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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2311**

Theresa M. Danielson,
Relator,

vs.

Minn. Dept. of Education,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 9, 2013
Affirmed
Bjorkman, Judge**

Department of Employment and Economic Development
File No. 29750857-5

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Economic Development)

Considered and decided by Johnson, Chief Judge; Ross, Judge; and Bjorkman,
Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Relator challenges the unemployment-law judge's (ULJ) decision that she is not eligible to receive unemployment benefits because she was discharged for employment misconduct. We affirm.

FACTS

Relator Theresa Danielson began working in respondent Minnesota Department of Education's (MDE) human-resources department in 1999. On August 24, 2011, Danielson was promoted to the position of personnel director II, the head of MDE's human-resources department. MDE Deputy Commissioner Jessie Montano told Danielson to restructure the department by creating a new personnel-services-manager position above the personnel director II. Danielson immediately appointed Natalie Chinander to a temporary unclassified position.

Under Minnesota law and Minnesota Management and Budget (MMB) policies, executive-agency employees must obtain delegated authority from the MMB commissioner to make certain employment decisions, such as reallocating¹ employees above a certain level and appointing unclassified employees to classified positions.² *See* Minn. Stat. §§ 43A.15, subs. 5, 7, .36, subd. 1 (2012). When Danielson became

¹ A reallocation is a noncompetitive promotion where an individual obtains a new position after assuming the duties of that position for a period of time.

² Under Minn. Stat. § 43A.15, subd. 7 (2012), an unclassified employee may be appointed to a classified position if the employee has passed a qualifying selection process and served at least one year in an unclassified position.

personnel director II, she mistakenly believed she had authority to make these employment decisions because her predecessor had received delegated authority from the MMB commissioner. But, in late November, Danielson learned that she needed to acquire her own delegation of authority to make the hiring decisions needed to restructure MDE's human-resources department. She requested the delegation on December 2 and was informed that if she received delegated authority, it would be retroactive.

On December 9, Chinander signed a job audit reallocating Danielson to the new personnel-services manager position. This was a two-level promotion and increased Danielson's salary by ten percent. Danielson initialed the audit in the HR-approval box. On December 15, Danielson signed a job audit promoting Chinander to personnel director II. Although Chinander's salary did not change, the promotion moved her into a classified position. Montano subsequently approved both promotions.

On December 30, MMB delegated retroactive authority to Danielson. But the delegation was limited; it did not permit Danielson to place herself and Chinander into their new positions without MMB approval or an open job posting. Upon learning of the two unauthorized promotions, MMB initiated an investigation. Based on the results of the investigation, MDE concluded that Danielson (1) approved the promotions without proper delegation of authority in violation of Minnesota law and MMB policies; (2) violated the executive branch's code of ethics, codified at Minn. Stat. § 43A.38 (2010), by using her position to gain an undue advantage and a private benefit; and (3) violated Minn. Stat. § 43.15, subd. 7, by appointing Chinander to a classified position

before she had served one year in an unclassified position. MDE discharged Danielson on May 10, 2012.

Danielson applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development determined Danielson was eligible for benefits. MDE appealed. Following an evidentiary hearing, the ULJ concluded that Danielson committed employment misconduct and is not eligible to receive benefits because she knew or should have known that she violated MMB policies and Minnesota law. Danielson requested reconsideration, and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

We review a ULJ's decision to determine whether it is "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d) (2012).

An employee who is discharged for "employment misconduct" is not eligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Employment misconduct is "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) (2012). Generally, an employee's refusal to follow the employer's reasonable policies and requests is employment misconduct. *Schmidgall v.*

FilmTec Corp., 644 N.W.2d 801, 804 (Minn. 2002). But “[a]n employer’s condonation of an employee’s wrongful conduct is a mitigating factor which may cause the employer to waive its right to discharge the employee on the basis of such misconduct.” *Bautch v. Red Owl Stores, Inc.*, 278 N.W.2d 328, 331 (Minn. 1979).

Whether an employee committed a particular act is a fact question, which we review for substantial evidence, giving deference to the ULJ’s credibility determinations. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether an act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

I. Substantial evidence supports the ULJ’s determination that Danielson knew or should have known that she violated her employer’s policies and Minnesota law.

Danielson does not deny that she violated MMB policies and Minnesota law. Rather, she asserts that her acts are not employment misconduct because her violations were not knowing. We are not persuaded. The ULJ found that Danielson knew or should have known that she violated MMB’s policies and Minnesota law. Substantial evidence supports this determination. Danielson worked in the human-resources department for more than ten years. She held a high-ranking position, and her job description specified that her duties included maintaining “current knowledge of legal requirements affecting the department’s personnel and labor relations activities and advis[ing] management of critical changes.” In 2008, she took a course on MMB’s “Job Audit Manual,” which describes the policies on delegation of authority, and she acknowledged reviewing the manual several times. And MMB policies were available to Danielson through MMB’s website and other manuals and training materials.

Moreover, Danielson had actual knowledge by late November that she needed to acquire her own delegation of authority and that such authority was needed to appoint Chinander to the personnel director II position. Although she requested authority on December 2, she had not received a delegation at the time she promoted Chinander. On December 30, Danielson received a letter granting her a delegation that did not include the authority to promote herself or Chinander. Danielson did nothing to obtain authority from MMB or correct her actions at that point. And the ULJ expressly rejected Danielson's testimony that she did not know she violated MMB policies and Minnesota law, finding it "simply not believable" that Danielson did not know the promotions required MMB approval. The record substantially supports the ULJ's credibility determination and findings.

II. Danielson's actions constitute employment misconduct.

Danielson argues that the ULJ applied the wrong legal standard and that her actions do not amount to employment misconduct. We disagree and address each argument in turn.

First, in rejecting Danielson's argument that she did not know she violated MMB policies, the ULJ stated:

Danielson was employed by the Minnesota Department of Education (MDE) for nearly 13 years and had a high ranking position in human resources. It is simply not believable that she didn't know that her actions required approval from MMB. The mere appearance of impropriety should have been enough to give her pause and perhaps investigate the matter further to quell any doubts.

Danielson argues that this statement shows the ULJ improperly held Danielson to the “mere appearance of impropriety” standard to which judges are held. We are not persuaded. When reviewed in context, the ULJ’s statement reflects the conclusion that Danielson’s act of giving herself a two-level promotion should have prompted her to verify that her actions complied with MMB’s policies and the law. Danielson’s failure to do so demonstrates that she acted negligently, which is the appropriate standard for employment misconduct. And even if the ULJ applied the incorrect legal standard, the error is harmless because we review the ULJ’s legal conclusion that Danielson’s actions constitute employment misconduct de novo.

Second, the ULJ’s factual findings support the legal conclusion that Danielson committed employment misconduct. If Danielson knew her acts of promoting herself and Chinander without approval violated her employer’s policies and Minnesota law, she clearly committed employment misconduct. *See Schmidgall*, 644 N.W.2d at 806 (stating that employment misconduct includes a knowing violation of an employer’s reasonable requests and policies). And if her conduct was negligent, her violations are not de minimis; they demonstrate a serious violation of the standards of behavior her employer has a right to reasonably expect and a substantial lack of concern for her employment. As head of MDE’s human-resources department, Danielson was expected to know and follow MMB policies and Minnesota law. She signed a code of conduct stating that she would comply with all policies and laws relating to her job. And she used her official position to authorize a self-serving transaction that significantly benefited her.

Danielson argues that an employee must knowingly violate the employer's reasonable policies to commit misconduct, citing *Riley v. Transp. Corp. of Am., Inc.*, 462 N.W.2d 604, 608 (Minn. App. 1990), and *Tuckerman Optical Corp. v. Thoeny*, 407 N.W.2d 491, 494 (Minn. App. 1987). We disagree. Both *Riley* and *Tuckerman Optical* were decided under the common-law definition of misconduct, which did not include negligence. See *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 822-23 (Minn. App. 2010), review denied (Minn. Sept. 29, 2010); see also *Houston v. Int'l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002). The legislature subsequently changed the definition of employment misconduct to include intentional, negligent, and indifferent conduct. *Houston*, 645 N.W.2d at 149; *Hanson v. Crestliner Inc.*, 772 N.W.2d 539, 543 (Minn. App. 2009); see also Minn. Stat. § 268.095, subd. 6(a). Because employment misconduct includes negligence, Danielson did not need to knowingly violate her employer's policies and the law to commit employment misconduct.

Danielson contends that she did not commit employment misconduct because she, in good faith, misunderstood her employer's rules and policies. See *Tuckerman Optical*, 407 N.W.2d at 493. We are not persuaded. The ULJ rejected Danielson's testimony that she did not know that she violated her employer's policies. And, as explained above, Danielson's job required her to know MMB's policies and procedures. Her failure to do so and to comply with these policies demonstrates a serious violation of the behavior her employer has a right to expect and a substantial lack of concern for her employment.

Danielson finally asserts that Montano condoned her misconduct by approving the promotions. We disagree. Montano is not expected to understand technical human-

resources procedures. Indeed, Montano relied on Danielson's expertise to ensure that human-resources transactions complied with MMB policies and Minnesota law. The fact that Montano approved Danielson's and Chinander's promotions does not show that she condoned the procedures Danielson used to authorize the promotions. On this record, we conclude that Montano did not condone Danielson's violations.³

Affirmed.

³ Danielson also contends that human-resources representative Sandra Helle condoned her misconduct in a letter sent on December 23. This argument is not availing. MMB's director of human-resources management testified that Helle's letter is a form letter sent to the manager of an individual who received a pay increase. The letter is routine paperwork, not the approval of a salary increase. There is also no evidence that Helle was aware of the procedures that Danielson used to authorize the promotions. Accordingly, Helle did not condone Danielson's misconduct.