

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0867**

DiMa Corporation,
Relator,

vs.

Jennifer Rogers,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 30, 2009
Reversed
Willis, Judge***

Department of Employment and Economic Development
File No. 20294677-3

Randall D.B. Tigue, 400 West Front Street, Albert Lea, MN 56007 (for relator)

Jennifer Rogers, 1815 15th Avenue Southeast, Apt. 14, St. Cloud, MN 56304-2313 (pro
se respondent)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic
Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN
55101 (for respondent Department)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Willis,
Judge.

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

UNPUBLISHED OPINION

WILLIS, Judge

Relator employer challenges the unemployment-law judge's decision that respondent employee was not discharged for employment misconduct and was therefore eligible for unemployment benefits. The employer argues that (1) because the employee acted inappropriately in front of customers and was insubordinate to a general manager, she engaged in employment misconduct; and (2) the fact that the employee was diagnosed with depression after the termination of her employment does not excuse her misconduct. We conclude that the employee's acts were disqualifying misconduct, and we reverse.

FACTS

Respondent Jennifer Rogers worked for relator DiMa Corporation as a cashier at an adult bookstore from August 2004 through November 26, 2007. In June or July 2007, a DiMa general manager spoke with Rogers because other employees had reported that they had seen Rogers lose her temper or cry at work. The general manager told Rogers that she should control her behavior on the job. Rogers received a second oral warning in October 2007 after she became upset at work while helping a customer check out. Rogers banged the items being purchased into the machine that deactivates the security devices, slammed the cash-register drawer shut with sufficient force to move the register a few inches, and then started to cry. Rogers was advised that any further conduct of that nature could result in the termination of her employment.

On November 26, 2007, a DiMa general manager approached Rogers because he had seen her sell shoes to a dancer who he thought was entitled to a store discount. As part of the store's discount policy, an employee giving a discount was to provide the customer with a hand-written receipt. Rogers did not give the customer a discount or issue a hand-written receipt. The general manager asked Rogers why she had handled the sale as she did. The unemployment-law judge (ULJ) found that when the general manager had to ask her a second time, Rogers tossed a receipt book on the counter "indicating that if the general manager wanted a receipt he could write it himself." DiMa discharged Rogers effective that day. Approximately a week later, Rogers was diagnosed to be suffering from depression.

After an initial determination of misconduct ineligibility, Rogers appealed. The ULJ concluded that Rogers had been discharged for reasons other than employment misconduct and that she was eligible for unemployment benefits. DiMa sought reconsideration of the decision, and the ULJ affirmed his original decision. This certiorari appeal follows.

D E C I S I O N

This court may affirm a ULJ's decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights "may have been prejudiced because the findings, inferences, conclusion, or decision are . . . affected by . . . error of law . . . [or] unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(4)-(5) (Supp. 2007). Whether an employee committed misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644

N.W.2d 801, 804 (Minn. 2002). “Whether the employee committed a particular act is a question of fact.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court will not disturb factual findings that are supported by substantial evidence. *Id.* But whether an employee’s act constitutes disqualifying misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

An employee who was discharged for misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). “Employment misconduct” is defined as

any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, . . . poor performance because of inability or incapacity, . . . or absence because of illness or injury . . . are not employment misconduct.

Id., subd. 6(a).

The relevant facts here are undisputed. The sole issue is whether Rogers’s behavior was employment misconduct. DiMa argues that the evidence shows that Rogers was discharged for employment misconduct because she continued to engage in precisely the kind of behavior that she had been warned to avoid, and her conduct plainly violated standards of behavior that DiMa had a right to expect and displayed a lack of concern for her employment. Rogers argues that although her mood swings and propensity for crying

at work may have been unsatisfactory conduct, her behavior was attributable to her depression and, therefore, was not intentional, negligent, or indifferent conduct.

The ULJ's order acknowledges that Rogers's conduct was inappropriate but concludes that it was not employment misconduct. The ULJ refers to the evidence "showing that Rogers was suffering from depression[] or illness which could affect her behavior[] at work." The ULJ also refers to Rogers's depression in his order affirming the decision on reconsideration, explaining that "[e]ven though [DiMa] was unaware of this medical condition, it is relevant in determining whether Rogers[']s conduct was intentional or the result of negligence or indifference." We disagree.

Under Minnesota law, "poor performance because of inability or incapacity" is not employment misconduct. Minn. Stat. § 268.095, subd. 6(a). The ULJ's decision suggests that Rogers suffered from depression at the time of her inappropriate conduct. But there is no such evidence in the record, and the ULJ made no such finding. Further, the ULJ did not find that Rogers's conduct was attributable to depression or that Rogers was unable to control her conduct because of depression. The definition of "employment misconduct" in subdivision 6 is exclusive and "no other definition applies." *Id.*, subd. 6(e). Thus, we conclude that Rogers's conduct was intentional and "display[ed] clearly a serious violation of the standards of behavior" that DiMa had the right to reasonably expect of an employee, and it therefore constitutes disqualifying misconduct. *Id.*, subd. 6(a).

Further, "[a]s a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall*, 644 N.W.2d at

804. DiMa may require its employees to follow reasonable policies and procedures, such as those regarding the handling of customer discounts. Even if Rogers believed that the customer in question was not eligible for a discount, the act of tossing a receipt book on the counter to indicate that the general manager could write a receipt himself was employment misconduct because it was an act of insubordination that displayed clearly a substantial lack of concern for her employment. Minn. Stat. § 268.095, subd. 6(a); *see also Daniels v. Gnan Trucking*, 352 N.W.2d 815, 816-17 (Minn. App. 1984) (holding that an employee's refusal to unload cargo when employer required it was a single, deliberate act of insubordination, rather than a single "hot-headed" incident and therefore was employment misconduct).

The ULJ's conclusion that Rogers was discharged for reasons other than employment misconduct is unsupported by the findings and is an error of law.

Reversed.