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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1511**

Misty Eystad,
Relator,

vs.

RKT Food and Fun LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 25, 2013
Reversed
Larkin, Judge**

Department of Employment and Economic Development
File No. 29712510-3

Misty Eystad, Morris, Minnesota (pro se relator)

RKT Food and Fun LLC, Elrosa, Minnesota (respondent)

Lee B. Nelson, Amy R. Lawler, Minnesota Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and
Rodenberg, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that she was discharged for employment misconduct and is therefore ineligible to receive unemployment benefits. Because the record lacks substantial evidence to support the misconduct determination, we reverse.

FACTS

Respondent, RKT Food and Fun LLC, discharged relator Misty Eystad from her employment as a full-time manager at Bucky's Bar in May 2012. Eystad established an unemployment-benefits account with respondent Minnesota Department of Employment and Economic Development (DEED). A DEED clerk determined that Eystad was discharged for reasons other than employment misconduct, and Eystad was paid benefits. RKT appealed the determination, and a ULJ held a de novo telephonic hearing. Ron Boogaard, the owner of Bucky's Bar, participated in the hearing. Although Eystad was provided notice of the hearing, she did not participate.

Following the hearing, the ULJ found that on or around May 1, "Bucky's Bar hosted a [private] party. During the party, Eystad stole \$20 from the bar by taking a \$20 bill from the cash register and placing it in the employee tip jar. . . . Eystad was discharged due to theft from the company." The ULJ therefore concluded that Eystad was discharged for employment misconduct, reasoning that "Bucky's Bar had the right to reasonably expect that Eystad would not steal from the company" and "Eystad's intentional conduct constitute[d] a serious violation of Bucky's Bar's expectations."

Eystad requested reconsideration and an additional evidentiary hearing. In support of her request, Eystad explained that she misread the date of the hearing and was volunteering with a children's camp in South Dakota, without cellular-telephone reception, when the hearing occurred. The ULJ denied Eystad's request for an additional evidentiary hearing and affirmed his initial determination. This certiorari appeal follows.

D E C I S I O N

Eystad argues that the ULJ erred by finding that she stole \$20 from Bucky's Bar and therefore concluding that she was discharged for employment misconduct. An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Employment misconduct means "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) (2012).

Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* We review the ULJ's factual findings "in the light most favorable to the decision" and defer to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). However, "[w]hen the credibility of an

involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge *must* set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c) (2012) (emphasis added).

This court 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)(5) (2012). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 288 Minn. 294, 299, 180 N.W.2d 175, 178 (1970).

The ULJ found that Eystad was discharged for theft. And theft, of even nominal amounts, constitutes employment misconduct. *See Skarhus*, 721 N.W.2d at 342, 344 (holding that a cashier’s theft of food valued at less than four dollars constituted employment misconduct because the employer could no longer trust the employee to handle money). The evidence of theft primarily consists of Boogaard’s testimony regarding a hearsay report from a bar patron. He testified as follows:

We had a, we were holding an event there for a couple that was having a [private] party and she was working that night, her and two other gals, and I was there because these people were friends of ours. Anyways, a guy that was sitting at the bar called me outside and he asked, who’s the gal with the long black hair. And I said, well, that’s Misty, she’s our manager. And he said, she’s scamming you. And I said, why would you say that. And he said, well, he said, I’ve been sitting at the bar just watching, just drinking and watching

and he said, she took, she took, she got a round of drinks for somebody at the bar that walked up to the bar and he said, she set all the drinks there and they gave her money and he said, she went and opened the till and she grabbed a \$20 bill and put it in the tip jar real quick. And he said, she grabbed some change and give it back to the, the people. And I said, well are you sure she wasn't making change for the till, you know, if the till is low on ones they'll make change out of the tip jar. No, he said. He said she was real quick about it. She grabbed a \$20 and flicked it into that tray and then made change and brought it back to them other people. . . . [H]e said, if you don't believe me, go in and look. He said, there's a \$20 bill in the tip jar. So, I went in and looked right away, and, yes, there was a \$20 bill lying in there.

Boogaard also testified that Eystad denied the accusation of theft when he confronted her.

The ULJ apparently credited Boogaard's testimony and concluded that the hearsay report was reliable. *See* Minn. R. 3310.2922 (2011) (an unemployment-law "judge may receive any evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs"). But even though Boogaard's testimony had a significant effect on the ULJ's decision, he did not "set out the reason for crediting" that testimony and therefore failed to comply with the express requirement of Minn. Stat. § 268.105, subd. 1(c).¹ For the reasons that follow, the ULJ's failure to provide an express credibility determination with supportive reasoning is fatal to the ULJ's theft finding.

We first observe that Boogaard's testimony was implausible at points. For example, according to Boogaard, Eystad was in charge of everything at the bar, including customer service, products, employees, and bookkeeping, yet Boogaard testified that "it

¹ We note that DEED does not argue that Eystad's failure to participate in the hearing relieved the ULJ of the statutory obligation to make an express credibility determination.

was in her discretion how many hours she wanted to work,” that he “didn’t require any specific number of hours from her,” and that he did not know “off-hand” how many hours per week she worked. In addition, Boogaard could not recall the exact date on which he discharged Eystad and testified that May 1 sounded “approximately correct.”

Moreover, Boogaard was vague and inconsistent regarding his reason for discharging Eystad. On one hand, Boogaard testified that he discharged Eystad for “taking the money from the cash register.” On the other hand, Boogaard described several statements that he made to Eystad that suggest he discharged her for poor performance. For example, he testified that “[w]e talked about a lot of the stuff that, of the way the bar was running and stuff, and different things that I had told her or asked her to do. And she either just wouldn’t do them or would tell me I could do it. Or, you know, it was just other things that, that we talked about while we were on the phone”; and “we talked about all that stuff. I, I talked to her about all the stuff that I expected from her and she wasn’t doing.”

Also of concern, Boogaard’s description of the hearsay theft accusation lacks important, relevant details. For example, Boogaard did not know how much money the customer gave Eystad, how much change Eystad provided the customer, the cost of the round of drinks that the customer purchased, how many drinks were purchased, or what button Eystad hit when she opened the till (e.g., whether she hit the “no-sale” button). This lack of detail calls into question the reliability of the hearsay report. *See id.* (an unemployment-law “judge may receive any evidence that possesses probative value,

including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs”).

There are additional reasons to question the credibility of Boogaard’s testimony regarding the hearsay accusation. First, Boogaard testified that the hearsay reporter had been sitting at the bar “drinking” when he observed the alleged theft. Second, although Boogaard eventually gave the ULJ the reporter’s name and telephone number, he provided vague testimony regarding the reporter’s identity at the beginning of the hearing. Third, Boogaard testified that the reporter did not want to be a witness at the unemployment-compensation hearing. Fourth, Boogaard never previously suspected Eystad of theft. And fifth, Boogaard testified that Eystad denied the accusation when he confronted her.

The record in this case would cause any reasonable person to question the credibility of Boogaard’s testimony regarding the hearsay accusation. The ULJ’s line of questioning regarding the lack of relevant detail and his unsuccessful attempt to telephone the hearsay reporter near the end of the hearing suggests that the ULJ recognized the credibility issue. The ULJ asked Boogaard, “is it possible that maybe this person whoever bought this round of drinks gave her a \$20 tip.” The ULJ also told Boogaard, “there’s also some evidence that could suggest that she got paid by the customer for the amount of the drinks and then some and she took whatever the tip was that this customer wanted to give her and put it in the tip jar and then gave change based on however much the customer paid her.”

Despite the obvious credibility issue and the fact that the eligibility decision hinged on that determination, the ULJ did not make an express credibility determination or offer *any* reason for crediting Boogaard's testimony. Because section 268.105, subd. 1(c), requires an express, reasoned credibility determination in this case, we will not defer to the ULJ's implicit, unexplained determination. And in the absence of the statutorily required explanation, which would reveal why the ULJ found Boogaard's testimony credible, we conclude that the ULJ's "findings, inferences, conclusion, or decision" are not supported by substantial evidence. The record simply does not establish a credible theft accusation. Thus, Eystad's substantial rights have been prejudiced. We therefore reverse without addressing Eystad's argument that the ULJ erred by denying her request for an additional hearing.

Reversed.