STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0487

Emily C. Dzurak,
Relator,

vs.

Discover Strength Personal Fitness Center, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed November 25, 2019
Reversed
Rodenberg, Judge

Department of Employment and Economic Development
File No. 36849159-3

Emily C. Dzurak, Shorewood, Minnesota (pro se relator)

Discover Strength Personal Fitness Center, Inc., Bloomington, Minnesota (respondent employer)

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

Considered and decided by Ross, Presiding Judge; Rodenberg, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Relator challenges the determination of an unemployment-law judge (ULJ) that relator is not entitled to unemployment benefits because she was discharged for employment misconduct. Relator argues on certiorari appeal that, although she did not satisfactorily perform the duties required of her by respondent-employer Discover Strength Personal Fitness Center (Discover), her conduct did not amount to employment misconduct. Because relator's conduct was merely inefficient and not misconduct, relator was not discharged for misconduct and is not ineligible to receive unemployment benefits on that basis. We therefore reverse.

FACTS

Relator Emily Dzurak worked for two years as a personal trainer and strength coach at Discover. Discover requires its employees to email clients daily, the objective being to retain those clients. Each email is required to contain substantive and personal information about the recipient. Discover also requires its employees to call former clients from its "recapture" list. If an employee fails to follow these policies, the employee receives a "strike." When an employee receives three strikes, the employee is subject to having her employment terminated.

On September 13, 2018, relator received her first strike after she failed to contact a client on her recapture list because it "slipped [her] mind." Relator received a second strike the following month because she failed to call two more clients on her recapture list and failed to send the required daily emails to several clients. Relator received her third strike

and was discharged from employment after Discover reviewed the contents of the emails that relator did send. It determined that the emails were overly "generic" and not sufficiently tailored to the individual recipient.

Relator sought unemployment benefits and was initially determined to be eligible. Discover appealed, and the case was heard by a ULJ. At the hearing, relator testified that she failed to timely contact clients on her recapture list because she was "extremely busy" and that it was a "time management issue." Relator conceded that it was possible that some of her emails to clients were overly generic. Discover's vice president of operations testified that relator's employment was terminated because she "fail[ed] to retain clients" and exhibited a "lack of concern" for employment.

The ULJ determined that relator is ineligible for unemployment benefits because she was discharged for employment misconduct. The ULJ concluded that Discover had a reasonable right to expect its employees to follow company policies, especially if an employee had previously been warned about deficient conduct. The ULJ stated that "[a] single example of failing to call a client . . . would probably not be employee misconduct[,]" but that "doing it again approximately two months later demonstrates a substantial lack of concern for the employment." On relator's motion for reconsideration, the ULJ affirmed the earlier determination.

This certiorari appeal followed.

D E C I S I O N

Relator argues that the ULJ erred in its determination that relator is ineligible for unemployment benefits because of employment misconduct. Relator does not argue that

Discover had no right to terminate her employment, and she does not challenge any of the ULJ's factual findings concerning the facts underlying the three strikes she was given, but contends that her conduct did not amount to misconduct.

At the outset, we do not consider the argument in relator's initial brief that her conduct resulted from attention deficit hyperactivity disorder (ADHD). Relator produced no evidence to the ULJ concerning ADHD. The record therefore contains nothing to suggest either that relator has ADHD or that the disorder caused any of her employment-related deficiencies. We generally do not address issues that were not presented to the lower court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Relator's argument concerning ADHD, and the evidence supposedly supporting it, were not presented to the ULJ. We therefore consider the question of whether relator engaged in employment misconduct without regard to her arguments concerning her alleged ADHD.

Appellate courts may affirm, remand the case for further proceedings, or reverse and modify the decision of a ULJ if the decision violates the constitution, exceeds the statutory authority or jurisdiction of the department, is made upon unlawful procedure, is affected by other error of law, is unsupported by substantial evidence, or is arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2018).

An employee discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2018). 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) (2018).

Whether an employee committed employment misconduct presents a mixed question of law and fact. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether an employee committed a particular act is a question of fact. *Id.* We view the ULJ's findings of fact in the light most favorable to its decision, and "will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether a particular act constitutes misconduct is a question of law, and is reviewed de novo. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

The record supports the ULJ's findings concerning the underlying facts of how and why relator's employment was terminated. Relator does not challenge those findings.

Relator concedes that her performance was unsatisfactory, but argues that her performance deficiencies were not employment misconduct. Relator correctly posits that employment misconduct under Minn. Stat. § 268.095, subd. 6(a), does not include termination of employment that is the result of "inefficiency or inadvertence," "simple unsatisfactory conduct," "conduct an average reasonable employee would have engaged in under the circumstances," "conduct that was a consequence of the applicant's inability or incapacity," or "good faith errors in judgment if judgment was required." Minn. Stat. § 268.095, subd. 6(b)(2)-(6) (2018).

We agree with relator that failing to send emails, sending generic emails, and failing to call several former clients, while unquestionably being grounds for termination of

employment, do not amount to employment misconduct. It is simple unsatisfactory conduct. Nothing in the record suggests a "*serious* violation of the [employer's] standards of behavior." Minn. Stat. § 268.095, subd. 6(a)(1) (emphasis added). Neither do the facts indicate any "*substantial* lack of concern" on relator's part. Minn. Stat. § 268.095, subd. 6(a)(2) (emphasis added).

In *Stagg*, the supreme court held that an employee who was habitually absent from and tardy to work displayed a serious violation of the standards of behavior that his employer had a reasonable right to expect. 796 N.W.2d at 317. It determined that the employee's actions rose to the level of misconduct. *Id.*; *see also Flahave v. Lang Meat Packing*, 343 N.W.2d 683, 686 (Minn. App. 1984) (holding that multiple failures to report to work without notice is employment misconduct). To like effect, use of foul language can amount to employment misconduct. *Blau v. Masters Rest. Assoc., Inc.*, 345 N.W.2d 791, 794 (Minn. App. 1984). The use of alcohol by an airline pilot not diagnosed as chemically dependent is employment misconduct. *Peterson*, 753 N.W.2d at 777. And dishonesty is employment misconduct. *Icenhower v. Total Auto., Inc.*, 845 N.W.2d 849, 856 (Minn. App. 2014), *review denied* (Minn. July 15, 2014).

Unlike these examples, and on our de novo review of whether relator's employment performance constitutes misconduct, relator's conduct here was the result of inefficiency, inadvertence, and simple unsatisfactory conduct. It was not "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." Minn. Stat. § 268.095, subd. 6(a)(1). And, while the evidence shows unsatisfactory

performance, it does not show a "substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a)(2).

The issue in this appeal is whether, having been discharged for the reasons given, relator is ineligible for unemployment benefits. She is not. We defer to the ULJ's factual findings, but independently consider whether those findings support a determination that relator committed employment misconduct. They do not.

Reversed.