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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0871**

Jean L. Furney,
Relator,

vs.

M&P Holdings, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 29, 2008
Affirmed as modified
Stoneburner, Judge**

Department of Employment and Economic Development
File No. 564 07

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Considered and decided by Stoneburner, Presiding Judge; Minge, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

On appeal by writ of certiorari from an unemployment law judge's determination that she is disqualified from receiving unemployment benefits, relator argues that the conclusion that her employment was terminated for aggravated employment misconduct should be reversed because (1) relator's due-process rights were violated when she was denied access to records; (2) the unemployment law judge failed to develop relevant facts; (3) the findings were not supported by the evidence and were arbitrary and capricious; and (4) denial of her request for reconsideration was an abuse of discretion. Because we conclude that the evidence supports a determination that relator was discharged for employment misconduct, rather than aggravated employment misconduct, we affirm as modified.

FACTS

Relator Jean L. Furney was the salaried general manager of the AmericInn Hotel in Hastings from September 28, 1987, until her employment was terminated on November 15, 2006. As general manager, it was Furney's responsibility to prepare daily deposit tickets for cash and checks received (cash), make bank deposits each business day, and ensure that the night audit balanced. Furney's money-handling responsibilities did not change when ownership of the hotel changed in 2001. At times relevant to this appeal, Furney's supervisor was Michael Sias.¹

¹ Because Sias was the sole owner of M&P Holdings, LLC, which owned the hotel, this opinion refers to Furney's employer as Sias.

The night audits were routinely faxed by the night auditor to Sias as soon as they were completed. Occasionally, Furney had to make adjustments to the night audits after they were faxed to Sias. The record is silent about whether Sias received copies of adjusted night audits. The night-audit form required entry of the amount of “cash to be accounted for.”² Because Sias lived out of state, he employed a bookkeeper near him in Wisconsin to keep books based on the night audits, and he checked the hotel’s bank deposits by Internet.

In 2006, Sias was interested in selling the hotel. Some prospective buyers questioned Sias about discrepancies in the financial records between the number of rooms sold each night and the amount of cash deposited. These inquiries prompted Sias to examine the records of the hotel and the bank. From this examination, Sias concluded that beginning in late July 2004, Furney, without permission, stopped preparing daily deposit tickets and making bank deposits each business day. Instead, she made only irregular bank deposits. The time between deposits varied from five to 20 days. Because Furney’s banking procedure changed at the same time that Sias employed a new bookkeeper, the bookkeeper was apparently unaware that “lumping” the bank deposits constituted a change in policy and failed to alert Sias to the change.

Based on his examination of the night audits and bank deposits, Sias determined that, beginning with Furney’s change in banking procedure, the net bank deposits were significantly less than the total cash to be accounted for as reported on the audits. Sias

² The night-audit form also had a space for “net cash deposited,” but the December 2005 audits in the record reflect that this space was left blank on all but three audits for that month.

retained a certified public accountant to review the records, and the CPA concluded that the shortages were even greater than Sias had calculated. The CPA reported a shortage of \$6,959 in 2004 and \$7,719.30 in 2005.

Sias concluded that Furney was stealing money from the hotel and that she had changed the timing of deposits to cover up her theft. Sias discharged Furney on November 15, 2006. The termination letter reviews the suspected shortages and states that Sias will “need an explanation as to why deposits were made late—why [Furney] changed the deposit system without saying anything and why [the hotel is] short over \$12,000 for 2004-2005 deposits *if you don’t want this matter to go further.*”³ (emphasis added). According to the letter, Furney was discharged “[b]ecause of the accounting shortfalls, and other issues we discussed, i.e. your husband’s use of company cell phone, constant conflicts with other staff, [your refusal] to schedule yourself for 3 shifts a week at the front desk and other issues you have been informed of.”

Furney applied for unemployment benefits and initially was determined to be qualified to receive benefits. Sias appealed. Furney attempted to subpoena the hotel’s financial records, but DEED declined to issue a subpoena. A telephone hearing was conducted on January 29, 2007. Sias’s summary comparing “cash to be accounted for” from the night audits with “bank deposit tickets” from January 1, 2004 to December 31, 2005, and the CPA’s similar summaries for 2004 and 2005 were admitted into evidence.⁴ Furney did not object to the admission of the summaries, but continually stated that she

³ Sias subsequently reported the suspected theft to the police and his insurer. There is no evidence in the record about the results of either of those reports.

⁴ The record on appeal contains only the CPA’s 2005 summary.

was unable to determine the accuracy of the numbers on the summaries because she had been denied access to the underlying records. Sias asserted that the primary reason for discharging Furney was his belief that she had stolen hotel funds. Furney denied that she had taken any money from the hotel and questioned whether there were, in fact, any shortages, offering various explanations about why the figures Sias and the CPA were relying on could be inaccurate and contending that an examination of the full record might explain what appeared to be the discrepancies between “cash to be accounted for” from the night audits and the actual bank deposits.

At the end of the hearing, the unemployment law judge (ULJ) indicated that the records would be subpoenaed and the hearing would be continued. On learning that the records fill several boxes, the ULJ ultimately suggested that only the records for December 2005 be provided. Although there was an overage rather than a shortage in the bank deposits for December 2005, Furney stated that one month’s records would be sufficient for her to explain how discrepancies could occur, regardless of whether that particular month showed a shortage or overage.

The hearing was reconvened, again by telephone, after the ULJ and Furney had been provided with the night audits and associated computer records for December 2005. Furney explained several discrepancies between the records and the summaries for that month.

Following the hearing, the ULJ issued findings of fact and a decision stating that the evidence showed that Furney stole about \$12,500 from her employer. The ULJ noted that Furney denied taking the money, but found that “the more credible evidence

show[ed] that [relator] was responsible for the missing funds.” The ULJ noted that Furney explained “small discrepancies in the records for December 2005,” but concluded that those “discrepancies [were] minor compared to the large shortages that were occurring.” Ultimately, the ULJ decided that Furney was discharged for aggravated employment misconduct as defined in Minn. Stat. § 268.095, subd. 6a(1) (2006),⁵ and that Furney was disqualified from receiving unemployment benefits.

Furney requested reconsideration. The ULJ affirmed the decision. This appeal by writ of certiorari followed.

D E C I S I O N

This court may affirm the decision of the ULJ or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

Minn. Stat. § 268.105, subd 7(d); see *Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007) (citing this standard of review).

⁵ “[A]ggravated employment misconduct means: the commission of any act, on the job or off the job, that would amount to a gross misdemeanor or felony if the act substantially interfered with the employment or had a significant adverse effect on the employment. . .”. Minn. Stat. § 268.095, subd. 6a(1).

I. Due process

Furney first argues that her due-process rights were violated when the ULJ failed to require that Sias give her access to all of the documents that the summaries were based on. This court reviews *de novo* the procedural due process afforded a party. *Zellman v. Ind. Sch. Dist.*, 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). Both the Minnesota Constitution and the United States Constitution protect an individual's right to not be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV; Minn. Const. art. I, § 7. Unemployment benefits constitute an "entitlement protected by the procedural due process requirements of the fourteenth amendment." *Schulte v. Transp. Unlimited, Inc.*, 354 N.W.2d 830, 832 (Minn. 1984). Due process necessitates that an individual receive adequate notice and an opportunity to be heard. *See id.* at 832-34. In an unemployment-benefits proceeding, due process requires, among other things, an opportunity to know the nature and contents of all evidence adduced in the matter. *Juster Bros. Inc. v. Christgau*, 214 Minn. 108, 119, 7 N.W.2d 501, 507 (1943).

At the initial hearing in this case, Furney specifically consented to limiting review of the documents underlying Sias's summaries to one month of records. We conclude that she thereby waived the issue of access to additional records. Furthermore, based on the modification that this court is making to the determination, as discussed below, review of additional records would not be relevant to the outcome of this case.

II. ULJ's duty to develop relevant facts and insufficient evidence to establish that Furney committed theft

Furney next argues that the ULJ failed to ensure that all relevant facts were clearly and fully developed as required by Minn. Stat. § 268.105, subd. 1(b) (2006). Insofar as the ULJ determined that Furney stole money from her employer, we conclude that Furney's argument has merit. Sias established that the net bank deposits were significantly less than the total of the "amount[s] of cash to be accounted for" shown on the night audits that were faxed to him, but the record does not disclose whether the figures Sias used came from corrected or uncorrected night audits. And the summaries are not proof of theft by Furney. The records for December of 2005 indicate that several different employees made cash deposits that month. While the record may support an inference that Furney had the most opportunity to misappropriate funds, this inference falls short of constituting substantial evidence that Furney committed theft. Sias repeatedly asserted that Furney's unauthorized change in the deposit procedure in July of 2004 is evidence that she was stealing money. But, as Sias demonstrated when he finally examined the bank deposits against the daily records, lumping the deposits did not conceal the discrepancies between deposits and the amount of a cash to be accounted for. Leaving cash at the hotel for periods of up to 20 days may be evidence that the opportunity for someone to take money was increased, but it is not substantial evidence that Furney took the money. Because the record is insufficiently developed, the evidence is insufficient to support the ULJ's conclusion that Furney committed gross misdemeanor

or felony theft. We therefore reverse the conclusion that Furney committed aggravated employment misconduct under Minn. Stat. § 268.095, subd.6a(1).

III. The record supports a determination that Furney was discharged for employment misconduct

Although DEED does not concede on appeal that the record lacks substantial evidence to support the ULJ's finding that Furney committed theft, DEED argues that, even if there is not substantial evidence to support that finding, this court should affirm Furney's disqualification from receiving unemployment benefits based on substantial evidence that her discharge was for employment misconduct in disregarding her employer's procedures regarding bank deposits. *See McDonald v. PDQ*, 341 N.W.2d 892, 893 (Minn. App. 1984) (holding that an employer "has the right to expect scrupulous adherence to procedure by employees handling employer's money"). We agree.

"Whether an employee has engaged in conduct that disqualifies him from unemployment benefits is a mixed question of fact and law." *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). "Whether a particular act constitutes disqualifying misconduct is a question of law, which this court reviews de novo." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

The letter discharging Furney specifically references her unauthorized change in banking procedure and notes that significant cash shortages in the bank deposits began at that time. Whether Furney stole the money, facilitated its theft by leaving it available at the hotel, or merely muddled the accounting records, as Furney appears to assert, there is

substantial evidence in the record that Furney's change in banking procedures was in intentional disregard of the procedures for handling money that Furney acknowledged that Sias expected.

Employment misconduct is defined as:

[A]ny 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.

Minn. Stat. § 268.095, subd. 6(a) (2006). Furney testified that she knew that Sias wanted her to fill out daily deposit tickets and make bank deposits each business day.

"Convenience" was the only explanation that Furney offered for delaying deposits for up to 20 days. Plainly, Furney did not scrupulously adhere to her employer's procedure for handling money. As a matter of law, her disregard of that procedure displayed a serious violation of the standard of behavior that her employer had a right to reasonably expect of her and constituted employment misconduct. We affirm the ULJ's determination of disqualification based on the conclusion that Furney's undisputed disregard of her employer's money-handling procedures constituted employment misconduct. Because we have modified the ULJ's decision, we do not reach Furney's argument that denial of her request for reconsideration was an abuse of discretion.

Affirmed as modified.