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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1786**

Beth A. Tappan,  
Relator,

vs.

Empo Corporation,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed November 10, 2008  
Affirmed  
Schellhas, Judge**

Department of Employment and Economic Development  
Agency File No. 9296 07

Beth A. Tappan, 5818 Thomas Circle South, Minneapolis, MN 55410 (pro se relator)

Empo Corporation, 3100 West Lake Street, Suite 100, Minneapolis, MN 55410  
(respondent)

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55101 (for respondent Department of Employment and Economic Development)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and  
Collins, Judge.\*

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\* 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## UNPUBLISHED OPINION

SCHELLHAS, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that she is disqualified from receiving unemployment benefits because she engaged in employment misconduct. We affirm.

### DECISION

Relator Beth A. Tappan applied for unemployment benefits and established a benefit account after her discharge from her employer, respondent Empo Corporation. A Department of Employment and Economic Development (DEED) adjudicator initially determined that relator was discharged for employment misconduct and disqualified from benefits as a result of her discharge. Relator filed an appeal resulting in a de novo evidentiary hearing before a ULJ. The ULJ determined that relator was discharged for reasons amounting to employment misconduct and disqualified from the payment of unemployment benefits. Relator requested reconsideration, and the ULJ issued an order affirming her decision. This certiorari appeal follows.

On certiorari appeal, 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" or "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(4), (5) (2006).

Whether an employee committed misconduct presents 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 fact question. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We review the ULJ's factual findings in the light most favorable to the decision and will not disturb them when they are supported by substantial evidence. *Id.* We defer to the ULJ's credibility determinations and resolutions of conflicts in testimony. *Yswsf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007) (conflicts in testimony); *Skarhus*, 721 N.W.2d at 344 (credibility determinations).

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). Employment misconduct means “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.” *Id.*, subd. 6(a) (2006). Good-faith errors in judgment if judgment was required are not employment misconduct. *Id.* But whether an employee's act constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

Relator argues that she did not engage in misconduct because she made a good-faith error in judgment. We disagree. Relator was the manager of the retail store, and her employer put its faith and trust in her by giving her authority to hire. Relator hired her son, knowing that he had been discharged from his prior employment for felony theft for which he had been prosecuted and because of which he was participating in a restitution program at the time of his hire. The ULJ found that when confronted by Empo, relator

acknowledged that had the prospective employee been anyone other than her son, she would not have hired him. In other words, but for the fact that he was her son, relator would not have hired someone who had been discharged by a prior retail employer for theft. Relator testified that “[Empo] drill[ed] it into us about how, you know, we’re supposed to try to minimize theft.” While working for Empo, relator’s son told two coworkers how they could steal cash from the register and cover it up so there would be no trace of the loss. An assistant Empo manager subsequently caught one of the coworkers stealing over \$200 from the cash register. Consequently, relator, her son, and other employees were fired. Relator’s hiring of her son, who was recently discharged from retail employment for felony theft, was not an action that a reasonable person would take in the best interests of an employer that was concerned about theft.

Instead, we agree with the ULJ that relator clearly displayed “a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee.” Minn. Stat. § 268.095, subd. 6(a). This court has held several times that even a single incident of conduct had a significant adverse impact on the employer and constituted misconduct when an employee fraudulently billed a customer or engaged in theft of food of even minimal value because the employer could no longer trust the employee to engage in his or her essential job function. *Frank v. Heartland Automotive Servs., Inc.*, 743 N.W.2d 626, 630-31 (Minn. App. 2008) (holding that fraudulent billing had significant adverse impact on employer under Minn. Stat. § 268.095, subd. 6(a), so that single incident exception did not apply); *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (same as to theft of small amount of food by cashier). “Because

the nature of an employer's interest will vary depending upon the job, what constitutes disregard of that interest, and therefore misconduct, will also vary." *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981); *see also Skarhus*, 721 N.W.2d at 344 (noting that employee's conduct should be considered in light of the employee's job responsibilities).

Here, Empo "had a clear and substantial interest in maintaining a responsible, self-disciplined work environment," in which Empo could trust that its employees would be honest and promote its best interests in carrying out her hiring duties. *Auger*, 303 N.W.2d at 257 (addressing earlier version of the definition of misconduct). Although relator testified that she did not believe her son would steal when she hired him and that she took Empo's best interests very seriously during her employment, she violated the trust and reasonable expectations of Empo. This was not a good-faith error in judgment within the meaning of Minn. Stat. § 268.095, subd. 6(a). *See Ress v. Abbott Nw. Hosp.*, 448 N.W.2d 519, 525 (Minn. 1989) (rejecting nurse's argument that his actions constituted good-faith errors in judgment).

Relator also disputes the ULJ's finding that prior to Empo's discovery of employee theft, relator was resistant and difficult regarding Empo's request that her son be transferred to a different store at the same Mall of America location where he was already working. Empo made this request in order to enforce its reissued handbook policy on employees not working under relatives in the same chain of command. The ULJ's finding is supported by substantial evidence, based on the testimony of Empo's

representatives. During the hearing, the ULJ gave relator several chances to respond to the allegations against her, and relator did not dispute the allegation.

The record contains substantial evidence to support the ULJ's conclusion that relator committed misconduct and was disqualified from receiving unemployment benefits.

**Affirmed.**