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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-26**

Paulette Shafer,
Relator,

vs.

Meridian Aggregates Company, a Limited Partnership,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 24, 2010
Reversed
Wright, Judge**

Minnesota Department of Employment and Economic Development
File No. 23364633-4

Paulette Shafer, Lucan, Minnesota (pro se relator)

Meridian Aggregates Company, St. Louis, Missouri (respondent)

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

Considered and decided by Lansing, Presiding Judge; Wright, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Relator challenges the determination by an unemployment law judge (ULJ) that relator was discharged for employment misconduct and, therefore, is ineligible to receive unemployment benefits. We reverse.

FACTS

Relator Paulette Shafer worked full time from 7:00 a.m. to 4:00 p.m. weekdays as a weigh master for Martin Marietta Materials (Martin Marietta), formerly known as Meridian Aggregates. Martin Marietta makes and sells crushed aggregates for use in producing concrete. Shafer's job requirements included weighing empty trucks, directing the drivers to the materials that they wanted to purchase, weighing the full trucks, and creating a bill for the products sold. The entire process takes approximately five to ten minutes for each customer. At the end of the day, Shafer was required to close the scale, process the sales paperwork, and send it electronically to the corporate headquarters. The closing process takes approximately 10 to 15 minutes.

In August 2009, the scales were scheduled to close each business day at 4:00 p.m. On August 24, 2009, when a customer arrived at approximately 3:55 p.m., Shafer refused to load the truck because she had closed out the billing system. Shafer was discharged on September 1, 2009, for turning away the customer.

Shafer subsequently applied to the Minnesota Department of Employment and Economic Development (DEED) for unemployment benefits. A DEED adjudicator initially determined that Shafer was eligible for unemployment benefits. Martin Marietta

appealed. After an evidentiary hearing, the ULJ determined that “an employer can expect a common sense judgment that employees will not send away customers” and that Shafer committed employment misconduct by doing so. Shafer sought reconsideration, and the ULJ affirmed. This certiorari appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator 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 view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2008).

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 an employee committed a particular act is a question of fact. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We review a ULJ’s factual findings in the light most favorable to the decision, and they will not be disturbed on appeal if there is evidence that reasonably tends to sustain those findings. *Schmidgall*, 644 N.W.2d at 804. But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). 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) (Supp. 2009). Employment misconduct does not include simple unsatisfactory conduct, conduct an average reasonable employee would have engaged in under the circumstances, or good-faith errors in judgment if judgment was required. *Id.*, subd. 6(b) (Supp. 2009). This statutory definition “is exclusive and no other definition applies.” *Id.*, subd. 6(e) (Supp. 2009)

Shafer agrees that she turned away a customer. And although Shafer disputes the ULJ’s finding that Shafer turned away the customer at 3:55 p.m., the record evidence reasonably supports that finding. We, therefore, consider whether the ULJ erred in determining the significance of Shafer turning away a customer five minutes before closing time.

The ULJ accepted Shafer’s testimony that she turned away the customer pursuant to an instruction from a previous supervisor that she was to “do her best to get all of the customers done by 3:30.” The ULJ determined, however, that “[e]ven with” the instruction from the supervisor, “an employer can expect a common sense judgment that employees will not send away customers.” “Common sense” is defined as “[n]ative good judgment.” *The American Heritage Dictionary* 382 (3d. ed. 1992). But the exclusive statutory definition of employment misconduct does not encompass lapses in common sense. To the contrary, Minnesota’s unemployment insurance statute explicitly excludes “good faith errors in judgment” from the definition of employment misconduct. *See*

Minn. Stat. § 268.095, subd. 6(b). It is apparent from both the record and the ULJ's decision that Shafer's conduct falls within this exclusion. Whether an employee should turn away a customer in the final minutes of the business day or incur overtime by accepting the customer is a judgment call. Indeed, the ULJ recognized that judgment was required by finding that Shafer failed to use "common sense judgment" when she turned away the customer. And the ULJ's acceptance of Shafer's explanation that she turned away the customer in reliance on previous instructions from a supervisor demonstrates that any error in judgment was made in good faith. Because the undisputed record evidence and the ULJ's findings demonstrate that Shafer's decision to turn away a customer five minutes before closing time was, at most, a good faith error in judgment, the ULJ erred by concluding that Shafer is ineligible to receive unemployment benefits because she committed employment misconduct.

Reversed.