STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1319

Jennifer Hursey,
Relator,

vs.

Homeservices Lending, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 17, 2017
Affirmed
Schellhas, Judge

Department of Employment and Economic Development
File No. 34564336-2

Peter Knapp, Thomas Mueller (certified student attorney), Mitchell Hamline Law Clinic, St. Paul, Minnesota (for relator)

Homeservices Lending, LLC, West Des Moines, Iowa (respondent employer)

Lee B. Nelson, Benjamin Jones, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Johnson, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Relator challenges an unemployment-law judge's determination that she is ineligible to receive unemployment benefits because she was discharged for misconduct. We affirm.

FACTS

Relator Jennifer Hursey began employment at Homeservices Lending, LLC on August 3, 2015. Homeservices terminated her employment on November 20, 2015. Hursey applied for unemployment benefits from respondent Minnesota Department of Employment and Economic Development (DEED). DEED determined that Hursey was ineligible for unemployment benefits because she was discharged from her employment for misconduct. Hursey appealed the determination.

An unemployment-law judge (ULJ) conducted a telephonic hearing, during which Hursey, one of her supervisors, and Homeservices' human-resources director testified. The ULJ found that Homeservices' discrimination and harassment policy "prohibit[ed] verbal, written, or physical conduct that degrad[ed] or show[ed] hostility or dislike toward an individual because of her race or color." The ULJ also found that Homeservices' code of conduct instructed employees to be sensitive to how their words or behavior could be perceived by others and to avoid actions and comments that could be taken as threatening, hurtful, offensive, or insulting. And the ULJ found that "Homeservices discharged Hursey because she sent an email from her work account to [a coworker], describing a coworker as a 'disrespectful colored girl' who demands respect for all the wrong reasons." The ULJ

concluded that "[a]n employer has the right to reasonably expect an employee not to make derogatory comments regarding a coworker's race," and determined that Hursey's conduct rose to the level of employment misconduct. The ULJ therefore decided that Hursey was ineligible for unemployment benefits and affirmed the decision upon reconsideration. This certiorari appeal follows.

D E C I S I O N

A person who is discharged from employment is not eligible to receive unemployment benefits if the person was discharged for misconduct. Minn. Stat. § 268.095, subd. 4 (2016). "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." Minn. Stat. § 268.095, subd. 6(a) (2016). The statutory definition of "employment misconduct" is exclusive. *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 458 (Minn. 2016).

"In unemployment benefits cases, [appellate courts] review the ULJ's findings of fact in the light most favorable to the decision and will not disturb those findings as long as there is evidence in the record that reasonably tends to sustain them." *Id.* at 460 (quotations omitted). "The question of whether an employee engaged in conduct that disqualifies him or her from unemployment benefits is a mixed question of fact and law." *Id.* "Whether a particular act constitutes disqualifying conduct is a question of law [appellate courts] review de novo." *Id.* Appellate courts "will narrowly construe the disqualification provisions of the statute in light of their remedial nature, as well as the

policy that unemployment compensation is paid only to those persons unemployed through no fault of their own." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted).

Hursey argues that her alleged refusal to abide by Homeservices' policies did not constitute misconduct because her e-mail did not rise to the level of a serious violation of employment expectations, was a single incident, and was a good-faith error in judgment. And she asserts that no direct evidence shows that the coworker who received her e-mail was offended by the statement for which she was terminated. Hursey also argues that Homeservices terminated her not because she violated its discrimination and harassment policy but, rather, because she complained to human resources about her supervisor.

Serious violation of Homeservices' reasonable expectations

"As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). An employee who knowingly violates a reasonable policy of the employer commits misconduct. *Id.* at 806. Here, the ULJ found that Hursey was aware of Homeservices' discrimination and harassment policy and code of conduct. Homeservices' discrimination and harassment policy prohibited harassment, which it defined "as verbal, written or physical conduct that degrades or shows hostility or dislike toward an individual because of his or her race, [or] color." Hursey admitted that she was aware of the workplace policy but believed that her conduct did not violate the policy. The ULJ also found that Hursey used the phrase, "disrespectful colored girl," to insult a coworker's race and that Hursey's conduct was intentional. When asked why she identified the coworker's race in

her e-mail, Hursey explained that she is "about details . . . [and] it's just a normal thing for me to provide every detail that I can." The ULJ did not find this testimony credible, and we defer to the ULJ's credibility determination. *See Brisson v. City of Hewitt*, 789 N.W.2d 694, 696 (Minn. App. 2010) (stating that this court defers to the ULJ's credibility determinations).

Single incident

Although Hursey concedes that the fact that Homeservices terminated her employment because of a single incident is not dispositive, she argues that the single-incident nature of her conduct "is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct," Minn. Stat. § 268.095, subd. 6(d) (2016), and that the ULJ failed to properly consider the single-incident nature of her conduct.

Hursey argues that her single incident of sending the e-mail was not misconduct because it could not have raised concern regarding her ability to perform the essential functions of her job. Courts have considered whether a single incident undermines an employee's ability to do the employee's job and have held that a single incident rises to misconduct where it causes the employer to question whether the employee can be trusted to perform the job's essential functions. *See Wilson*, 888 N.W.2d at 462–63 (noting that employers have right to reasonably expect applicants to tell truth during employment process and concluding that employee's employment-application misstatement constituted misconduct); *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (concluding that cashier who stole food engaged in misconduct when employer no longer

trusted her to handle money and accurately account for items sold). But Hursey fails to cite any legal authority that requires us to hold that a single incident cannot constitute misconduct unless the incident involves an employer's ability to trust an employee to perform her job's essential functions. We therefore reject Hursey's argument that her single incident of sending the e-mail did not constitute misconduct because it did not implicate her ability to perform her job.

We also conclude that the ULJ did not err by failing to consider or give adequate weight to the single-incident nature of Hursey's conduct in determining that Hursey engaged in employment misconduct. Minnesota Statutes section 268.095, subdivision 6(d), does not provide a single-incident exception. *Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 875–76 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011); *see* Minn. Stat. § 268.095, subd. 6(d). Instead, it "directs that the ULJ afford weight to the fact of the single-incident nature of the conduct without directing that the conduct be construed as misconduct or not." *Potter*, 805 N.W.2d at 876. But it does not require a ULJ to specifically acknowledge or explain that the ULJ considered the single-incident nature of the conduct. Minn. Stat. § 268.095, subd. 6(d).

Here, during the telephonic hearing, a witness for the employer testified that Hursey was discharged for one reason—the statement in her e-mail, which violated Homeservices' code of conduct and discrimination and harassment policy. In the order of affirmation, the ULJ explicitly considered the fact that the discharge occurred because of a single incident. The ULJ explained that while the comment included in the e-mail was a single incident,

the conduct was intentional and a serious violation of Homeservices' reasonable expectations.

Based on our review of the record, we conclude that the ULJ's findings are supported by substantial evidence, that the ULJ did not err by concluding that Hursey used the phrase in her e-mail to insult her coworker's race, and that Hursey's conduct was intentional and displayed a serious violation of the standards of behavior and policies that Homeservices has the right to reasonably expect of her.

Good-faith error in judgment

Hursey also argues that her behavior was not misconduct because it was a good-faith error in judgment. Section 268.095 excludes from misconduct "good faith errors in judgment if judgment was required." Minn. Stat. § 268.095, subd. 6(b)(6) (2016). The sending of the e-mail cannot be deemed misconduct if (1) Hursey sent the e-mail because of a good-faith error in judgment and (2) judgment was required.

Hursey argues that compliance with Homeservices' discrimination and harassment policy requires the use of judgment because it does not contain an exhaustive list of all language or behavior that could be deemed a violation. We reject the argument that an employer's failure to include an exhaustive list of all possible prohibited behavior precludes an employee from engaging in misconduct by violating the employer's policy. Here, Hursey was aware of Homeservices' policy prohibiting discrimination and harassment. She signed an acknowledgment that she reviewed the policy that defined harassment "as verbal, written or physical conduct that degrades or shows hostility or dislike toward an individual because of his or her race, [or] color." And she knew that

Homeservices' code of conduct cautioned employees against using language that could be taken as threatening, hurtful, offensive, or insulting.

Hursey maintains that the word "colored" is not offensive, but the ULJ found that Hursey used the phrase "disrespectful colored girl" to insult a coworker's race. We agree with the ULJ's determination. Furthermore, the Eighth Circuit has referred to the term "colored girl" as derogatory. *See White v. Honeywell, Inc.*, 141 F.3d 1270, 1273 (8th Cir. 1998) (referring to "colored girl" as derogatory name). We conclude that when Hursey sent the e-mail in which she referred to a coworker as "a disrespectful colored girl," she did not make a good-faith error in judgment.

Hursey's complaint to human resources

The ULJ found that Homeservices discharged Hursey because of her e-mail, not because she complained to human resources about her supervisor. Homeservices' human-resources director testified that Hursey was discharged for one reason—the statement in her e-mail, which was of significant concern and in direct violation of Homeservices' discrimination and harassment policy and code of conduct. The ULJ found the director's testimony credible because it was straightforward, plausible, and consistent with the documentation provided by Homeservices and Hursey. We defer to the ULJ's credibility determination. Substantial evidence supports the ULJ's finding that Hursey was discharged because of her e-mail. We will not disturb this finding.

In conclusion, because Hursey seriously violated her employer's reasonable expectations, the ULJ did not err in determining that Homeservices discharged Hursey for misconduct. Hursey therefore is ineligible for unemployment benefits.

Affirmed.