pointing out Myers’ admission that she sold outdated product. The ULJ affirmed its determination, noting that Myers’ admitted sales of outdated product had not resulted in *immediate* discharge and concluding that the evidence was insufficient to show that additional allegations “involved intentional conduct serious enough to constitute employment misconduct.” This appeal by writ of certiorari followed.

DECISION

I. Standard of Review

The Minnesota Court of Appeals may affirm the decision of the ULJ, remand the case for further proceedings, or it may reverse or modify the ULJ's decision if "the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are . . . unsupported by substantial evidence in view of the entire record as submitted[.]" Minn. Stat. § 268.105 subd. 7(d) (2010). Substantial evidence is "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (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) (quoting *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002)). Whether an employee committed a particular act is a question of fact, but whether that act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). This court reviews the ULJ's factual findings in the light most favorable to the decision and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Subway does not dispute the ULJ's findings of fact or credibility determinations; therefore the only issue before this court is one of law. *See St. Croix Sensory, Inc. v.*

Dep't of Emp't & Econ. Dev., 785 N.W.2d 796, 799 (Minn. App. 2010) (stating that, when the parties do not dispute the facts, this court reviews the issue de novo).

II. Employment misconduct

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.” Minn. Stat. § 268.095, subd. 6(a) (2010). Employment misconduct does not include “conduct that was a consequence of the applicant’s inefficiency or inadvertence[,] . . . simple unsatisfactory conduct[,] . . . conduct that was a consequence of the applicant’s inability or incapacity[,] . . . [or] good faith errors in judgment [.]” *Id.* subd. 6(b). A discharged employee’s “behavior may be considered as a whole in determining the propriety of [the employee’s] discharge and [the employee’s] qualification for unemployment benefits.” *Drellack v. Inter-Cnty. Cmty. Council, Inc.*, 366 N.W.2d 671, 674 (Minn. App. 1985).

The ULJ found that Myers consistently failed to meet Subway’s expectations with regard to food inventory, acknowledged that Myers admitted selling outdated food, and found that “food inventory problems . . . were undoubtedly a major factor in the termination.” But the ULJ considered only whether other reasons given for the termination “involved intentional conduct serious enough to constitute employment misconduct.” We disagree with the ULJ’s implied conclusion that because Meyers was not immediately terminated for selling outdated food, continuing to sell outdated food did not constitute employment misconduct.

The October 26, 2010 warning cites five dates on which Myers continued to serve outdated product. The Employee Termination form references numerous oral and written warnings about poor management of food inventory and Myers' failure to make the necessary performance improvements requested by Subway concerning food inventory. On this record, we conclude that Meyers' continuing to sell outdated food product constituted employment misconduct as defined in the statute whether Meyers' continued mishandling of food inventory was intentional, negligent, or indifferent. Myers is therefore ineligible for unemployment benefits even if the additional reasons cited for her discharge did not rise to the level of employment misconduct.

Reversed.