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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1358**

Pamela A. Matyi,
Relator,

vs.

Cahill Salon & Tan Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 26, 2008
Affirmed
Peterson, Judge**

Department of Employment and Economic Development
File No. 5575 07

Pamela A. Matyi, 1823 Wentworth Avenue, South St. Paul, MN 55075 (pro se relator)

Cahill Salon and Tan Inc., 6576 Cahill Avenue, Inver Grove Heights, MN 55076-2021
(respondent)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic
Development, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul,
MN 55101-1351 (for respondent Department)

Considered and decided by Peterson, Presiding Judge; Kalitowski, Judge; and
Collins, Judge.*

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

UNPUBLISHED OPINION

PETERSON, Judge

Relator challenges the decision by an unemployment-law judge (ULJ) that she was disqualified from receiving unemployment benefits because she was discharged for misconduct after she scheduled a hair appointment with a salon client at relator's home. Relator argues that (1) the receptionist, not relator, suggested this as a way to accommodate the client's busy schedule; and (2) the ULJ did not contact relator's witness. We affirm.

FACTS

Respondent Cahill Salon & Tan, Inc., employed relator Pamela A. Matyi as a full-time cosmetologist from March 2006 through March 26, 2007. When relator was hired, she received a copy of the employee handbook and also signed a noncompete agreement. The handbook states, "In accepting outside employment, employees should avoid any situation that will . . . [t]ake away from [the employer's] customers by providing similar services out of home or any other place of doing business." The noncompete agreement states:

I agree not to solicit or assist others to solicit any [s]alon-related business, directly or indirectly, from any of [the employer's] clients even if I am participating in a business outside of [the employer's] market area.

. . . .

While I am employed by [the employer], I agree not to compete with [the employer] directly or indirectly, whether as owner, employee, consultant or otherwise[.] . . . "[C]ompete" means to participate in any business activity which is similar

to the business activity which I perform during my employment with [Cahill].

On Friday, March 23, 2007, one of relator's clients came into the salon and wanted to have her hair done that day before going out of town on Monday. Relator could not fit the client into her schedule on Friday and was off on Saturday and Sunday. The customer declined to have another stylist do her hair. Relator indicated that she would be willing to do the client's hair at relator's home during the weekend, and the receptionist gave the client relator's home telephone number. There was disputed evidence about whether relator or the receptionist suggested that the client go to relator's house to have her hair done. The client did not go to relator's house to have her hair done.

Relator admitted that she knew that the employer would not approve of her doing a client's hair at relator's home. Relator testified that she told the receptionist not to tell her supervisor about the incident "because I can get in trouble. I guess, I didn't realize I can get fired for it, but I knew I would get written up for it." When the employer learned about the March 23 incident, relator was discharged.

Relator filed a claim for unemployment benefits with respondent Department of Employment and Economic Development. A department adjudicator determined that relator was discharged for employment misconduct and, therefore, was disqualified from receiving unemployment benefits. Relator appealed to a ULJ. Following an evidentiary hearing, by findings of fact and decision issued May 10, 2007, the ULJ determined that relator was discharged for misconduct and that she was disqualified from receiving

unemployment benefits. Relator filed a request for reconsideration. The ULJ affirmed the May 10, 2007 decision. This certiorari appeal followed.

D E C I S I O N

This court may affirm the ULJ's decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights "may have been prejudiced because the findings, inferences, conclusion or decision are . . . affected by . . . error of law," "unsupported by substantial evidence in view of the entire record as submitted," or "arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d)(4)-(6) (2006). This court defers to the ULJ's conclusions regarding conflicts in testimony and the inferences to be drawn from testimony. *Ywsfw v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

Whether an employee committed misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). "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). This court will not disturb factual findings that are supported by substantial evidence. *Id.* But whether an employee's act constitutes disqualifying misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

An employee who was discharged for misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). "Employment misconduct" is defined as

any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Id., subd. 6(a) (2006).

“A single incident can constitute misconduct when an employee deliberately chooses a course of conduct that is adverse to the employer.” *Schmidgall*, 644 N.W.2d at 806. In other contexts, this court has stated that an employer has a legitimate interest in protecting itself against “the deflection of trade or customers by the employee by means of the opportunity which the employment has given him.” *Webb Publ’g Co. v. Fosshage*, 426 N.W.2d 445, 450 (Minn. App. 1988) (quoting *Bennett v. Storz Broad. Co.*, 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965)). And an employee owes a duty of loyalty to the employer that prohibits the employee from competing with the employer during the employment. *Rehabilitation Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304 (Minn. App. 1987).

Relator understood that giving a client her home telephone number and agreeing to do the client’s hair at relator’s home were against company policy. Relator violated both the employee handbook, which states that an employee “should avoid any situation that

will . . . [t]ake away from [the employer's] customers by providing similar services out of home," and the noncompete agreement, which prohibits "solicit[ing] or assist[ing] others to solicit any [s]alon-related business, directly or indirectly, from any of [the employer's] clients." By agreeing to do a client's hair at home, relator violated the employer's reasonable policies and deliberately chose a course of conduct adverse to the employer. Accordingly, the ULJ properly concluded that relator's conduct was misconduct. *See Skarhus*, 721 N.W.2d at 344 (explaining that as a result of cashier's single theft, employer could no longer entrust cashier to perform job's essential functions).

At the hearing before the ULJ, the employer submitted statements by the receptionist and a stylist, dated April 24 and 25, 2007, and relator submitted a statement by the client, dated April 12, 2007. Relator suggests that a comparison of the dates of the statements casts doubt on the credibility of the statements submitted by the employer. The statements differ as to whether relator or the receptionist suggested that relator do the client's hair at relator's home. As the ULJ found, "Regardless of who raised this option, the fact remains that [relator] agreed to this and did indicate to the customer that she would do the customer's hair at home." By agreeing to do the client's hair at relator's home, relator was at a minimum assisting in soliciting business away from the employer.

Relator attached to her brief copies of her tax returns that were not presented to the ULJ. The record on certiorari appeal consists of the papers filed with the department and the exhibits and transcript, if any. Minn. R. Civ. App. P. 110.01 (explaining record on appeal), 115.04, subd. 1 (providing that rule 110.01 applies to certiorari appeals). An appellate court may not consider matters that are not part of the record before the

department. *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977). In any event, relator's tax returns are irrelevant to whether she committed misconduct.

Relator argues that the ULJ should have contacted the client. If relator wanted the client to testify, relator could have subpoenaed her under Minn. R. 3310.2914, subp. 1 (2007). Also, relator has not shown that the client's testimony would have changed the misconduct determination and, therefore, is not entitled to an additional evidentiary hearing. *See* Minn. Stat. § 268.105, subd. 2(c) (2006) (standard for obtaining additional evidentiary hearing).

Affirmed.