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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1609**

Evonne Thode,
Relator,

vs.

Public Employees Retirement Association,
Respondent,

Department of Employment and
Economic Development,
Respondent.

**Filed June 9, 2014
Affirmed
Johnson, Judge**

Department of Employment and
Economic Development
File No. 31066856-3

Evonne Thode, St. Paul, Minnesota (pro se relator)

Public Employees Retirement Association, St. Paul, Minnesota (respondent)

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

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and
Chutich, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Evonne Thode was terminated from her job because she violated her employer's data-privacy policies. She sought unemployment benefits, but the department of employment and economic development determined that she is ineligible because she was discharged for employment misconduct. We affirm.

FACTS

Thode was employed by the Public Employees Retirement Association (PERA), a state government agency responsible for administering retirement plans for many public-sector employees in Minnesota, until she was involuntarily terminated in April 2013. Thode's duties included entering PERA participants' social security numbers, birthdates, addresses, salaries, and other information into PERA's computer systems. Her practice was to initial and date a document by hand after she completed the necessary data-entry steps. The documents used for this data-entry function are maintained temporarily and then destroyed pursuant to PERA's document-retention policy. PERA prohibits employees from removing its confidential documents from the workplace.

In 2013, a confidential PERA document was found in the home of a woman who was under investigation for identity theft. The FBI executed a search warrant at the home of the woman, who was the girlfriend of Thode's brother. The search yielded, among other things, a PERA document with the names and social security numbers of public-sector employees. Thode had initialed and dated the document in September 2006.

After PERA learned that one of its confidential documents had been uncovered in a criminal investigation into identity theft, and after the FBI had questioned Thode, PERA initiated its own internal investigation. Thode initially told the PERA investigator that she never intentionally removed confidential PERA documents from the workplace. In a follow-up interview, however, Thode admitted that, a few years earlier, she had removed confidential documents from the workplace and brought them home. She said that she did so to practice her data-entry skills with an electronic spreadsheet. In both interviews, Thode said that she was unsure how the confidential PERA document with her handwriting was subsequently transported to the home of the identity-theft suspect. She said that she may have inadvertently included the document in a stack of unrelated personal documents on her desk at work, which she brought home. She testified that she carried the unrelated personal documents from her home to the identity-theft suspect's home because she was seeking the assistance of the identity-theft suspect in connection with a possible employment-related lawsuit against PERA.

In April 2013, PERA terminated Thode's employment. The termination letter states that Thode was terminated for a "[v]iolation of the PERA's Data Privacy Guidelines" based on her "[f]ailure to secure private and confidential member information" and for a "[v]iolation of MN Policy on Appropriate Use of Electronic Communications and Technology" based on her "[n]on-compliance of access and use of electronic tools and communication for business-related purposes." The letter states, "[t]his is a very serious breach of PERA's responsibility to ensure protection of all members' private data."

Thode applied for unemployment benefits. The department of employment and economic development (DEED) determined that she is ineligible on the ground that she was discharged for employment misconduct. Thode filed an administrative appeal. A ULJ conducted an evidentiary hearing. The ULJ found that Thode engaged in employment misconduct by removing documents from her workplace. After Thode requested reconsideration, the ULJ affirmed her earlier decision. Thode appeals by way of writ of certiorari.

D E C I S I O N

Thode argues that the ULJ erred by determining that she is ineligible for unemployment benefits.

This court reviews a ULJ's decision denying unemployment benefits to determine whether the findings, inferences, conclusions of law, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (2012). The ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination whether an employee was properly found to be ineligible for unemployment benefits is a question of law, which is subject to a *de novo* standard of review. *See id.*

The ULJ determined that Thode is ineligible for unemployment benefits because she was discharged for employment misconduct. "An applicant who was discharged from employment by an employer is ineligible for all unemployment benefits . . . if . . . the applicant was discharged because of employment misconduct as defined in

subdivision 6.” Minn. Stat. § 268.095, subd. 4, 4(1) (2012). “Employment misconduct” is defined as intentional, negligent, or indifferent conduct that clearly displays either “a serious violation of the standards of behavior the employer has the right to reasonably expect” or “a substantial lack of concern for the employment.” *Id.*, subd. 6(a). “As a general rule, refusing 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).

The ULJ found that Thode intentionally removed documents from the workplace and brought them to her home. This finding is supported by the evidentiary record. In fact, Thode admitted that she brought confidential PERA documents from her workplace to her home. The ULJ also found that Thode’s removal of confidential documents was a serious violation of PERA’s policies. This finding also is supported by the evidentiary record. The executive director of PERA testified that PERA employees are not allowed to remove documents from the workplace, either intentionally or accidentally, and that Thode received training on PERA’s privacy policy. In addition, Thode’s termination letter states that she committed “a very serious breach of PERA’s responsibility to ensure protection of all members’ private data.” Given the evidence in the agency record, the ULJ properly concluded that Thode engaged in “employment misconduct.” *See* Minn. Stat. § 268.095, subd. 6(a); *Schmidgall*, 644 N.W.2d at 804.

In light of this conclusion, it does not matter how the confidential PERA document came to be located in the home of the identity-theft suspect. The ULJ noted Thode’s testimony that she may have inadvertently taken the document to the identity-theft

suspect's home because it was mixed up in her personal papers. The ULJ found that, one way or another, "Thode allowed a document to fall into the hands of an identity thief." Regardless, Thode's intentional removal of confidential documents from the workplace to her home is a sufficient factual basis for the ULJ's determination that Thode engaged in employment misconduct.

Thode contends that her violation of PERA's data-privacy policies cannot be deemed a "serious" violation because the FBI did not inform PERA of the discovery of the document until six months after the search. This argument is without merit. The timing of the FBI's communication with PERA has no bearing on whether PERA regards Thode's violation as a "serious violation" of its policies. The fact that the document appeared in a federal criminal investigation indicates that the misplacement of the document is a serious matter. In addition, an unlawful disclosure of PERA's confidential documents potentially may give rise to civil liability. *See* Minn. Stat. §§ 13.05, .08, .63, subd. 3 (2012).

Thode also contends that she did not engage in employment misconduct because she was discharged for a single incident that did not have a significant effect on the employment. No longer is there a single-incident exception to the definition of employment misconduct. *Potter v. Northern Empire Pizza, Inc.*, 805 N.W.2d 872, 876 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011). At present, the fact that an employee's misconduct was a single incident is merely "an important fact that must be considered," though the ULJ's decision need not "contain a specific acknowledgement or explanation" of such consideration. Minn. Stat. § 268.095, subd. 6(d). The ULJ did not

address this issue, and it does not appear that Thode made such an argument to the ULJ. Even if Thode's violation of PERA's data-privacy policies were an isolated incident, her violation would be too serious to require a ULJ to determine that she did not engage in employment misconduct. This conclusion is demonstrated by the fact that her violation implicates both criminal and civil liability.

Thode further contends that the ULJ erred because she is protected by the Minnesota Whistleblower Act, which provides, in relevant part:

An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

. . . .

(2) the employee is requested by a public body or office to participate in an investigation, hearing, inquiry.

Minn. Stat. § 181.932, subd. 1 (2012). The whistleblower act creates a private cause of action that may be alleged in a civil action in district court. Minn. Stat. § 181.935(a) (2012). But the whistleblower act has no role in an unemployment appeal. In any event, the ULJ found that PERA terminated Thode's employment because she violated PERA's data-privacy policies, not because she participated in the FBI's investigation. The ULJ's finding would preclude liability under the whistleblower act.

In sum, the ULJ did not err by finding that Thode was discharged for employment misconduct or by concluding that she is ineligible for unemployment benefits.

Affirmed.