STATE OF MINNESOTA
IN COURT OF APPEALS
A10-24

Judith VanderMolen,
Relator,

vs.

Twist Interior Design (Corp),
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 24, 2010
Affirmed
Larkin, Judge

Department of Employment and Economic Development
File No. 23136686-3

Judith W. VanderMolen, Edina, Minnesota (pro se relator)

Twist Interior Design (Corp), Minneapolis, Minnesota (respondent)

Lee B. Nelson, Amy R. Lawler, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent-department)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

LARKIN, Judge

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

FACTS

Relator Judith VanderMolen began working for Twist Interior Design (Twist) in August 2006. VanderMolen was responsible for bookkeeping and payroll. Twist's owner, Sandy LaMendola, expected that only she and VanderMolen would deposit Twist's funds at its bank. VanderMolen never received permission to delegate this responsibility. VanderMolen was reprimanded on one occasion for allowing another employee to use VanderMolen's password to access Twist's computer system. This was problematic because VanderMolen's password provided the employee with otherwise unauthorized access to Twist's financial records.

VanderMolen was scheduled to go on vacation beginning April 21, 2009. On April 20, she intended to deposit some of Twist's funds at its bank but was unable to get to the bank before it closed. Therefore, on April 21, VanderMolen gave the funds to her adult son and asked him to deposit the funds. When VanderMolen's son presented the funds at the bank, the bank discovered an error in the deposit and telephoned LaMendola to resolve the issue. When LaMendola learned that VanderMolen's son was making the deposit, she was upset. But the deposit was properly received by the bank, and Twist suffered no financial loss. Nonetheless, upon VanderMolen's return from her vacation on

May 1, Twist discharged VanderMolen for employment misconduct, claiming a breach of trust.

VanderMolen established a benefits account with the Minnesota Department of Employment and Economic Development (DEED) and applied for unemployment benefits. DEED determined that she was ineligible to receive unemployment benefits. VanderMolen appealed this decision, and an evidentiary hearing was held. VanderMolen and LaMendola testified at the hearing. An unemployment-law judge (ULJ) found that VanderMolen was ineligible to receive unemployment benefits because she was discharged for employment misconduct. VanderMolen requested reconsideration, and the ULJ affirmed his decision. This certiorari appeal follows.

D E C I S I O N

Our review of a ULJ's eligibility determination is governed by Minn. Stat. § 268.105, subd. 7(d) (2008), which provides, in relevant part:

> The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:
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> . . .
>
> (4) affected by [an] error of law; [or]
>
> (5) unsupported by substantial evidence in view of the entire record as submitted[.]

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). 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." *Id.*, subd. 6(a) (Supp. 2009). The misconduct definitions set out in the act are exclusive and "no other definition applies." *Id.*, subd. 6(e) (Supp. 2009). "If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct . . . ." *Id.*, subd. 6(d) (Supp. 2009).

Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* This court reviews the ULJ's factual findings "in the 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).

VanderMolen contends that the ULJ's decision is based on numerous errors. She asserts that the ULJ's factual findings are not supported by substantial evidence, arguing that there was no evidence of an express policy that prohibited a non-employee from making a bank deposit on her behalf. But a finding of misconduct is not dependent upon a violation of an expressly-communicated policy. The issue is whether the employee's conduct clearly displays a "serious violation of the standards of behavior the employer has *the right to reasonably expect* of the employee." Minn. Stat. § 268.095, subd. 6(a)

(emphasis added); *see also Brown v. Nat'l Am. Univ.*, 686 N.W.2d 329, 333 (Minn. App. 2004) ("We are aware of no law that requires that an employer have an express policy regarding prohibited behavior for employees. The focus of the definition of misconduct is on standards of behavior the employer has the right to reasonably expect of the employee . . . ." (quotation omitted)), *review denied* (Minn. Nov. 16, 2004). Moreover, the conduct need not be intentional: negligent or indifferent conduct qualifies. Minn. Stat. § 268.095, subd. 6(a).

It is simply not necessary for an employer to imagine all the ways in which an employee might harm the employer and expressly forbid each potential infraction before misconduct may be found. And an employer has the right to reasonably expect that its employees will not allow unauthorized access to the employer's funds or financial information. Because it is irrelevant whether VanderMolen was explicitly instructed that only she could make deposits, any error in the related findings is not a basis for reversal. *See* Minn. Stat. § 268.105, subd. 7(d)(5) (stating that we may reverse "if the substantial rights of the petitioner may have been prejudiced" because the findings are unsupported by substantial evidence); *Midway Ctr. Assocs. v. Midway Ctr. Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (holding that to prevail on appeal, an appellant must show both error and prejudice resulting from the error); *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993) (stating that the appellant bears the burden of demonstrating that error is prejudicial), *review denied* (Minn. June 28, 1993).

VanderMolen also argues that her conduct constitutes a good faith error in judgment. An exception to employment misconduct exists for "good faith errors in

judgment if judgment was required." Minn. Stat. § 268.095, subd. 6(b)(6) (Supp. 2009). VanderMolen's argument is unavailing. VanderMolen knew that she was authorized to make bank deposits. By enlisting a non-employee to make a deposit on her behalf, VanderMolen departed from the known procedure and provided the non-employee with unauthorized access to Twist's funds and financial information. Given that VanderMolen had previously been reprimanded for allowing another *employee* to access Twist's financial information, her decision to grant a non-employee such access was not a "good faith" error in judgment. And contrary to VanderMolen's suggestion, harm is not necessary for a determination of misconduct. *Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986).

VanderMolen further contends that her misconduct was limited to a single incident, which is an important factor that must be considered in determining whether she committed employment misconduct for purposes of the statute. *See* Minn. Stat. § 268.095, subd. 6(d). But LaMendola testified that VanderMolen's provision of her computer password to another employee was a factor in the termination decision. Thus, the record shows two alleged instances of misconduct: VanderMolen provided an employee with otherwise unauthorized access to Twist's financial records and later allowed a non-employee to make Twist's bank deposit on her behalf. And an employee's "behavior may be considered as a whole in determining the propriety of [his] discharge and [his] qualification for unemployment compensation benefits." *Drellack v. Inter-County Cmty. Council, Inc.*, 366 N.W.2d 671, 674 (Minn. App. 1985).

VanderMolen argues that the prior incident did not constitute notice of how deposits should be handled. But the prior incident did constitute notice that Twist did not want VanderMolen to allow anyone else to access Twist's financial information. VanderMolen also complains that the previous incident was not given as a reason for her discharge until LaMendola was prompted by the ULJ, it was not mentioned to her at the time of her discharge, it was not included in written statements submitted to DEED, and "[i]n fact, the employer's stated reason for discharging [her] without a warning appears to have been a pretext for replacing [her], during [her] vacation, and before [she] was discharged, with a former employee who was then readily available." These arguments appear to challenge LaMendola's credibility. But we defer to the ULJ's credibility determinations. *See Skarhus*, 721 N.W.2d at 344.

To the extent that VanderMolen raises a pretextual-discharge claim, the ULJ was required to consider the claim if VanderMolen raised it in the underlying proceeding. *See Scheunemann*, 562 N.W.2d at 34 ("When the reason for the discharge is disputed, the hearing process must allow evidence on the competing reasons and provide factual findings on the cause of discharge."). But VanderMolen did not present evidence supporting a pretextual-discharge claim at the evidentiary hearing. She first raised the claim in her request for reconsideration. A ULJ must grant an additional evidentiary hearing if the requesting party shows that evidence that was not submitted at the original hearing would likely change the outcome and there is good cause for failing to previously submit the evidence. Minn. Stat. § 268.105, subd. 2(c)(1) (Supp. 2009). The ULJ found: "The request for reconsideration does not suggest that there was additional evidence

which could have been submitted but was not available at that time." We construe this as a finding that VanderMolen did not have good cause for failing to submit her pretextual-discharge evidence at the original hearing, which justifies the ULJ's decision not to grant an additional hearing.

Lastly, VanderMolen asserts that the ULJ did not consider her claim that she became unemployed prior to her formal discharge due to a substantial reduction in her hours and that she is therefore entitled to unemployment benefits "regardless of the incident and the final discharge." But VanderMolen did not establish an unemployment benefits account and did not request benefits until after her May 2009 discharge. The benefits claim that is at issue here relates to her request for benefits following her May discharge. Any reduction in hours during a period preceding her May discharge, for which she did not claim unemployment benefits, is not relevant.

An "employer has the right to expect scrupulous adherence to procedure by employees handling the employer's money." *McDonald v. PDQ*, 341 N.W.2d 892, 893 (Minn. App. 1984). LaMendola testified that "nobody else, except [VanderMolen] or I, had authorization to make deposits, nor had anyone else ever been given permission or access to deposits for our business to my knowledge." The ULJ found that VanderMolen "was in a position of financial trust and failed to follow the known expectations of the company in that regard." The ULJ concluded that VanderMolen's conduct was, at the least, substantial negligence constituting employment misconduct. By allowing a non-employee to make her employer's bank deposit, VanderMolen failed to scrupulously adhere to a procedure related to the handling of her employer's funds and clearly

displayed a serious violation of the standards of behavior that her employer had a right to reasonably expect. The ULJ therefore did not err by determining that VanderMolen was discharged for employment misconduct and ineligible for unemployment benefits. Accordingly, we affirm.

Affirmed.

Dated:

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Judge Michelle A. Larkin