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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-129**

Karin Davis,
Relator,

vs.

EMC Publishing LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed December 8, 2009
Affirmed
Halbrooks, Judge**

Department of Employment and Economic Development
File No. 21248201-3

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Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and
Huspeni, Judge.*

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

UNPUBLISHED OPINION

HALBROOKS, Judge

Relator challenges the determination of an unemployment-law judge (ULJ) that she is ineligible to receive unemployment benefits because she was discharged for employment misconduct. Alternatively, relator argues that her case must be remanded due to the ULJ's failure to properly develop the record at her appeal hearing. Because we conclude that relator's actions leading to her termination constituted employment misconduct and because the ULJ was not required to sua sponte call a witness on behalf of relator to meet the statutory obligation of proper record development, we affirm.

FACTS

Relator Karin M. Davis was employed by respondent EMC Publishing LLC as an executive assistant starting in March 2003. Because relator's duties included booking company travel and purchasing small quantities of office supplies, EMC issued her a company credit card to perform these tasks. EMC did not have an express policy that permitted or prohibited an employee's personal use of the company credit card. During her employment, relator used the company card for personal purchases in conjunction with business purchases. She kept track of the personal purchases and wrote a check to EMC to cover those charges when the bill arrived. Other employees used the company cards for similar, incidental purchases (up to about \$20) without incident.

In 2008, relator purchased a water heater. She made a \$500 down payment and planned to make monthly payments of \$500 until the purchase was paid in full. In June 2008, the water-heater vendor did not receive relator's payment. The vendor called

relator at work, and relator authorized the vendor to charge that month's payment on the company credit card. Relator intended to repay EMC immediately. But the vendor mistakenly charged the company card for the entire \$1,439 balance. When relator discovered the mistake, she talked with Eric Peterson, the head accountant for EMC. She was told not to make any additional personal purchases on the credit card and that EMC no longer permitted personal purchases on its company cards. Relator complied with that rule.

When the credit card bill arrived, relator asked to postpone reimbursement to EMC because she needed to pay her son's school tuition. Peterson authorized a postponement of the payment. When the next month's bill arrived, relator again asked for a postponement because she had recently opened a new checking account and did not have her new checks. Peterson asked Jim Afdahl, the vice president and chief financial officer, whether the company would permit a second postponement. This conversation was the first time that Afdahl learned of relator's \$1,439 charge. Relator was discharged the following day for improper use of the company credit card and for failing to promptly repay her personal purchase.

Relator established a benefits account with respondent Minnesota Department of Employment and Economic Development (DEED). DEED concluded that relator was ineligible for unemployment benefits because she was discharged for employment misconduct.¹ Relator challenged that determination and requested a hearing before a

¹ The initial decision also concluded that relator engaged in aggravated employment misconduct, but the ULJ later reversed that determination.

ULJ. Only relator and Afdahl testified at the hearing. Relator testified to her past use of EMC's credit card and the practices of other employees who had access to the company credit cards. Afdahl testified that he was unfamiliar with the employees' practices regarding the company credit cards but that he understood "personal use" to mean only smaller purchases made in connection with business purchases. Relator testified as to the procedures for reimbursing EMC for personal purchases made on the company credit card and submitted exhibits for the ULJ's consideration. She did not seek to call any witnesses or request that the ULJ subpoena additional witnesses.

The ULJ affirmed the disqualification, finding that relator engaged in employment misconduct. In her request for reconsideration, relator argued that her decision to use the EMC credit card was either a good-faith error in judgment or a single incident with no significant adverse impact on the employer. The ULJ affirmed the earlier decision and further held that relator's conduct did not fall under either exception. This certiorari appeal follows.

DECISION

I.

Relator challenges the ULJ's determination that she is ineligible for unemployment benefits, arguing that her use of EMC's credit card did not constitute employment misconduct. On review, this court may affirm a ULJ's decision, remand it for further proceedings, or reverse or modify it

if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusion or decision are:

- (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 the entire record as submitted; or
- (6) arbitrary or capricious.

Minn. Stat. § 268.105, subd. 7(d) (2008).

An employee who is discharged for misconduct is not eligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct is defined as

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.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Id., subd. 6(a) (2008). “The focus of the definition of misconduct is on standards of behavior the employer has the right to reasonably expect of the employee.” *Brown v. Nat’l Am. Univ.*, 686 N.W.2d 329, 333 (Minn. App. 2004) (quotation omitted), *review denied* (Minn. Nov. 16, 2004). This is an objective inquiry: “was the employer’s expectation for the employee reasonable under the circumstances?” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006).

Whether an employee has engaged in employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Findings of fact are viewed in the light most favorable to the ULJ's decision and are upheld if supported by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether a particular act constitutes misconduct is a question of law and is reviewed de novo. *Schmidgall*, 644 N.W.2d at 804.

Relator was discharged for misuse of EMC's credit card and for failing to timely reimburse EMC for her personal purchase. The ULJ found that EMC employees used company credit cards for minor personal purchases made in conjunction with business purchases. The ULJ also found that relator was supposed to keep track of her personal purchases and reimburse EMC for those purchases when the bill arrived. Relator does not dispute these findings of the ULJ. But relator argues that her actions did not violate EMC's reasonable expectations because EMC did not have a written policy regarding employee use of company credit cards.

Relator's use of the company credit card exceeded what EMC permitted. She charged \$1,439 for a personal water heater. In addition, she failed to promptly reimburse EMC when the bill arrived. EMC had a right to reasonably expect its employees using the company credit card to charge only incidental, personal purchases and to reimburse EMC within that billing cycle. The fact that EMC had no written policy directing employees in their personal use of company assets does not mean that unfettered credit card use was appropriate. *See Brown*, 686 N.W.2d at 333 ("We are aware of no law that requires an employer to have an express 'policy' regarding prohibited behavior for

employees.”). Based on the factual findings of the ULJ, including relator’s testimony regarding her past use of EMC’s credit card and prompt repayment, relator’s actions meet the legal standard of employment misconduct.

We next address relator’s argument that her conduct falls under the single-incident exception. The statutory definition of “misconduct” excludes “a single incident that does not have a significant adverse impact on the employer.” Minn. Stat. § 268.095, subd. 6(a). When determining whether an act has a significant adverse effect on an employer, we must examine the “conduct in the context of [the employee’s] job responsibilities.” *Skarhus*, 721 N.W.2d at 344. We have held that an employer suffered a significant adverse impact when the employer’s “ability to assign the essential functions of the job to its employees was undermined by the employee’s conduct.” *Id.*

Relator argues that her personal use of the company credit card would not affect her ability to do work for EMC because it was unrelated to her responsibilities. But relator’s essential job duties were to make travel arrangements and to purchase office supplies. After relator charged \$1,439 for a personal purchase and then failed to repay that purchase in a timely manner, EMC’s ability to trust relator with the company credit card to perform her essential work tasks was undermined. We therefore conclude that although relator’s conduct stemmed from a single incident during her employment, it did have a significant adverse impact on EMC.

Finally, we address relator’s contention that her conduct was a good-faith error in judgment. Misconduct does not include good-faith errors in judgment if judgment is required. Minn. Stat. § 268.095, subd. 6(a). In *Marn v. Fairview Pharmacy Servs. LLC*,

we held that an employee's conduct does not fall under this exception when the employee acts outside the scope of his or her position. 756 N.W.2d 117, 122 (Minn. App. 2008). In order for this exception to apply, the employee's act must require judgment related to her work with the company; it does not apply to situations where an employee makes a decision wholly separate from her position with the employer. Relator's conduct fell outside the scope of her employment. Therefore, we conclude that her actions do not fall under the good-faith-error-in-judgment exception.

Because the ULJ correctly determined that relator's use of EMC's credit card for a significant, personal purchase and her failure to timely reimburse EMC for that purchase constituted employment misconduct, we affirm.

II.

We next address relator's argument that her case should be remanded because the ULJ failed to properly develop the record by not calling Peterson, the head accountant, to testify during the evidentiary hearing. "The evidentiary hearing is conducted by an unemployment law judge without regard to any burden of proof as an evidence gathering inquiry and not an adversarial proceeding." Minn. Stat. § 268.105, subd. 1(b) (2008). "The unemployment law judge must ensure that all relevant facts are clearly and fully developed." *Id.* To this end, the ULJ has the authority to "administer oaths and affirmations, take depositions, and issue subpoenas to compel the attendance of witnesses and the production of documents and other personal property considered necessary as evidence in connection with the subject matter of an evidentiary hearing." *Id.*, subd. 4. Subpoenas are available to a party to compel attendance of witnesses. Minn. R.

3310.2914, subp. 1 (2007). The ULJ should assist unrepresented parties in the presentation of evidence. Minn. R. 3310.2921 (2007). This includes recognizing and interpreting the claims of pro se parties. *Miller v. Int'l Express Corp.*, 495 N.W.2d 616, 618 (Minn. App. 1993).

Relator does not cite, and we fail to find, any authority for shifting the burden of producing evidence from a party to the ULJ. Under the statute, the ULJ has a limited amount of authority in an evidentiary hearing. The ULJ may issue subpoenas when a party requests the presence of a witness. Minn. Stat. § 268.105, subd. 4. But nothing in the language of the statute supports the proposition that the ULJ may call its own witnesses or gather its own evidence. *Id.*

Relator was represented by counsel at the evidentiary hearing and again on her motion for reconsideration. She was able to testify about the practices of EMC employees regarding the company credit cards, and the ULJ accepted that testimony. At no time did relator request a subpoena for Peterson or suggest that it was error to conduct the hearing without him. The statutes and rules pertaining to a DEED appeal do require a ULJ to ensure a fully developed record and to help unrepresented parties during the hearing. But we cannot conclude that these requirements place a burden on the ULJ to sua sponte call a witness or present evidence. Because relator presents no evidence that the ULJ failed to properly develop the record at the hearing, we affirm.

Affirmed.