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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1491**

Kari D. Brenes,
Relator,

vs.

Guy Metals Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 29, 2008
Affirmed
Collins, Judge***

Department of Employment and Economic Development
File No. 4947 07

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Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Collins,
Judge.

* 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UNPUBLISHED OPINION

COLLINS, Judge

Relator challenges the decision by the unemployment-law judge (ULJ) that she was disqualified from receiving unemployment benefits because she engaged in employment misconduct, arguing that (1) her conduct does not constitute employment misconduct; (2) the decision is not supported by substantial evidence; (3) the ULJ erred by failing to make credibility determinations; and (4) the ULJ's rulings denied her a fair hearing. We affirm.

DECISION

I.

Relator Kari D. Brenes contends that her actions do not constitute employment misconduct. When an employer discharges an employee for "employment misconduct," the employee is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). Employment misconduct is "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).

A challenge to the determination that an employee committed employment misconduct presents a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee's act itself constitutes employment misconduct is a question of law that this court reviews de novo, but whether

the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court views the ULJ's factual findings in a light most favorable to the decision, and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ULJ's factual findings will not be disturbed when substantially supported by the evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2006).

Brenes was discharged by Guy Metals for violating the company's electronic-communications policy, which prohibits the receipt or transmission of personal e-mails or e-mails containing "inappropriate, offensive, racist, sexist, or harassing" messages or images. Although Brenes admits that she violated this policy, she argues that Guy Metals waived the right to enforce it because the company was aware that other employees transmitted and received personal e-mails at work, but did not reprimand them. We disagree.

Brenes's conduct amounts to employment misconduct because she was aware of Guy Metals' electronic-communications policy, yet chose to act in a manner that violated its terms. A knowing violation of an employer's policies constitutes employment misconduct because it demonstrates a substantial lack of concern for the employer's interests. *Schmidgall*, 644 N.W.2d at 804. And the violation of an employer's policies by others, or an employer's selective enforcement of its policies, is not a defense to employment misconduct. *Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986) (stating that an employer's alleged selective enforcement of rules is not a defense to a finding of employee misconduct), *review denied* (Minn. Aug. 20, 1986); *Dean v.*

Allied Aviation Fueling Co., 381 N.W.2d 80, 83 (Minn. App. 1986) (stating that the violation of an employer's policies by others is not a defense to employment misconduct).

Brenes also claims that her use of work time for personal e-mails was merely unsatisfactory conduct or a good faith error in judgment. Simple unsatisfactory conduct or a good faith error in judgment, if judgment was required, does not amount to employment misconduct. Minn. Stat. § 268.095, subd. 6(a) (2006). But Brenes's conduct does not fit within these exceptions. First, her conduct amounts to more than just unsatisfactory performance. As noted above, Brenes's deliberate and repeated violation of the company's electronic-communications policy exhibited a substantial lack of concern for her continued employment with the company. And, second, Brenes's violation of the policy does not constitute a good faith error in judgment because no judgment was required; the policy explicitly prohibited employees from transmitting personal e-mails and inappropriate messages or images.

II.

Brenes next argues that the finding that her receipt and transmission of personal e-mails led to her termination is not supported by substantial evidence. She argues that the weight of the evidence confirms her theory that she was discharged for considering legal action against Guy Metals for promoting a racially hostile work environment.

Brenes is correct that some of the evidence supports her theory and argument. But upon our careful review of the record, we are satisfied that witness testimony and exhibits produced at the hearing substantially support the ULJ's factual findings. Brenes's

supervisor, Guy Young, testified that he discharged Brenes for sending and receiving personal e-mails at work in violation of the company's electronic-communications policy. Young asserted that he discovered hundreds of personal e-mails sent and received by Brenes. His testimony is corroborated by a number of Brenes's e-mails entered into evidence that contain personal correspondence between Brenes and her friends. Many of the e-mails include such content as explicit sexual references and details of Brenes's efforts to obtain new employment. Supported by substantial evidence in the record, the ULJ's finding of employment misconduct is not erroneous.

III.

Brenes also argues that the ULJ erred by failing to set out reasons for crediting Young's testimony over hers. We disagree. "When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2006). Failure to do so is a basis for remand. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007).

Brenes's argument fails because credibility determinations did not have a significant effect on the outcome of the case. It was unnecessary for the ULJ to make any dispositive credibility determinations because the numerous personal and inappropriate e-mails offered as exhibits provided sufficient direct evidence to support the decision.

IV.

Lastly, Brenes contends that her right to a fair hearing was violated when the ULJ (1) admitted a 50-page exhibit offered by Guy Metals into evidence only a day before the hearing, (2) denied her application for a subpoena, and (3) failed to rule on evidentiary objections on the record. The ULJ is to exercise control over the hearing procedure to protect the parties' right to a fair hearing and ensure that relevant facts are clearly and fully developed. Minn. R. 3310.2921 (2007).

1. Submission of Exhibit

First, Brenes challenges the admission of Guy Metals's exhibit. She claims that it was not properly admitted because she received it only a day before the hearing and was denied a continuance. Generally, parties are to submit exhibits to the department no later than five days before the hearing so copies can be mailed to the other parties before the hearing. Minn. R. 3310.2912 (2007). Recognizing that there may be occasions when the parties do not meet this deadline, the rules also provide for submission at the hearing, with the record left open for a response or the hearing continued to allow cross-examination on the documents if necessary. *Id.*

Brenes's primary contention is that the exhibit, containing numerous e-mails both sent and received by her, is a "discombobulated mess." At the hearing, Brenes's attorney argued that he was unable to make sense of the exhibit because it contained duplicate e-mails. But he received a copy before the hearing and used the exhibit to cross-examine Young. Nothing in the record suggests that its admission prejudiced Brenes's case. Therefore, the ULJ did not abuse his discretion in admitting the exhibit.

2. Subpoena Request

Brenes also argues that she was improperly denied subpoenas to obtain (1) e-mails from Guy Metals that she believed would support her case, (2) the disciplinary records of other employees who violated the e-mail policy, and (3) communications from Guy Metals notifying other employers that their employees were e-mailing inappropriately. We disagree. Subpoenas are available in unemployment proceedings “to compel . . . the production of documents or other exhibits upon a showing of necessity.” Minn. R. 3310.2914, subp. 1 (2007). But the denial of the subpoena request was appropriate in this instance. Brenes waited until only two days before the hearing to request the subpoenas, and any potential harm was mitigated by her opportunity to testify as to the contents of the e-mails. And, again, selective discipline is no defense to an allegation of employment misconduct. *Silverston*, 390 N.W.2d at 871. Lastly, whether Guy Metals contacted other employers has no bearing on whether Brenes’s actions constituted employment misconduct.

3. Ruling on Record

Finally, Brenes argues that the ULJ erred by making an evidentiary ruling outside the record. Under the department’s rules, a ULJ “must rule upon evidentiary objections on the record.” Minn. R. 3310.2921 (2007). Brenes claims that one of the ULJ’s rulings was not made on the record because the recording device that captures testimony during the hearing was not operating at the time of the determination. But Brenes’s argument ignores the fact that the ULJ later summarized the ruling on the record and each of the parties agreed that the summary was accurate.

Because Brenes's actions amount to employment misconduct, and because the hearing procedure employed by the ULJ afforded Brenes a fair opportunity to present her case, we affirm her disqualification from receiving unemployment benefits.

Affirmed.