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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1326**

Glenda Brush,
Relator,

vs.

Holiday Stationstores, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 23, 2018
Affirmed
Rodenberg, Judge**

Department of Employment and Economic Development
File No. 35523499-3

Glenda J. Brush, Aitkin, Minnesota (pro se relator)

Holiday Stationstores, Inc., St. Louis, Missouri (respondent-employer)

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

Considered and decided by Smith, Tracy M., Presiding Judge; Bjorkman, Judge;
and Rodenberg, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Relator Glenda Brush appeals from an unemployment-law judge's (ULJ) determination that relator was terminated from her job for employment misconduct, rendering her ineligible for unemployment benefits. We affirm.

FACTS

Relator worked for Holiday Stationstores Inc. (Holiday) in Aitkin as a full-time cashier and shift lead from February 22, 2016 to March 23, 2017. Holiday's policy requires that "All Fresh Bakery Products are to be placed on sale from 4 p.m. to 10 p.m. daily." Cashiers apply this discount by using the "Bakery ½ price" button on the cash register. Store policy also requires that "at 10 p.m. all product should be removed from the bakery case," inventoried as "staled product," and thrown away. Staled product is not to be given away, taken home, or consumed without being purchased. Relator was informed of these policies when she was hired as part of her training, and the policies were part of the employee handbook. Relator agrees that she was aware of the policies. Employees are eligible to apply a ten-percent discount to their purchases in the store.

Relator's manager, Margaret Moneta, watched video recordings of the store from the evening of March 15, 2017. Moneta noticed that, after 4:00 p.m., relator took two rolls to the cash register. Rolls cost \$1.29 and donuts cost 99 cents before applying the half-price-after-4 p.m. discount and the employee discount. Relator rang up the two rolls as

one donut and paid 44 cents ($99 \text{ cents} \div 2 = 49.5 \text{ cents}$; $90\% \text{ of } 49.5 = 44.55 \text{ cents}$).¹ She ate one of the rolls, and put the other roll into her purse. The pastries were reduced to half price because of the time of day, but Holiday has no buy-one-get-one-free policy for pastries.

Relator stated that she often saw other employees either give away donuts or discount them. She testified that she rang up her two rolls as one donut, and as a buy-one-get-one-free purchase, based on her belief, gleaned from one year of employment at Holiday, that this was acceptable. Relator agrees that she paid 44 cents for the two rolls, ate one, and put the second into her purse.

While watching the March 15 video, Moneta also noticed that relator removed the remaining pastries from the bakery case shortly before 10:00 p.m., bagged the pastries as staled product, and handed the bag to two customers. Those customers left the store with the bag and entered a vehicle. They did not pay for the pastries. Relator testified that the customers have, in the past, taken staled product out to the dumpster for her. She gave the bag to them intending that they would do so on this occasion. Relator admitted that she does not know what the customers do with the staled product on these occasions, but stated that she trusts the customers to throw away the staled product. It was never her intention to give the staled product to customers for personal consumption.

¹ The Holiday cash registers record keystrokes, and a record of transactions can be printed out. The transaction journal provided verifies that relator paid for only one donut at the discounted-after-4:00 p.m. price.

Moneta terminated relator's employment on March 23, 2017, because she paid only 44 cents for two rolls for which she should have paid \$1.16, and because she gave staled product to customers. Relator then applied for unemployment insurance. Holiday advised the Department of Employment and Economic Development (DEED) by letter that relator had been terminated for violating a reasonable and known policy. DEED determined that relator was ineligible for unemployment benefits because she was terminated for employment misconduct. Relator appealed. A telephone hearing with the ULJ began on May 8, 2017, and was continued to May 19 to allow time for Holiday to submit a copy of the March 15 video and for relator to submit a statement from a former coworker. Before the resumed hearing date, Holiday submitted the March 15 video and the cash-register-transaction journal and relator submitted written statements from a former coworker and one of the customers depicted on video, along with various other documents.

The ULJ found that relator was terminated for employment misconduct and was therefore ineligible to receive unemployment benefits. Relator requested reconsideration, and the ULJ affirmed the previous decision.

This certiorari appeal followed.

D E C I S I O N

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016). "The question of whether an employee engaged in conduct that disqualifies him or her from unemployment benefits is a mixed question of fact and law." *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). 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 factual findings “in the light most favorable to the decision and will not disturb those findings as long as there is evidence in the record that reasonably tends to sustain them.” *Wilson*, 888 N.W.2d at 460 (quotations omitted). “Whether a particular act constitutes disqualifying conduct is a question of law we review de novo.” *Id.* “Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.” *Skarhus*, 721 N.W.2d at 345. We may only “reverse or modify the [ULJ’s] decision if the substantial rights of the [relator] may have been prejudiced because the findings, inferences, conclusion, or decision” violate constitutional provisions, exceed respondent’s statutory authority, were made pursuant to an unlawful procedure, are based on an error of law, are unsupported by the record evidence, or are arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2016).

The ULJ determined that, on March 15, relator took two rolls and paid too little for them. The ULJ found that, had relator priced the rolls correctly, she would have paid \$1.16 total—65 cents for each roll at half price, plus the ten-percent employee discount. Relator actually paid 44 cents. The ULJ also found that relator gave a bag of staled product to a customer in violation of Holiday policy. Relator was terminated on March 23 as a result of these incidents. These factual findings are supported by the record, and are not really even in dispute.

We next consider de novo whether relator’s conduct constitutes employment misconduct. *Wilson*, 888 N.W.2d at 460. Appellant argues that her actions do not constitute employment misconduct because she had learned that it was common practice

at the store for employees to buy one pastry and get one free, and she gave the bag of pastries to the customers intending that they would throw them away for her.

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) (2016). The governing statutes also provide that “[i]f 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.” Minn. Stat. § 268.095, subd. 6(d) (2016).

We have held that stealing from an employer undermines the employer’s trust in the employee and constitutes employment misconduct. *Skarhus*, 721 N.W.2d at 344. In *Skarhus*, we declined to “focus solely on the minimal value of the stolen food,” recognizing that such an analysis would require extensive fact-finding and “disregard[s] the type of adverse impact that is not readily quantifiable.” *Id.* A cashier’s duties include handling the employer’s and customers’ money and accurate accounting of items sold. Following any mishandling of money, the employer may no longer be able to trust the employee with those responsibilities. *Id.* In such cases, the employer’s “ability to assign the essential functions of the job to its employee [is] undermined by the employee’s conduct” and the “theft constitutes a single act that ha[s] a significant adverse impact on the employer.” *Id.*

Here, it is undisputed that relator took two rolls and paid less for them than Holiday policy requires. The ULJ found that relator should have paid \$1.16 for her two rolls;

Relator admitted that she paid only 44 cents. That the difference between the price paid and the actual price is less than a dollar does not affect our analysis. Under *Skarhus*, we cannot consider the minimal value of the items taken.

Appellant argues that she rang up her purchase as she did based on her understanding of past practice. But the ULJ expressly found relator's testimony not credible. As stated above, "[c]redibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus*, 721 N.W.2d at 344. Moreover, the ULJ found that relator could not have known what a customer would do with the bag of staled product and that store policy prohibited giving away staled product. The record also supports these findings.

Even if the events of March 15 are considered a single incident, having occurred on one day, we held in *Skarhus* that even a single act of theft "ha[s] a significant adverse impact on the employer." *Id.* The record supports the ULJ's determination that relator's conduct "seriously violated the employer's reasonable expectations and showed a substantial lack of concern for her employment, amounting to employment misconduct." The ULJ correctly noted that the only issue is "whether the behavior in which [relator] engaged (not others) amounted to employment misconduct." And we agree with the ULJ that, under settled Minnesota law, relator's conduct amounted to employment misconduct.

Relator appears to argue that the ULJ improperly considered incidents other than those occurring on March 15. The ULJ's Findings of Fact and Decision did reference an incident from January 1, 2017 in the fact section. But it does not appear that the ULJ considered that incident at all in reaching the conclusion that relator was terminated for

employment misconduct. Instead, the ULJ's analysis considered only the March 15 incidents. In her brief, relator also identifies a number of "inconsistencies." These "inconsistencies" were appropriately resolved by the ULJ's credibility findings and, as noted, those issues are properly resolved by the ULJ, who heard the testimony. *Wilson*, 888 N.W.2d at 460.

Finally, relator states that Holiday should have engaged in "corrective[,] not punitive action resulting in loss of full time employment." "[T]he focus of the inquiry [in an unemployment benefits case] is the employee's conduct, not that of the employer." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 316 (Minn. 2011). It is not our proper role to review the level of discipline an employer chooses for employee misconduct. We review the ULJ's determination that relator is ineligible for unemployment benefits because of employment misconduct. On this record, the ULJ did not reversibly err.

We recognize that the value of the pastries involved here was minimal, and that the resulting complete disqualification from receiving unemployment benefits is harsh. But the law has long recognized that even a single and low-value theft by an employee responsible for handling money is considered employment misconduct. We apply the law as it is, and not as we would prefer it to be in a particular case. *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

Affirmed.