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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0994**

Charlene Hughes,
Relator,

vs.

Vivien Bacaner,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 9, 2020
Affirmed
Reilly, Judge**

Department of Employment and Economic Development
File No. 37205851-3

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Vivien Bacaner, St. Louis Park, Minnesota (pro se respondent employer)

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

Considered and decided by Connolly, Presiding Judge; Reilly, Judge; and Kirk,
Judge.*

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

UNPUBLISHED OPINION

REILLY, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that relator is ineligible for unemployment benefits because she was discharged for employment misconduct. Relator argues that her conduct did not rise to the level of employment misconduct because it (1) was a good-faith error in judgment; (2) was what an average, reasonable employee would have done; and (3) involved a single incident. We affirm.

FACTS

In January 2018, relator Charlene Hughes began working for respondent Vivien Bacaner as an in-home caregiver for Bacaner’s elderly mother and father. Hughes “worked exclusively at night,” and typically worked “two nights a week,” and alternatively three nights a week. Father “gets up a lot during the night” and part of her duties required Hughes to assist father when he needed to use the bathroom at night. When father would call, Hughes would put a “gate belt or transfer belt around him and then he would . . . stand up and [she] would help him turn to sit down in his wheelchair.” Hughes would then take father in the wheelchair to the bathroom door where he would take a walker to the toilet.

In early December 2018, father was hospitalized for about a week with bronchitis. When he was discharged, the hospital suggested that father be transferred from a seated to a standing position with two people rather than one person. As a result, Bacaner purchased a new “Sit to Stand” lift device to assist caregivers when transferring father. Although Bacaner had purchased a lift prior to father’s December 2018 hospitalization, that lift was a “fossil,” was “cumbersome” to use, and father would not use it. Bacaner testified that

she purchased the new lift “with the idea” that, in addition to the physical therapy, the new lift “would be a way of getting [father] back to a one-person transfer” because it “is very easy to use.”

A representative from the lift company trained Bacaner and another caregiver on how to operate the lift, and “each person trained the next person on it.” Bacaner knew that Hughes received training on the lift’s operation because she “signed off” on it. But unbeknownst to Bacaner, Hughes was not “comfortable” using the lift by herself. And according to Hughes, she observed that “no one was using the lift,” and heard that father “was refusing to use the lift.” Thus, Hughes thought “we were just back to our regular,” transferring of father “with the gate belt and the walker.”

By January 4, 2019, Bacaner determined that her father “was very conditioned and happy with [the lift] as were all the staff.” Consequently, Bacaner provided the caregivers with a note directing them to transfer her father using only the lift. Hughes initialed the written directive, acknowledging that she had received and understood the instruction. But according to Hughes, she continued to observe other caregivers not using the lift and, therefore, she continued to transfer father using the belt and wheel chair.

On February 7, 2019, father suggested to Hughes that she transfer him using the lift. Hughes informed father that she was not “comfortable using the lift,” and ignored his request. The next morning, Bacaner received a phone call from the morning caregiver informing her that her father was “so agitated” because “he had to go to the bathroom three times and [Hughes] wouldn’t use the lift and made him use his walker.” Bacaner

subsequently terminated Hughes's employment due to her failure to follow the directive to use the lift.

Hughes applied for unemployment benefits and respondent Department of Employment and Economic Development (DEED) issued an initial determination that Hughes was ineligible for unemployment benefits because she had been discharged due to aggravated employment misconduct. Hughes appealed the determination and, following a de novo hearing, a ULJ determined that Hughes was not discharged because of aggravated employment misconduct. But the ULJ found that Hughes engaged in employment misconduct because, by ignoring Bacaner's instruction, Hughes "seriously violated Bacaner's reasonable expectations." The ULJ, therefore, determined that Hughes was ineligible for unemployment benefits. Hughes subsequently requested reconsideration and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

Hughes challenges the ULJ's decision that she was discharged for employment misconduct. On certiorari appeal from a ULJ's decision, we 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).

Generally, an employee’s refusal “to abide by an employer’s reasonable policies and requests amounts to disqualifying misconduct.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). But “simple unsatisfactory conduct” and “good faith errors in judgment if judgment was required” are not employment misconduct. Minn. Stat. § 268.095, subd. 6(b) (2018). And “[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.” *Id.*, subd. 6(d) (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).

Hughes argues that her decision not to use the lift “was not employment misconduct because it was a good-faith error in judgment.” To support her claim, Hughes cites *Benson*

v. Iowa Beef Processors, 348 N.W.2d 394 (Minn. App. 1984).¹ In that case, this court determined that the employee made a good-faith error in judgment when he failed to “perfectly comply with the [employer’s] procedures” because he was substituting at a different work assignment, received no instructions from any supervisor, and relied on his coworker’s instructions. *Id.* at 397. Therefore, this court concluded that the employee had not engaged in employment misconduct. *Id.*

Hughes argues that this case is like *Benson* because she “received inconsistent instructions from Bacaner during her employment about the use of lifts” with father, and she was not adequately trained to use the lift. But unlike in *Benson*, Hughes received a specific instruction to use the lift to transfer father. And the record reflects, and Hughes does not dispute, that she initialed the note with the instructions, indicating that she understood that she was required to use the lift. Moreover, Bacaner testified that she understood that Hughes had been adequately trained to use the lift because Hughes “signed off on th[e] note,” and did not otherwise “notify [Bacaner] that she didn’t like [the lift] or didn’t want to use it or wasn’t trained on it.” Consequently, this case is readily distinguishable from the circumstances in *Benson*.

Hughes also contends that her decision not to use the lift was reasonable and a good-faith error in judgment because “other employees besides Hughes . . . made the judgment call to transfer [father] with the belt and wheelchair, rather than with the Lift.” We

¹ Hughes also relies on unpublished caselaw to support her argument. But, unpublished decisions are not precedential. Minn. Stat. § 480A.08, subd. 3(c) (2018); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993).

disagree. Conduct inconsistent with an employee's training or established procedure is not considered a good-faith error of judgment. *See Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 525 (Minn. 1989). And a "[v]iolation of an employer's rules by other employees is not a valid defense to a claim of misconduct." *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986). As stated above, Hughes was specifically instructed on January 4, 2019, to use the lift to transfer father. The fact that other employees may have ignored this instruction does not make Hughes's conduct reasonable and is not a valid justification for her alleged misconduct. *See id.*

Finally, Hughes argues that, "[b]ecause this was the first time that Hughes was made aware that [father] preferred the Lift, [her] conduct only involved a single incident, and should have been taken into account when determining whether her actions were employment misconduct." But an employer is entitled to establish reasonable policies and requests. *Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985). An employee's decision to knowingly violate an employer's reasonable policies amounts to misconduct disqualifying the employee from receiving unemployment benefits. *Schmidgall*, 644 N.W.2d at 806. And a single incident of an employee deliberately choosing a course of action adverse to the employer can constitute misconduct. *See Colburn v. Pine Portage Madden Bros.*, 346 N.W.2d 159, 161 (Minn. 1984).

Here, Bacaner established a reasonable and specific procedure to transfer father using the new lift. A single violation of this policy could be considered serious in light of father's age and fragility. Moreover, as DEED points out, Hughes's conduct did not involve a single incident. Hughes received the instructions on January 4, 2019, yet she

continued to disregard these instructions until father complained in early February 2019. Hughes's refusal to abide by her employer's reasonable instructions amounts to a serious violation of the standards Bacaner had a right to reasonably expect. Accordingly, the ULJ did not err by concluding that Hughes was ineligible for unemployment benefits because she was discharged for employment misconduct.

Affirmed.