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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-569**

Danyila Pavlyk,
Relator,

vs.

Macy's Retail Holdings, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed December 21, 2010
Affirmed
Stoneburner, Judge**

Department of Employment and Economic Development
File No. 23828534-3

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Macy's Retail Holdings, Inc., c/o Talx UCM Services, Inc., St. Louis, Missouri
(respondent employer)

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Considered and decided by Stoneburner, Presiding Judge; Bjorkman, Judge; and
Harten, Judge.*

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

UNPUBLISHED OPINION

STONEBURNER, Judge

In this certiorari appeal, relator challenges a determination that she is ineligible for unemployment benefits because she was discharged for employment misconduct. We affirm.

FACTS

Relator Danyila Pavlyk worked for respondent Macy's Retail Holdings, Inc. (Macy's), as a counter manager in its St. Paul store from May 2008 until her employment was terminated in November 2009. Macy's has written personnel policies of which relator was aware. In relevant part, the policies prohibit actions that create a hostile work environment and state that Macy's does not tolerate acts or threats of violence, including intimidation, harassment, or coercion. Relator's employment was terminated as a result of her physical contact with a co-worker during a dispute between the two women in the public area of the store.

Respondent Minnesota Department of Employment and Economic Development (DEED) initially determined relator to be eligible for unemployment benefits. Macy's appealed, arguing that relator's employment was terminated due to misconduct, making her ineligible for benefits. An unemployment-law judge (ULJ) conducted a hearing at which the primary dispute was about the nature of the physical contact between relator and the co-worker.

Macy's store manager testified that when she met with relator about the incident, she asked relator to demonstrate how she had touched the co-worker, and relator

responded by grabbing the store manager's wrist tightly. But relator testified that she gently touched or tapped the co-worker's wrist in an effort to calm her. Neither relator nor Macy's introduced the videotape from a security camera that purportedly captured the altercation. Relator argued that the video would be the "best witness" and urged the ULJ to view the videotape. But exhibit 5, which was read into the record by the ULJ, was a letter from a Macy's security detective who viewed the videotape, stating that "there's no sign of any physical altercation [on the videotape and] [a]fter speaking [to the co-worker involved in the argument with relator] it seems as though the physical altercation happened outside of the range of the camera."

Based on the testimony presented, the ULJ found that relator "grabbed [the co-worker's] wrist tightly" during the quarrel and that this act created a hostile environment in violation of Macy's written policy. The ULJ concluded that "[g]rabbing another employee during a heated altercation is hostile," and the actions "were clearly serious violations of the standards of behavior that the employer had a right to reasonably expect of [relator]," constituting "employment misconduct," as that term is defined by Minn. Stat. § 268.095, subd. 6 (Supp. 2009). The ULJ determined that relator is therefore ineligible for unemployment benefits.

Relator requested reconsideration, arguing that the ULJ should have obtained and reviewed the videotape, reiterating that she only "lightly touched" the co-worker's wrist "to cool her down." After reconsideration, the ULJ affirmed the finding of employment misconduct and the determination of ineligibility. Relator challenges the ULJ's decision in this review by writ of certiorari.

DECISION

I. Standard of Review

This court's review of a ULJ's eligibility determination is governed by Minn. Stat. § 268.105, subd. 7(d) (2008), which provides,

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: . . .

- (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.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd 4(1)(2008). 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, which we review to ascertain whether it is “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(5). 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).

II. The record was adequately developed.

Minn. Stat. § 268.105 (2008 & Supp. 2009) governs evidentiary hearings by ULJs. Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009) provides, “The unemployment law judge must ensure that all relevant facts are clearly and fully developed.” Relator argues that the ULJ violated the duty to develop the record by failing at the evidentiary hearing to view the videotape of the altercation. Relator asserts that the videotape *might* demonstrate who was telling the truth regarding whether relator ‘grabbed’ or merely ‘touched’ her co-worker’s wrist.¹

The ULJ thoroughly questioned both parties about the incident, including the nature of the physical contact. Macy’s store manager provided a detailed account of how relator gripped her wrist to demonstrate the contact relator had with her co-worker. The ULJ found the store manager’s testimony about the contact to be more credible than relator’s testimony. This court must defer to the ULJ’s credibility determination.

Skarhus, 721 N.W.2d at 344.

Despite the assertion by Macy’s in its administrative appeal that the contact was captured by the security camera, the statement of the security detective who actually reviewed the videotape reflects that the admitted physical contact was not captured on videotape. “A judge may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly repetitious.” Minn. R. 3310.2922 (2009). Therefore, the record supports the

¹ Relator also briefly argues that the videotape could demonstrate whether she escalated the argument by following the co-worker to continue the dispute. But relator was not fired for following the co-worker and the ULJ did not determine that following constituted employment misconduct. Evidence regarding following is therefore not relevant to the eligibility determination.

ULJ's determination that the videotape was not critical to the determination of what occurred and would have been, at best, cumulative to the testimony of relator and the store manager.

Relator also appears to argue that she should have been allowed on reconsideration to submit the videotape. "In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing" Minn. Stat. § 268.105, subd. 2(c) (Supp. 2009). An additional hearing is ordered if the party shows that the new evidence either (1) would change the outcome of the decision and good cause existed for not submitting the evidence at the original hearing or (2) would show that the evidence presented at the hearing was likely false. *Id.* The ULJ's finding on reconsideration, that the videotape would not affect the outcome of the decision, is supported by the record and is not clearly erroneous.

We conclude that the ULJ did not fail to adequately develop the record in this case.

III. Relator's conduct constituted employment misconduct.

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." Minn. Stat § 268.095, subd. 6(a) (emphasis added). Relator argues that the ULJ did not consider whether her conduct rose to the level of a "serious" violation. But the ULJ's decision clearly reflects such

consideration. The ULJ specifically referenced the statutory language quoted above and concluded that “[relator’s] actions were clearly *serious* violations of the standards of behavior that [Macy’s] had a right to reasonably expect of her.” (Emphasis added.)

Relator next asserts that there is no evidence that the altercation had any adverse effect on Macy’s business, and that the ULJ erroneously equated *any* violation of Macy’s policy with a *serious* violation of the policy. But the ULJ correctly noted that an employer has the right to expect that its employees will refrain from touching other employees in a hostile manner and found that relator’s conduct was hostile. And creation of a hostile work environment is plainly adverse to any business. We find no merit in relator’s argument that the event had no effect on Macy’s business and, therefore, was not serious.

IV. The ULJ considered that relator was discharged based on a “single incident.”

Minn. Stat. § 268.095, subd. 6(d) provides, “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.” But this statutory language does not preclude a determination that a single incident can constitute misconduct. *See* Minn. Stat. § 645.08(1) (2008) (requiring that statutory terms be given their plain meaning unless specifically defined).

Relator argues that the ULJ erred as a matter of law by failing to consider whether she was fired for a single incident. But the record reflects that the ULJ considered the fact that termination of relator’s employment was based on a single incident. Although there was evidence that relator had been previously warned about her hostile demeanor

toward other employees, the ULJ elicited testimony from Macy's store manager that the November 6, 2009 incident is the only occasion on which relator violated Macy's policy prohibiting actions that create a hostile work environment. Accordingly, the decision reflects the ULJ's awareness and consideration of the fact that relator's employment was terminated solely due to the incident involving physical contact with her co-worker.

V. Relator's conduct was not reasonable.

Relator argues that her conduct was reasonable and, constitutes only a good-faith error in judgment. Exceptions to employment misconduct exist for "conduct an average reasonable employee would have engaged in under the circumstances" and "good faith errors in judgment if judgment was required." Minn. Stat. § 268.095, subd. 6(b)(4), (6). But relator acknowledges that she was informed of Macy's policy prohibiting actions that create a hostile work environment. And, at the hearing, she agreed that she knew that grabbing somebody's wrist would be a violation of the policy. Therefore, no judgment or discretion was required of relator under the circumstances.

Relator implies that she had no other reasonable choice but to calm down the upset co-worker by physical contact and that no one was available to help her diffuse the situation. But relator could have walked away or allowed her co-worker to walk away from the dispute. There is no merit in relator's assertion that physical contact was compelled by the circumstances. Relator's conduct was unreasonable, not a good-faith error, particularly because relator knew that grabbing a co-worker's wrist was a violation of Macy's company policies.

Affirmed.