FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1054

DOROTHY E. HAUSER,

Appellant,

v.

GOODWILL INDUSTRIES OF SW
FLORIDA, INC. and UNITED
HEARTLAND,

Appellees.

On appeal from an order of the Judge of Compensation Claims.
Frank Clark, Judge.

Date of Accident: April 10, 2017.

December 20, 2019

WINOKUR, J.

In this workers' compensation case, Dorothy Hauser, the injured employee, appeals the Judge of Compensation Claims' (JCC's) denial of her claim for temporary partial disability (TPD) benefits for the time period following her termination of employment with the Employer, Goodwill. In the order, the JCC found that Goodwill justifiably terminated Hauser's employment for misconduct as defined by statute and, as a consequence, is ineligible for TPD benefits under section 440.15(4)(e), Florida Statutes. On appeal, Hauser does not deny that the conduct

attributed to her, if proved, constitutes misconduct under the statutory definition of section 440.02(18), Florida Statutes. Instead, she argues that the JCC erred when he admitted Goodwill's exit interview form as evidence of this conduct. Because we find this form contains inadmissible hearsay, we agree and reverse.

The exit interview form in question indicates that Goodwill fired Hauser because she made derogatory comments about persons of Mexican heritage to a co-employee that were overheard by a customer. The Employer/Carrier (E/C) did not present testimony from any witness with personal knowledge of the incident described in this form. The district director for Goodwill testified that she typed up the description in the form based on information she received in a telephone conversation with the complaining customer. She did not testify as to the substance of her conversation with the customer. She admitted that she did not keep the customer's initial voicemail message, had lost the customer's contact information, and did not even remember his name. She also did not recall speaking with the co-employee or undertaking any further investigation. Hauser denied making the comments attributed to her in the form[*] and objected to its admission as hearsay. The JCC overruled Hauser's hearsay objection and admitted the form as evidence of her misconduct.

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[*] Hauser admitted to two prior instances of using similarly offensive language for which Goodwill issued a notice of corrective action before she was injured. Generally, a single isolated instance of failing to follow employer policy has not been viewed as rising to the level of misconduct. *See Thorkelson v. NY Pizza & Pasta, Inc.*, 956 So. 2d 542, 545 (Fla. 1st DCA 2007) (noting that one violation of employer's policy may constitute misconduct, but "repeated violations of explicit policies, after several warnings, are usually required") (quoting *Ash v. Fla. Unemp't Appeals Comm'n*, 872 So. 2d 400, 402 (Fla. 1st DCA 2004) (footnote omitted)). Although the notice provided Hauser with a final warning, she was not fired at that time. Regardless, Goodwill clearly identified the postinjury derogatory comments described in the exit interview form as the basis for her termination.

A JCC's decision to admit evidence is reviewed for abuse of discretion. *See King v. Auto Supply of Jupiter, Inc.*, 917 So. 2d 1015, 1017 (Fla. 1st DCA 2006) (holding JCC's admission of evidence is reviewed for abuse of discretion). "However, the question of whether a statement is hearsay is a matter of law and is subject to de novo review on appeal." *Cannon v. State*, 180 So. 3d 1023, 1037 (Fla. 2015). Here, the JCC gave two reasons for overruling the objection. First, he found that the exit interview form is admissible because Hauser "admitted" to the described incident, presumably under the admissions exception to hearsay under section 90.803(18), Florida Statutes. Although Hauser had a vague recollection of the event, she adamantly denied making the derogatory comments: the very basis of the misconduct alleged here. Because we find no record support for the JCC's finding of any admission by Hauser relevant to the hearsay issue here, we find no exception on this basis.

Second, the JCC found the form was admissible under the business records exception to the hearsay rule found in section 90.803(6)(a), Florida Statutes. Although the form itself appears to satisfy this exception, the portion of the form setting forth the alleged misconduct also consists of hearsay, and it is this evidence that the E/C sought to introduce as evidence of Hauser's misconduct. Section 90.805 states that "[h]earsay within hearsay is not excluded under s. 90.802, *provided each part of the combined statements conforms with an exception to the hearsay rule* as provided in s. 90.803 or s. 90.804" (emphasis added). *See, e.g., Harris v. Game & Fresh Water Fish Comm'n*, 495 So. 2d 806, 809 (Fla. 1st DCA 1986) (noting general rule concerning hearsay within hearsay and quoting Charles W. Ehrhardt, *Florida Evidence*, § 90.805, at 563 (2d ed. 1984): "For example, if a business record includes a statement of a bystander to an accident, the bystander's statement is hearsay and not included within the business records exception because the statement was not made by a person with knowledge who was acting within the regular course of the business activity."); s*ee also Carter v. State*, 951 So. 2d 939, 943-44 (Fla. 4th DCA 2007) (finding police report/victim affidavit did not fit within business records exception to hearsay); *Van Zant v. State*, 372 So. 2d 502, 503 (Fla. 1st DCA 1979) ("[I]f the person who prepared the record could not testify in court concerning the recorded information, the information does not become admissible

as evidence merely because it has been recorded in the regular course of business.").

Here, the customer—the bystander to the derogatory comments allegedly made by Hauser—was not acting in the regular course of Goodwill's business activities when he made his complaint. Furthermore, the district director who prepared the business record could not testify concerning the customer's statement. The E/C has not alleged any other hearsay exception that would apply to the written record of the customer's statement. As a result, the exit interview form was not admissible as proof of the misconduct alleged by the E/C. The JCC, therefore, erred when he admitted the exit interview form as evidence in support of the E/C's misconduct defense.

Accordingly, we REVERSE the order below and REMAND for a new hearing on Hauser's petition for benefits.

ROWE and M.K. THOMAS, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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