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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1535**

Wahnita Felien,
Relator,

vs.

VFW Richfield Fred Babcock Post 5555,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 29, 2019
Affirmed
Bratvold, Judge**

Department of Employment and Economic Development
File No. 36627401-2

Wahnita Felien, Minneapolis, Minnesota (pro se relator)

VFW Richfield Fred Babcock Post 5555, Richfield, Minnesota (respondent employer)

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

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Relator challenges the unemployment-law judge's (ULJ) decision that she is ineligible for unemployment benefits. Because substantial evidence supports the ULJ's decision that relator was discharged for employment misconduct, we affirm.

FACTS

The following summary is based on the ULJ's written findings after an evidentiary hearing. Relator Wahnita Felien worked as a server for respondent-employer VFW Richfield Fred Babcock Post 5555 (the VFW) from October 15, 2016, until her discharge on April 30, 2018.¹ The VFW is a veterans' organization and operates a restaurant, bar, and banquet facility in Richfield. The VFW also provides services and hosts meetings for veterans' groups and the general community.

Two of the VFW's policies are relevant to the issue on appeal. First, when organizations host meetings in the private room at the VFW, the VFW charges each customer a "higher" private-menu price of, for example, \$13 per meal, which includes beverages, tax, gratuity, and use of the room. For many years, the VFW permitted servers to collect the private-menu payment, then enter the regular-menu price into the cash register, and keep the difference as a tip. In April 2017, VFW hired P.L. as general manager and she changed this practice. P.L. told servers, including Felien, they must enter the actual amount collected from each private-room customer into the cash register. Another server

¹ Felien also worked at the VFW for many years previously.

also met with Felien to train her on the new procedure. The second VFW policy is to add a cover charge on certain nights. For example, when a band performs at the VFW, the VFW charges customers a \$5 cover if they also have a meal, and a \$10 cover without a meal. The server collects the cover charge from the customer.

In May 2017, P.L. testified that Felien failed to enter the band cover charges collected from guests into the register. P.L. confronted Felien about the issue, and warned Felien that “she could be discharged if she failed to collect and enter the cover charges collected from customers.”

On May 26, 2017, the Richfield Lions Club held a private-room meeting at the VFW. Felien served this meeting and gave each customer the private menu. Felien did not follow the new policy, however; she charged each private-room customer the private-menu price but entered the regular-menu price in the cash register and kept the difference. Felien offered to pay back the difference, but P.L. declined, gave Felien a written warning, and told Felien that “failure to ring in the correct amount was grounds for termination of employment.”

On April 28, 2018, a VFW employee informed P.L. that Felien had served the Richfield Lions Club in the private room the previous night, but she “had not entered the correct charge into the register.” P.L. followed up and determined that Felien had entered the regular-menu prices, not the private-menu prices. On April 30, 2018, P.L. discharged Felien because “she failed to follow the correct procedure when entering the price charged to the customer and kept the difference between the higher price and the regular price for herself.”

Felien applied for unemployment benefits with respondent Department of Employment and Economic Development (DEED). DEED determined that Felien was ineligible for unemployment benefits and Felien appealed.

A ULJ conducted an evidentiary hearing; P.L. and the VFW post commander appeared for the employer; P.L. and Felien testified. Felien testified that P.L. did not inform her “personally” that the private-room policy had changed. Felien testified that she entered the regular-menu price for the Richfield Lions Club meeting in the private room, but testified that she thought this was “okay.” Felien also testified that P.L. “was very negative to me and I was greeted with rather negative response[s] whenever I did try to ask [P.L.] anything,” and Felien felt that P.L. was trying to “get rid” of her because she was old. Finally, Felien testified that she had never received any written warnings from P.L., and there were “no sit down meetings with [P.L.] to discuss any of the things that have been written about.”

The ULJ issued its decision and concluded that Felien was ineligible to receive unemployment benefits because she was discharged for employment misconduct. The ULJ found that Felien (1) “entered \$71.05 into the register instead of \$97” that she had collected as cover charges, and (2) twice failed to follow the private-menu policy and “rang in the regular menu price, instead of entering the higher price for the group meeting.” The ULJ found that P.L.’s testimony was credible, that P.L. had informed Felien about the policy change, and that “Felien did not want to adapt to the change and wanted to keep the money for herself.” The ULJ found that the VFW was entitled to “reasonably expect that its employees will enter the correct amount to be charged for a meal and not to steal money

owed to the employer.” The ULJ found that Felien had violated the VFW’s policies, and a preponderance of the evidence “establishe[d] that Felien was discharged for employment misconduct.” Thus, the ULJ found Felien ineligible for benefits.

Felien requested reconsideration, arguing that (1) the VFW had incorrectly calculated the private-room charges; (2) she had never seen the written “disciplinary actions” until the hearing; and (3) she was not informed about the change in the private-menu policy.²

In response to Felien’s request for reconsideration, the VFW submitted a letter stating that the ULJ’s decision incorrectly stated that Felien “entered \$71.05 into the register instead of \$97” when she was required to collect cover charges. In fact, “[t]hat amount of money loss is attributed to [the] written warning given on May 26” for failing to correctly charge the Richfield Lions Club. The VFW stated that the actual “[l]osses attributed to the band cover charges [were] unclear.”

The ULJ issued a revised order, modifying its factual findings and affirming the ineligibility determination. The ULJ determined that “Felien has not submitted any evidence which would likely change the outcome of the decision,” and that the “credible evidence” supported its previous decision that Felien was discharged for employment misconduct. This certiorari appeal follows.

² In her reconsideration request, Felien also stated that she had suffered an injury at work. The ULJ stated that she argued “that this injury and her age were the real reasons for her discharge.” Felien does not raise this argument in her appeal to this court, and we do not consider it.

DECISION

An employee is ineligible for unemployment benefits if she or he was “discharged because of employment misconduct.” Minn. Stat. § 268.095, subd. 4(1) (2018). Employment misconduct is defined, in part, as “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) (2018). This court has held that “[a]n employee’s refusal to abide by the employer’s reasonable policies ordinarily constitutes employment misconduct.” *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011).

This court may reverse or modify the ULJ’s decision “if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are . . . unsupported by substantial evidence in view of the entire record as submitted.” *See* Minn. Stat. § 268.105, subd. 7(d)(5) (2018). “Whether an employee engaged in employment misconduct presents a mixed question of fact and law.” *Cunningham*, 809 N.W.2d at 235. Whether an employee committed a particular act is a question of fact. *Id.* We review the ULJ’s findings of fact in the light most favorable to the decision and will not disturb the findings if “there is evidence in the record that reasonably tends to sustain them.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether the factual findings establish employee misconduct is a question of law, which is reviewed de novo. *Cunningham*, 809 N.W.2d at 235.

Here, substantial evidence supports the ULJ's determination that Felien was discharged for employment misconduct for failing to adhere to the private-menu policy. At the evidentiary hearing, P.L. testified that, on May 26, 2017, the Richfield Lions Club held a meeting in the private room at the VFW, and Felien "charged the group the right price [but] rang in the lesser amount and kept the difference." P.L. also testified that, on April 28, 2018, Felien again "rang in the menu prices versus the banquet prices" while serving a private party. Based on P.L.'s testimony, the ULJ found that it was "more likely than not" that P.L. provided training to Felien, but "Felien did not want to adapt to the change and wanted to keep the money for herself." Thus, based on the testimony deemed credible by the ULJ, Felien violated VFW's private-menu policy on two occasions.

Still, on appeal Felien argues that the VFW changed its private-menu policy and P.L. "had no staff meetings to inform the wait staff to procedural changes, . . . [and] none of the changes were distributed to the staff in any context or form." We will not second-guess the ULJ's credibility findings unless the ULJ fails to provide reasoning for its findings. Minn. Stat. § 268.105, subd. 1a(a) (2018) ("When the credibility of a witness testifying in a hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony."); *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006) ("Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal."). In this case, the ULJ stated that she found P.L.'s testimony and written submissions more credible because P.L. specifically testified that she held staff meetings and "assigned a coworker to provide additional training to Felien" on the change in the

private-room charging policy. The ULJ did not believe Felien's assertions that she was unaware of the change. The ULJ's credibility finding is supported by evidence in the record.

Felien also contends that the VFW was not harmed by her failure to adhere to the private-menu policy. In *McDonald v. PDQ*, an employee was fired for violating an employer's policy that required cashiers to ring up purchases immediately. 341 N.W.2d 892, 893 (Minn. App. 1984). This court affirmed the decision finding the employee ineligible after concluding that the employee's conduct demonstrated a "substantial disregard" for the employer's interest because the "employer has the right to expect scrupulous adherence to procedure by employees handling the employer's money." *Id.*; see also *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 84 (Minn. App. 1986) (concluding that employee's violation of employer's rules that resulted in a loss of money to the employer was employment misconduct). This court will not "focus solely on the minimal value" of the employer's loss because any mishandling of money undermines the employer's ability to trust an employee with important responsibilities. *Skarhus*, 721 N.W.2d at 344. Here, the ULJ found that Felien's failure to "enter [the] correct amount to be charged for a meal" caused the VFW to lose money. Accordingly, the ULJ did not err in determining that Felien's failure to follow the VFW's charging policy constituted employment misconduct.³

³ In addition, the ULJ found that Felien committed employment misconduct because she "failed to enter in the band cover charges collected from guests into the register." On appeal, Felien asserts that this incident never took place; Felien states that "there was no cover charge" to collect that evening because there was no entertainment on that Friday

We understand that the private-menu policy, in large part, is about who collects the tips and distributes them, and that Felien feels that P.L. had not paid her tips for some days during which she worked private parties. But, when considering whether an employee is eligible for unemployment benefits, the proper “focus of the inquiry is the employee’s conduct, not that of the employer.” *Stagg*, 796 N.W.2d at 316. We conclude that the ULJ’s finding that Felien was aware of the change in the private-menu policy and did not adhere to it is supported by the record.

We also note that many VFW customers submitted letters describing Felien’s many years of “exceptional service.” But our review is limited to whether the ULJ’s decision is “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(5). Because the ULJ’s decision is supported by substantial evidence, we affirm the determination that Felien was discharged for employment misconduct and is not eligible for unemployment benefits.

Affirmed.

evening at the VFW. The ULJ’s finding that Felien failed to follow the VFW’s private-room charging policy supports the ULJ’s determination that Felien was fired for misconduct, *see Cunningham*, 809 N.W.2d at 235, thus, this court need not consider the cover-charge incident because Felien’s other misconduct already disqualifies her from unemployment benefits.