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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1174**

Leah Stephenson,
Relator,

vs.

Grandma's Inc., Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed July 13, 2010
Affirmed
Stauber, Judge**

Department of Employment and Economic Development
File No. 22018237-3

Stephanie M. Balmer, Falsani, Balmer, Peterson, Quinn & Beyer, Duluth, Minnesota (for relator)

Grandma's Inc., Duluth, Minnesota (respondent employer)

Lee B. Nelson, Amy R. Lawler, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent DEED)

Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On certiorari appeal from the decision of an unemployment law judge (ULJ) that relator was ineligible to receive unemployment benefits because she had been discharged

for employment misconduct after regularly using coupons to deduct items from a cash tab and pocketing the cash, relator argues that (1) the practice was unofficially authorized and relator did not know it was wrong and (2) the hearing was unfair because the ULJ did not ensure that the facts were fully developed and did not allow relevant evidence to be admitted. We affirm.

FACTS

Relator Leah Stephenson was employed as a server for respondent Grandma's Saloon & Grill (Grandma's) earning minimum wage plus tips. On February 8, 2009, a coworker noticed that relator had two coupons for free appetizers, as well as a discount "gold card" in her server book.¹ Relator's server book was turned over to general manager Eric Robinson, who was suspicious of the coupons. The free appetizer coupons were widely distributed throughout the community, providing anyone with easy access to the coupons. Robinson marked the coupons and told the other managers to tell him if relator submitted the marked coupons.

During relator's next shift, relator applied the coupons to two different customer's bills. These customers paid the full amount of their bills in cash, without submitting coupons. By applying the coupons to the bills after the customers had paid and left the restaurant, relator was able to pocket the \$18 cash value of the coupons.

After an employee notified Robinson that relator had redeemed the coupons, Robinson questioned relator. Relator initially indicated that she believed the coupons

¹ A gold card works like a credit card and offers discounts on various food items for a period of time.

were still in her book. But after Robinson told her that he had marked the coupons and that he knew relator had collected the value of the coupons instead of deducting them from the customers' bills, relator admitted that she no longer had the coupons. Relator admitted that during a shift the previous week, some customers did not want to wait for a manager to process their coupons, so the customers asked her to accept the coupons as her tip. Relator believed that she had done nothing wrong, but admitted that she never asked management if this conduct was acceptable, she just assumed it was "okay."

Grandma's terminated relator's employment for misconduct. Relator subsequently established a benefit account with respondent Minnesota Department of Employment and Economic Development, and a department adjudicator initially determined that relator was eligible for unemployment benefits because she was discharged for reasons other than employment misconduct. Grandma's appealed, and a de novo hearing was held on the matter.

At the hearing, Robinson testified that Grandma's had been suspicious of another server redeeming coupons for cash but that nothing had ever been proved. Robinson also testified that this type of conduct was unacceptable and had not been approved. Conversely, relator presented the testimony of two former servers at Grandma's who both testified that they believed that retroactive redemption of coupons was acceptable and a "very common practice." Relator also testified that she had been redeeming coupons in this fashion for many years, and that if she had known there would be an issue with her conduct, she would have sought management's approval.

The ULJ determined that relator's conduct was intentional and that it constituted employment misconduct and concluded that relator was ineligible for unemployment benefits. Relator filed a request for reconsideration with the ULJ, who affirmed. This certiorari appeal followed.

D E C I S I O N

This court may reverse or modify the decision of a ULJ if the substantial rights of the petitioner may have been prejudiced because the ULJ's findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4)-(5) (2008). Substantial evidence means “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. For Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Employees discharged for misconduct are ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). “Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed the alleged act is a fact question. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court defers to the ULJ's credibility determinations and findings of fact. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But whether a particular act constitutes

employment misconduct is a question of law, which this court reviews de novo.

Schmidgall, 644 N.W.2d at 804.

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, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Minn. Stat. § 268.095, subd. 6(a) (2008).

Relator argues that there is nothing in the record to support the ULJ's finding that her conduct constituted intentional employment misconduct. To support her claim, relator points to her testimony that she had been redeeming coupons as tips for many years, and that it was common for servers at Grandma's to redeem coupons in this fashion. Relator also points to the testimony of her witnesses as further support of her claim that her conduct was widely accepted and considered appropriate conduct by the staff at Grandma's. Thus, relator argues that the ULJ erred in concluding that she was ineligible for benefits.

We agree that there is testimony to support relator's claim that her conduct likely was practiced among the servers at Grandma's. But Robinson testified that the

redemption of coupons for cash had not been approved by management and that the conduct was unacceptable. Moreover, the record reflects that when Robinson first questioned relator about the coupons that had been discovered in her server book, relator initially lied to Robinson and told Robinson that the coupons were still in her server book. The issue is one of credibility, and the ULJ found Robinson's testimony more credible. Although we may have weighed the evidence differently, there is substantial evidence in the record to support the ULJ's decision that relator's conduct constituted employment misconduct. *See Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (stating that this court defers to the ULJ's determinations regarding witness credibility and conflicting evidence).

Relator also contends that the ULJ failed to fully develop the record and provide her with a fair hearing. Minnesota law provides that

[t]he [ULJ] must ensure that all relevant facts are clearly and fully developed. The department may adopt rules on evidentiary hearings. The rules need not conform to common law or statutory rules of evidence and other technical rules of procedure. The department has discretion regarding the method by which the evidentiary hearing is conducted.

Minn. Stat. § 268.105, subd. 1(b) (2008). The ULJ "must exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2007). "A judge may exclude any evidence which is irrelevant, immaterial, unreliable, or unduly repetitious." Minn. R. 3310.2922 (2007).

Here, relator's counsel asked Grandma's regional manager whether Grandma's punished employees who took soup or crackers in the course of their employment at

Grandma's. The ULJ found that the question was "not relevant." It is well settled that a violation of an employer's policies by others is not a defense to employment misconduct. *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986) (stating that the violation of an employer's policies by others is not a defense to employment misconduct). Moreover, an employer's selective enforcement of its own rules is no defense to a finding of misconduct. *Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986) (stating that whether or not other employees violated same rules and were disciplined or discharged was not relevant to the present case). Therefore, because the disputed question here pertained to Grandma's enforcement of different policies with respect to other employees, relator cannot show that the question was relevant.

Relator further argues that the ULJ erred in refusing to consider a text message relevant for purposes of determining credibility and that the ULJ's refusal to consider it was erroneous and denied her right to a fair hearing.

A review of the record indicates that relator attempted to admit into evidence a text message from a current employee at Grandma's which stated that she did not want to testify. Relator attempted to admit this text message as evidence that current employees were afraid to testify on Stephenson's behalf. After the ULJ questioned the reason for submitting the text message, relator's attorney withdrew the submission. We acknowledge that if the server who sent the text message had been subpoenaed and testified consistently with relator's testimony, relator's claim would have been further

supported. But the witness was not subpoenaed, and the text message was not submitted as evidence. Therefore, the ULJ did not err in refusing to consider the message.

Affirmed.