STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1340

Laurie Kiely,
Relator,

vs.

Minneapolis Special School District #001,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 27, 2010
Affirmed
Halbrooks, Judge

Department of Employment and Economic Development
File No. 22134556-4

Laurie A. Kiely, Minneapolis, Minnesota (pro se relator)

Minneapolis Special School District #001, c/o TALX UCM Services Inc., St. Louis, Missouri (respondent)

Lee B. Nelson, Britt K. Lindsay-Waterman, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent Department of Employment and Economic Development)

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

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that she is ineligible for unemployment benefits because she was discharged for employment misconduct. Relator asserts that she was actually discharged in retaliation for complaining of discrimination. Because the record contains substantial evidence that relator was discharged for specific conduct that meets the definition of employment misconduct and because there is no evidence she was discharged in retaliation for her complaint, we affirm.

FACTS

Relator Laurie Kiely began employment with respondent Minneapolis Special School District #001 in 1986 as a full-time janitor engineer. In March 2007, relator was suspended for "misconduct, insubordination, violation of safety rules, procedures, violation of department rules and procedures, false statements during the investigation, and poor performance." About a month later, in April 2007, relator received a ten-day suspension for similar conduct. According to the school district's administrative manager of employee relations, "those are pretty serious suspensions. And they would not have been issued for just one minor infraction."

In December 2007, relator was asked to sign a "last-chance agreement." The agreement, which was in effect until December 12, 2009, specified that the school district had "the right to terminate [relator]'s employment if she fails to follow the department rules and procedures that are well established and have been clearly communicated to

her." In February 2009, relator received a memorandum outlining various new procedures that employees were required to follow. One of the new procedures was that "all purchases, with the exception of belts, must be approved by [the] area supervisor." It is undisputed that approximately two weeks after receiving and signing this memorandum, relator purchased a flashlight and some handi-wipes without receiving permission from her supervisor. She was terminated on March 2, 2009, for violating this policy.

Relator applied for unemployment benefits through respondent Minnesota Department of Employment and Economic Development (DEED) and was deemed ineligible because she was discharged for employment misconduct. Relator appealed, and a telephone hearing was held by a ULJ. At the hearing, relator testified that she had attempted to contact her former supervisor in order to comply with the purchasing policy. She testified that she did not call her current supervisor because she did not have his phone number. She left a message for her former supervisor, and although she did not hear back from him, she bought the items anyway.

Relator claimed that her discharge was due to retaliation for a discrimination claim she filed in 2006. At the hearing, she testified that she "never had a [discipline] hearing until [she] had filed a complaint with the state." She stated that "[i]t just seems like it's retaliation, is what I feel. Because I never had any performance problems in the past. All of a sudden, all this stuff appeared in my file." The administrative manager replied that relator's discharge was not retaliation for her 2006 claim of discrimination.

The ULJ found that relator had a history of disciplinary problems, that "[relator] was aware of, and understood, th[e] memorandum" requiring permission for all purchases, and that relator "was discharged for failing to follow department procedures while she was on a 'last chance' agreement." The ULJ concluded that relator's behavior "displays clearly a serious violation of the standards of behavior the employer has the right to expect of an employee and a substantial lack of concern for the employment." The ULJ upheld the department's initial determination of ineligibility.

Relator requested reconsideration and for the first time raised allegations that she was subjected to a hostile work environment because of her gender. The ULJ affirmed his decision and declined to consider the allegations of the hostile work environment because relator had not raised the issue at the evidentiary hearing. The ULJ stated that "[t]he additional evidence about an alleged hostile work environment would not likely change the outcome of the decision. [Relator] was discharged for specific conduct. . . . Further, there is no showing of good cause for failing to submit the evidence about alleged retaliation at the evidentiary hearing." This certiorari appeal follows.

D E C I S I O N

Whether an employee committed employment misconduct presents a mixed question of fact and law. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). Whether the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). The ULJ's factual findings will not be disturbed on appeal if they are supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2008). Whether the act committed by the

employee constitutes employment misconduct presents a question of law, which we review de novo. *Scheunemann*, 562 N.W.2d at 34. Relator admits that she purchased a flashlight and handi-wipes without prior permission, which she also acknowledges was in violation of the school district's policy. Accordingly, there is no factual dispute. But we must still determine whether this admitted policy violation constitutes employment misconduct and whether relator's discharge was actually a pretext for retaliation—questions we review de novo. *See id.*

Employment misconduct is "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." Minn. Stat. § 268.095, subd. 6(a) (2008). An employee who is discharged for employment misconduct is ineligible from receiving unemployment benefits. *Id*., subd. 4(1) (2008). An employer has a right to expect an employee to abide by reasonable policies and procedures. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). A knowing violation of an employer's directives, policies, or procedures constitutes employment misconduct. *Id.* Relator does not argue on appeal that she was unaware of the policy or was unaware that her unauthorized purchases would violate the policy. Accordingly, relator's violation of the no-purchases-without-permission policy fits within the definition of employment misconduct as either conduct that displays clearly a serious violation of the standards her employer had the right to reasonably expect or conduct that displays clearly a substantial lack of concern for the employment.

But the statutory definition of "misconduct" excludes "a single incident that does not have a significant adverse impact on the employer." Minn. Stat. § 268.095, subd. 6(a). Although relator was ultimately discharged for a single violation of the new policy, misconduct after a suspension does not necessarily fall into the single-incident category, even if unrelated to earlier misconduct. *See Drellack v. Inter-County Cmty. Council, Inc.*, 366 N.W.2d 671, 674 (Minn. App. 1985). More appropriately, it has been characterized as "the 'last straw' supporting a termination." *Id.* Accordingly, we conclude that relator's purchases without permission after two suspensions and a last-chance agreement were part of a pattern of misconduct supporting termination rather than a single incident.

Relator argues that her discharge was in retaliation for a 2006 discrimination complaint. Relator raised this issue at the evidentiary hearing before the ULJ and again in her request for reconsideration. If an applicant for benefits claims that the stated reason for her discharge was pretextual, the ULJ must allow the applicant to present evidence on that claim. *Scheunemann*, 562 N.W.2d at 34. "When the reason for the discharge is disputed, the hearing process must allow evidence on the competing reasons and provide factual findings on the cause of discharge." *Id.* (emphasis omitted). "The [ULJ] is then obligated to weigh the evidence, determine credibility, and make a determination on the reasons for the discharge." *Id.* If the reason for discharge is determined to be pretextual, the relator is entitled to unemployment benefits. *See id.* ("The statutory disqualification for reemployment insurance benefits applies to individuals who are discharged for misconduct." (emphasis omitted)).

The ULJ gave relator an opportunity at the hearing to present evidence of retaliation. But relator offered little evidence to support her belief that her discharge was pretextual. In her request for appeal that was introduced as an exhibit at the hearing, relator mentioned that other employees who were not wearing their uniforms were not disciplined as she was. But relator never suggested that other employees who had violated the no-purchases policy had received different treatment. She also stated that her discipline issues did not begin until after she complained of discrimination but did not offer any evidence that she had engaged in similar conduct prior to the discrimination complaint without being disciplined. The ULJ asked the school district's representative if relator's discharge was retaliation, and he stated that it was not. The ULJ is entitled to weigh the evidence and make credibility determinations. *See Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006) ("Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal."). This court must assume that the ULJ found the school district's representative's denial credible and relator's testimony not credible. Accordingly, the ULJ's determination that relator was terminated for her violation of the policy and not as a pretext for retaliation is supported by substantial evidence.

In her request for reconsideration, relator raised the issue of a hostile work environment; she did not raise this claim at the evidentiary hearing.

> In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing conducted under subdivision 1.

> The unemployment law judge must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence . . . .

Minn. Stat. § 268.105, subd. 2(c) (2008).

In denying relator's request for reconsideration, the ULJ expressly found that the allegation of a hostile work environment was unlikely to change the outcome because relator was discharged for specific conduct. After reviewing the record, we agree. It is undisputed that relator was subject to a last-chance agreement, that she was aware of the no-purchases-without-permission policy, and that she knowingly violated that policy. There is therefore substantial evidence that she was discharged for employment misconduct and that the presence or lack of a hostile work environment would not change this outcome. The ULJ also expressly found that relator provided no good cause for not having raised the issue at the evidentiary hearing—a finding that is also supported by the record. Accordingly, the ULJ's decision to decline to hold an additional evidentiary hearing was consistent with the statute.

Affirmed.