STATE OF MINNESOTA
IN COURT OF APPEALS
A11-250

Ester Killion,
Relator,

vs.

County of Hennepin,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed October 31, 2011
Affirmed
Schellhas, Judge

Department of Employment and Economic Development
File No. 25964717-5

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Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Crippen, Judge.*

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

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

SCHELLHAS, Judge

Relator Ester Killion challenges the decision by an unemployment-law judge (ULJ) that she is ineligible for unemployment benefits because she was discharged for misconduct after she physically threatened a client. We affirm.

FACTS

Killion began her employment with respondent Hennepin County as a human-service representative on the emergency-assistance team in January 2006. Her primary duty was to interview clients to determine their eligibility for emergency assistance. During her employment, Killion was made aware of the county's policy that requires employees to conduct themselves in a way that does not reflect negatively on the county. The policy explicitly prohibits verbal abuse of persons seeking assistance from the county.

On July 27, 2010, Killion overheard a coworker talking with a client who had a violence indicator in her file, meaning that a county employee had flagged her file because the employee felt uncomfortable during an interview with the client, which could mean that the client had been physically or verbally violent. Killion observed the client become upset and talk rudely and loudly to her coworker. Sensing that her coworker's situation with the client was "getting out of hand," Killion approached her coworker's client and attempted to calm her down without success. Killion then asked other coworkers to call security, and she returned to her desk.

The first security officer to arrive asked Killion if there was a problem, and Killion pointed to her coworker. The officer asked Killion's coworker if there was a problem and whether anyone needed to be escorted out. The coworker said no, but Killion approached and began talking to the client, who then called Killion a b---- and said, "Your turban must be on too tight." The security officer then placed himself between the client and Killion and heard Killion say to the client, "I'll meet you outside after work." When the client refused to lower her voice, the security officer escorted her and her two children out of the building. As the client was being escorted out, a second security officer at the scene observed Killion walk around from the back of the desk and say to the client, "My name is Ester and I will kick your ass." That officer extended his arm to prevent Killion's movement and told her to calm down.

The county investigated the incident by interviewing witnesses and reviewing a videotape. The tape has no audio but shows the client being escorted out by security with Killion following her. The tape also shows the client turning around and a security officer putting his arm out towards Killion. Based on the interviews and the tape, the county terminated Killion's employment.

Killion applied for unemployment benefits, and respondent Department of Employment and Economic Development (DEED) determined that she is ineligible for unemployment benefits because of employment misconduct. Killion appealed, and after an evidentiary hearing, a ULJ concluded that Killion was discharged for misconduct and therefore ineligible for unemployment benefits. Killion requested reconsideration, the

ULJ conducted an additional evidentiary hearing, and the ULJ again concluded that Killion was terminated for misconduct and ineligible for benefits.

This certiorari appeal follows.

D E C I S I O N

Killion argues that the ULJ erred in concluding that she engaged in employment misconduct. Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether a particular act constitutes employment misconduct is a question of law that we review de novo. *Id.* But "[w]hether 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). "In unemployment benefit cases, the appellate court is to review the ULJ's factual findings in the light most favorable to the decision and should not disturb those findings as long as there is evidence in the record that reasonably tends to sustain them." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted).

Employees who are discharged from employment are ineligible for unemployment benefits if they were "discharged because of employment misconduct." Minn. Stat. § 268.095, subd. 4(1) (2010). "Employment misconduct" is defined as "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) (2010). Here, the ULJ determined that Killion's conduct fell under both definitions of misconduct.

Killion argues that her conduct is statutorily excluded from the definition of employment misconduct and that the ULJ inadequately analyzed the fact that she was terminated for a single incident of misconduct. Her arguments are unpersuasive.

Statutory Exclusions

The statute excludes from misconduct "simple unsatisfactory conduct," "conduct an average reasonable employee would have engaged in under the circumstances," and "good faith errors in judgment if judgment was required." Minn. Stat. § 268.095, subd. 6(b)(3)–(4), (6) (2010).

Killion asserts that her conduct was merely unsatisfactory, arguing essentially that her heat-of-the-moment statements to the client are not egregious enough to rise to the level of misconduct. Killion's argument is unpersuasive. In *Bray v. Dogs & Cats Ltd.*, this court concluded that an employee's conduct was unsatisfactory when she failed to meet deadlines and follow company procedures. 679 N.W.2d 182, 185 (Minn. App. 2004). Although she "attempted to be a good employee[, she] just wasn't up to the job and was unable to perform her duties to the satisfaction of the employer." *Id*. This court distinguished that case in *Potter v. N. Empire Pizza, Inc.*, in which we held that "an employee who intentionally physically contacts another in anger engages in employment misconduct." ___ N.W.2d ___, ___, 2011 WL 3903200, at *4 (Minn. App. Sept. 6, 2011), *pet. for review filed* (Minn. Oct. 7, 2011). We upheld the ULJ's determination that the employee was ineligible for unemployment benefits because he was discharged after poking a coworker in the ribcage out of anger. *Id.* at *5.

In this case, the ULJ found that "more likely than not . . . Killion physically threatened the client." Although the employee in *Potter* committed an act of physical violence against a coworker and Killion only threatened physical violence against a client, we consider the distinction insignificant. We therefore consider not whether Killion performed her job duties adequately but, instead, whether her physically threatening a client constituted misconduct. We conclude that Killion's conduct "exceeds the 'simple unsatisfactory' exception reserved for failures to meet basic job performance standards." *Id.* at *4. Her conduct does not fall within the statutory exception to employment misconduct under section 268.095, subdivision 6(b)(3).

Killion also argues that she acted as an average reasonable employee would have acted under the circumstances. We disagree. The county's policy prohibited employees from verbally assaulting clients, and security was readily available to employees in connection with abusive clients. We conclude that Killion's conduct was not "conduct an average reasonable employee would have engaged in under the circumstances" and, therefore, does not fall under this exception to employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(4).

Killion also argues that although it may have been poor judgment on her part to insert herself into the situation with the client, she exercised good-faith judgment. To support this argument, Killion emphasizes that county supervisors encouraged her and her coworkers to assist each other in diffusing tense situations with clients, and a supervisor admitted that she encouraged employees to work together as a team to do an effective job. Killion complains that the ULJ did not address the fact that the county

"encouraged and expected" employees to assist each other with verbally abusive clients. But judgment is not required when an employee is acting outside the scope of his or her job duties. *See Marn v. Fairview Pharmacy Servs. LLC*, 756 N.W.2d 117, 122 (Minn. App. 2008) (holding relator did not make a good-faith error in judgment when he called a customer and alerted it to his employer's shortcomings because the relator acted outside the scope of his employment as a patient financial advocate), *review denied* (Minn. Dec. 16, 2008). As in *Marn*, Killion did not make a good-faith error in judgment because no judgment was required. Killion's job responsibilities were to interview clients to determine their eligibility for emergency assistance. Killion fulfilled any duty she had to assist her coworker in diffusing a tense situation with the client when she called security. When she continued to engage with the client after the arrival of security, and especially when she physically threatened the client, she acted outside the scope of her employment. *See id.* (noting relator would have acted within the scope of his employment had he contacted internal sources, but he exceeded the scope when he actually contacted the customer and expressed an opinion that was adverse to his employer's interests). We therefore conclude that Killion's conduct does not fall under the good-faith-error-in-judgment exception to employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(6).

Single Incident

Killion argues the ULJ erred because he did not adequately analyze her conduct as a single incident that occurred in the heat of the moment. She bases her argument primarily on a recent amendment to chapter 268, which removed as a statutory exception to employment misconduct "a single incident that does not have a significant adverse

impact on the employer" and added a provision that requires that the "important fact" that the conduct was "only a single incident" be "considered in deciding whether the conduct rises to the level of employment misconduct." 2009 Minn. Laws ch.15, § 9, at 48.

Killion asserts that the ULJ should have considered the adverse impact of her conduct because, although the legislature removed the language from the statute, caselaw involving the adverse-impact standard is not abrogated. She also asserts that the ULJ did not sufficiently articulate how he "considered" the "important fact" of the statements being a single incident. DEED maintains that the adverse-impact standard is not the current law and the "consider" requirement added to the statute is not a heavy procedural burden. We agree with DEED.

The legislature has frequently amended chapter 268 over the past decade, causing coinciding shifts in the caselaw. In *Potter*, this court traced the history and status of the single-incident exception, noting that "[b]efore the legislature passed a statutory definition of employment misconduct, courts defined it" and "included a single-incident exception to employment misconduct." 2011 WL 3903200, at *3 (citing *Tilseth v. Midwest Lumber Co.*, 295 Minn. 372, 374–75, 204 N.W.2d 644, 645–46 (1973)). Through caselaw, the single-incident exception developed into a "so-called 'hotheaded incident' exception." *Id.* (citing *Windsperger v. Broadway Liquor Outlet*, 346 N.W.2d 142, 145 (Minn. 1984)). But "an isolated hotheaded-incident exception no longer exists." *Id*. at *4. The new requirement in the statute that the ULJ must "consider" as an "important fact" whether the discharge involved "only a single incident" did not revive the single-incident exception to employment misconduct. *Id*. at *3. Killion's argument

that the ULJ erred by inadequately analyzing her conduct as a single incident that occurred in the heat of the moment lacks merit. We conclude that the ULJ properly followed the statute and did not err by not analyzing Killion's conduct under the adverse-impact framework.

Killion's argument that the ULJ did not sufficiently articulate how he "considered" the "important fact" of the statements being a single incident also lacks merit. Unlike other sections of chapter 268, the amendment that requires the ULJ to "consider" as an "important fact" whether the discharge involved "only a single incident" is silent on procedure. *See, e.g.*, Minn. Stat. § 268.105, subd. 1(c) (2010) (explicitly directing ULJs to "set out the reason for crediting or discrediting" testimony). Based on the language in section 268.095, subdivision 6(d), we conclude that the ULJ sufficiently considered the single nature of the incident in this case when he noted in his decision that "this was the only incident that Killion had physically threatened someone" and that it was the reason for her discharge. *See Potter*, 2011 WL 3903200, at *4 (stating in dicta that the ULJ adequately considered the single-incident factor when he confirmed in the hearing that the single incident was the only reason for discharge).

We conclude that Killion engaged in employment misconduct when she physically threatened a client and therefore is ineligible for unemployment benefits.

Affirmed.