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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1806**

Rebecca A. Joy,
Relator,

vs.

American Legion-Backus #368,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 11, 2009
Affirmed as modified
Lansing, Judge**

Department of Employment and Economic Development
File No. 20941553-3

Rebecca Ann Joy, P.O. Box 283, Big Lake, MN 55309 (pro se relator)

American Legion-Backus #368, P.O. Box 3, Backus, MN 56435-0003 (respondent)

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(for respondent Department of Employment and Economic Development)

Considered and decided by Halbrooks, Presiding Judge; Lansing, Judge; and
Shumaker, Judge.

UNPUBLISHED OPINION

LANSING, Judge

By writ of certiorari Rebecca Joy appeals an unemployment-law judge's determination that she is ineligible for unemployment benefits because she was discharged for aggravated employment misconduct. Although the record does not provide substantial evidence of aggravated employment misconduct, Joy's on-duty consumption of alcohol and failure to account for money missing from a box of pull-tab receipts for which she was responsible establish general employment misconduct, and we affirm as modified.

F A C T S

The American Legion-Backus #368 employed Rebecca Joy from August 10, 2004 until March 26, 2008. Her final position at the American Legion post was club manager. When her job ended, Joy applied for unemployment benefits. The Department of Employment and Economic Development (DEED) determined that Joy was ineligible for benefits. Joy appealed DEED's determination and requested an evidentiary hearing.

Four people testified at the evidentiary hearing: the post's commander, the post's finance officer, the post's gambling manager, and Joy. The commander testified that, before the post's March 2008 board meeting, Joy reported personally distressing incidents that had occurred while she was working at the post; that the post's executive board investigated the incidents and discovered that Joy had been "drinking behind the bar" in violation of the post's written policy and causing customers to complain; that the board discussed the investigation's results at a meeting on March 24, 2008; that the board

decided to suspend Joy for thirty days because of her involvement in the incidents; that during the suspension the gambling department audited the pull-tab box for which Joy was responsible; that the audit showed that \$4,806 was missing from the box; that, on the advice of an attorney, the commander called Joy on March 25 and “told her the money was missing and that she’d either be fired or if we got a letter of resignation, our official [position] would be that she resigned from the post”; and that Joy’s boyfriend delivered Joy’s letter of resignation to the club on March 26. The finance officer and the gambling manager corroborated the commander’s testimony.

Joy admitted that she consumed alcohol while working as a bartender at the post, despite knowing that she was “not supposed to drink behind the bar.” But she said that, when she resigned on March 26, 2008, she knew nothing about the money missing from her pull-tab box. She said she resigned because the post’s customers treated her badly and because the board refused to take action to remedy the situation. She also said she did not learn that the money was missing until she was arrested for felony theft.

After the hearing on Joy’s unemployment eligibility, the unemployment-law judge (ULJ) determined that the testimony on behalf of the post was consistent, detailed, and more credible than the testimony of Joy, which “was self serving and improbable.” The ULJ concluded that Joy was ineligible for unemployment benefits because she was discharged for aggravated employment misconduct. Joy filed a request for reconsideration, and the ULJ denied the request and affirmed the decision. After the ULJ affirmed the decision, a jury acquitted Joy of felony theft in connection with the

disappearance of \$4,806 in pull-tab receipts from the American Legion post. Joy appeals by writ of certiorari.

D E C I S I O N

We review a ULJ's decision to determine whether substantial rights were 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. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2007). A ULJ's determination that an employee committed a particular act is a factual determination that will be sustained if substantial evidence supports it. *Tilseth v. Midwest Lumber Co.*, 295 Minn. 372, 375-76, 204 N.W.2d 644, 646 (1973) (stating that issue of whether employee had insulted customer was issue of fact and that evidence supported finding). A ULJ's determination that an employee's acts make her ineligible to receive unemployment benefits is a question of law that we review de novo. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). Based on our review, we may affirm, reverse, or modify the ULJ's decision, and we may also remand the case for further proceedings. Minn. Stat. § 268.105, subd. 7(d).

An employee commits aggravated employment misconduct when she commits "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) (Supp. 2007). Joy argues on appeal that the ULJ's ineligibility determination must be reversed because, after the ULJ denied her request for reconsideration, a jury acquitted her of felony theft in connection with the disappearance of \$4,806 in pull-tab receipts from the American Legion post. Although

the ULJ did not have an opportunity to consider the acquittal in making the initial determination or on reconsideration, we take judicial notice of the acquittal—which has not been disputed by the post or DEED. *See* Minn. R. Evid. 201 (allowing court to take judicial notice of any fact generally known or capable of accurate determination); *Cummings v. Koehnen*, 568 N.W.2d 418, 424 n.7 (Minn. 1997) (taking judicial notice, in appeal from determination under Minnesota Human Rights Act, of Department of Human Right’s findings in two similar cases); *Smisek v. Comm’r of Pub. Safety*, 400 N.W.2d 766, 768 (Minn. App. 1987) (taking judicial notice of district court order in related proceeding).

We agree with Joy’s contention that the jury’s acquittal undermines the ULJ’s finding that Joy’s conduct constitutes an act “that would amount to a gross misdemeanor or felony.” *See* Minn. Stat. § 268.095, subd. 6a(1) (stating standard for aggravated employment misconduct). The commissioner does not request a remand but argues, instead, that the acquittal was measured by a standard of proof beyond a reasonable doubt, which is not required for unemployment compensation decisions. In the alternative, the commissioner argues that substantial evidence shows that Joy was discharged for employment misconduct. We do not determine whether the differing-standards-of-evidence argument is viable in light of the statute’s requirement of an act “that would amount to a gross misdemeanor or felony” because the ULJ did not consider the subsequent acquittal or consider its effect. *Id.* But even though Joy’s acts may not meet the standard for aggravated employment misconduct, Joy is nonetheless ineligible for benefits if her acts constitute employment misconduct. *See id.*, subd. 4(1) (Supp.

2007) (stating that employee who is discharged for employment misconduct is ineligible for all unemployment benefits). Thus, we turn to the question of whether substantial evidence demonstrates that Joy was discharged for employment misconduct.

An employee commits employment misconduct when her “intentional, negligent, or indifferent conduct . . . displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or . . . displays clearly a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (Supp. 2007). Minnesota caselaw clarifies that the statutory definition of employment misconduct includes “refusing to abide by an employer’s reasonable policies,” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002), and that an “employer has the right to expect scrupulous adherence to procedures by employees handling the employer’s money.” *McDonald v. PDQ*, 341 N.W.2d 892, 893 (Minn. App. 1984).

First, we conclude that substantial evidence in the record supports the ULJ’s determination that Joy was discharged. The post commander stated that he called Joy on March 25 and gave her the option of being “fired” or submitting her resignation. The commander also testified that, if Joy had not resigned, she would have been fired. The commander’s words “would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity,” and his testimony therefore demonstrated that Joy was discharged. Minn. Stat. § 268.095, subd. 5(a) (Supp. 2007) (defining discharge); *cf. id.*, subd. 2(a) (Supp. 2007) (stating that “quit . . . occurs when the decision to end the employment was, at the time the employment ended, the employee’s”).

Second, substantial evidence also establishes that Joy was discharged for employment misconduct. Joy admitted that she consumed alcohol while working as a bartender at the post, despite knowing that she was “not supposed to drink behind the bar.” The commander testified that Joy’s alcohol consumption while bartending caused her to act inappropriately toward customers, that her alcohol consumption and inappropriate actions caused the executive board to suspend her for thirty days, that a day after the board decided on the suspension an auditor discovered that just under \$5,000 was missing from the pull-tab box for which Joy was responsible, and that, based on these discoveries, Joy was given the option to resign or be terminated.

Joy’s acts of consuming alcohol while bartending in violation of the post’s policy and failing to keep track of \$4,806 in pull-tab receipts for which she was responsible “display[] clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee” and constitute employment misconduct. *Id.*, subd. 6(a). Because the post discharged Joy after discovering these violations, she is ineligible for benefits. *Id.*, subd. 4(1).

Joy suggests that the ULJ erred by crediting the testimony of the commander, finance officer, and gambling manager over her testimony. She emphasizes that they made general statements at the hearing that were not entirely consistent with their other, more detailed remarks. For example, she emphasizes that the gambling manager first said that, when the post audited Joy’s pull-tab box, “we had someone come in and audit, for state purposes we have to have an outside person come in and audit the actual game.” When the ULJ followed up by asking if an outside auditor “came in on March 25,” the

gambling manager clarified that the March 25 audit was conducted by “[a]n employee of the post here but . . . she does not work within the gambling department.”

The minor clarifications and discrepancies that Joy identifies are apparent from the hearing transcript and exhibits and were, therefore, part of the record that the ULJ considered when making the ineligibility determination. The ULJ ultimately concluded that “the testimony on behalf of Post #368 is [] more credible than the testimony from Joy,” and we defer to the ULJ’s credibility determinations. *See Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996) (deferring to credibility finding by commissioner’s representative).

We conclude that the ULJ’s determination that Joy committed aggravated employment misconduct cannot be sustained in light of the acquittal on criminal charges and absent the ULJ’s consideration of that fact. But we affirm the ineligibility determination on the modified grounds of employment misconduct because Joy was discharged after the post discovered that she consumed alcohol while bartending, in violation of the post’s written policy, and that just under \$5,000 was missing from a box of pull-tab receipts for which Joy was responsible.

Affirmed as modified.