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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0182**

Patty Kirkey,
Relator,

vs.

LSS of Traverse, LLC,
Respondent,

Department of Employment and
Economic Development,
Respondent.

**Filed August 20, 2018
Affirmed
Jesson, Judge**

Department of Employment and
Economic Development
File No. 35944503-3

Patty Kirkey, Graceville, Minnesota (pro se relator)

LSS of Traverse, LLC, Wheaton, Minnesota (respondent)

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

Considered and decided by Worke, Presiding Judge; Jesson, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

JESSON, Judge

After arguing and swearing in a room full of vulnerable adults at a senior care center, relator Patty Kirkey was terminated from her employment. Kirkey applied for unemployment benefits, but an unemployment law judge ultimately determined that Kirkey was ineligible for benefits because she was terminated for employment misconduct. Kirkey appeals the ULJ's decision, disputing some of the factual findings and challenging the determination that her behavior constituted employment misconduct. We affirm.

FACTS

Relator Patty Kirkey worked for Legacy Senior Care (Legacy), which is owned by respondent LSS of Traverse, LLC, as a dietary aid starting in 2014. During her employment at Legacy, Kirkey was reprimanded multiple times for a wide variety of misconduct. This included having a bad attitude, swearing, delegating her own work assignments, not following dress-code requirements, failure to complete work assignments before taking breaks, and misplacing her cellphone. These incidents ultimately resulted in her placement on final-warning status—where another disciplinary infraction would cause her to be terminated—leading up to an early October incident.

On October 7, 2017, Kirkey was working in the dining room helping serve meals to residents. The dietary staff were falling behind schedule, and a nurse came to assist. While the dietary staff were still busy, Kirkey stopped helping and started to leave to clean dishes. The nurse became upset after noticing this and told Kirkey that she should not leave as the residents were not fully served. In response, Kirkey got into a loud argument with the

nurse, stated it was not her job to serve the dining room, and loudly swore—saying the situation was “bullsh-t.” This argument took place in front of numerous residents, and multiple employees reported it.

Because of this incident, Legacy followed its internal policy that swearing in front of residents results in immediate termination and ended Kirkey’s employment. Kirkey filed for unemployment benefits. Respondent Department of Employment and Economic Development (DEED) initially determined her eligible. However, Legacy appealed DEED’s determination and the case was scheduled to be heard before an unemployment law judge (ULJ).

At the hearing before the ULJ, both Kirkey and her supervisor testified. The supervisor reiterated the facts of the dining-room incident, while Kirkey denied arguing or swearing. The ULJ issued a decision, determining that Kirkey was ineligible for unemployment benefits under Minnesota Statutes section 268.095, subdivision 4 (2016), which prohibits payment of unemployment benefits to those discharged for employment misconduct. The ULJ based its findings of fact on Legacy’s witness testimony, since it determined that testimony was “detailed, specific, and supported by business records.” Kirkey requested reconsideration of the ULJ’s determination, but the ULJ reaffirmed the earlier decision. In the order on reconsideration, the ULJ noted that Legacy was more credible than Kirkey.

On a writ of certiorari, Kirkey appeals to this court.

DECISION

Kirkey argues the ULJ erred in finding her ineligible for unemployment benefits due to misconduct because she asserts that the testimony against her was false, specifically regarding the dining-room incident. An individual is ineligible for unemployment benefits when that individual was terminated for employment misconduct. Minn. Stat. § 268.095, subd. 4. When reviewing disqualification for employment misconduct, this court considers a mixed question of fact and law. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether an employee committed a specific act is a question of fact, but whether the act committed constitutes employment misconduct is a question of law reviewed de novo. *Id.* This court may reverse or modify the decision if the ULJ's findings, inferences, conclusion, or decision are "unsupported by substantial evidence in view of the entire record as submitted."¹ Minn. Stat. § 268.105, subd. 7(d)(5) (Supp. 2017). To address this issue, we must (1) examine whether the ULJ's determinations regarding the dining-room incident are supported by substantial evidence; and (2) then determine whether that conduct constitutes employment misconduct.

¹ DEED asserts that the standard of review requires this court to accept the findings of the ULJ, provided that there is evidence in the record that *reasonably* tends to sustain them. DEED relies, in part, on *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). Without deciding whether substantial evidence differs from evidence that "reasonably sustains," we disagree with DEED's description of our standard of review. This court has consistently applied the "substantial evidence" standard of review enacted by the legislature in 2005. See Minn. Stat. § 268.105, subd. 7(d)(5) (Supp. 2017); 2005 Minn. Laws ch. 112, art. 2, § 34, at 710; see also *Cunningham v. Wal-Mart Assocs.*, 809 N.W.2d 231, 235 (Minn. App. 2011) ("Findings of fact will be upheld if they are supported by substantial evidence in light of the entire record."); *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) ("[W]e will not disturb the ULJ's factual findings when the evidence substantially sustains them.").

Here the ULJ found that Kirkey confronted a fellow employee during dining service while the room was full of residents. Furthermore, the ULJ found that Kirkey was loud during the confrontation and swore. Both of these findings are supported by substantial evidence. The incident report admitted in the record describes the incident in detail and is consistent with the ULJ's determination. Additionally, Kirkey's supervisor attested to these facts during the hearing. While Kirkey may have provided different evidence, the ULJ found the supervisor credible, and we defer to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 345 ("Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal."). Therefore, the supervisor's testimony, in addition to the report documenting the incident, substantially support the ULJ's findings. We next address whether Kirkey's actions constitute employment misconduct.

Minnesota Statutes section 268.095, subdivision 6 (2016), defines employment misconduct as intentional, negligent or indifferent conduct that clearly displays "(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." A single incident can constitute misconduct, if the conduct is done deliberately and is adverse to the employer. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002). And an employee's decision to violate a reasonable policy of the employer is misconduct. *Id.*

Kirkey's conduct—confronting, yelling, and swearing at a coworker in front of vulnerable adults—rises to the level of employment misconduct. Yelling and swearing at a coworker under these circumstances violated the standards of behavior Legacy reasonably expected of Kirkey, and doing so in front of vulnerable adults in their home

showed a substantial lack of concern for her employment. This is consistent with our previous decisions determining that aggressive and offensive conduct constitutes misconduct. See *e.g.*, *Pitzel v. Packaged Furniture & Carpet*, 362 N.W.2d 357, 357-58 (Minn. App. 1985). Furthermore, swearing in front of residents is an explicit violation of Legacy’s policy, which reinforces our determination that it constituted misconduct. See *Schmidgall*, 644 N.W.2d at 806 (“an employee’s decision to violate knowingly a reasonable policy of the employer is misconduct.”).

Because Kirkey engaged in aggressive and disruptive conduct by arguing and swearing at a coworker in front of numerous residents and staff, we determine that she committed employee misconduct and is ineligible for unemployment benefits.²

Affirmed.

² The ULJ’s determination that Kirkey engaged in employment misconduct also included several incidents of alleged misconduct by Kirkey separate from the dining-room incident. Kirkey makes numerous challenges to the findings surrounding these incidents on appeal. But because the dining-room incident on its own constitutes employment misconduct, we decline to address these arguments.