STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2077

Katrina Land,
Respondent,

vs.

Apogee Retail LLC,
Relator,

Department of Employment and Economic Development,
Respondent.

Filed August 24, 2010
Affirmed
Kalitowski, Judge

Department of Employment and Economic Development
File No. 23215004-3

Katrina Land, St. Paul, Minnesota (pro se respondent)

Matthew R. Doherty, Brutlag, Hartmann & Trucke, P.A., Minneapolis, Minnesota (for relator)

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

Considered and decided by Ross, Presiding Judge; Kalitowski, Judge; and Wright, Judge.

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

KALITOWSKI, Judge

Relator Apogee Retail LLC challenges the unemployment-law judge's decision that respondent Katrina E. Land is eligible to receive unemployment benefits because she was not discharged for employment misconduct. We affirm.

D E C I S I O N

Relator argues that the unemployment-law judge (ULJ) erred as a matter of law by determining that respondent's conduct, as demonstrated by four incidents, did not amount to employment misconduct. We disagree.

In reviewing a ULJ's eligibility decision, we may affirm or remand the ULJ's decision, or reverse or modify it if the relator's substantial rights have been prejudiced because the ULJ's findings or decision are, among other things, made upon unlawful procedure, affected by error of law, or unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d) (2008). We review the ULJ's factual findings in the light most favorable to the decision, and will not disturb the findings if they are substantially sustained by the evidence. *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). But whether an employee's act constitutes employment misconduct is a question of law that we review de novo. *Id*.

An individual discharged from employment is ineligible for unemployment benefits if the applicant was discharged because of employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct is defined as "any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably

expect of the employee; or (2) a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a) (Supp. 2009). But inefficiency or inadvertence, simple unsatisfactory conduct, conduct that an average reasonable employee would have engaged in, and poor performance due to inability or incapacity do not constitute employment misconduct. *Id.*, subd. 6(b)(2)-(5) (Supp. 2009).

In general, an employee's decision to knowingly violate an employer's reasonable policy is misconduct. *Schmidgall v. Filmtec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002). "This is particularly true when there are multiple violations of the same rule involving warnings or progressive discipline." *Id.* at 806-07. An employee's conduct may be considered as a whole in determining whether the employee was discharged because of employment misconduct. *Drellack v. Inter-County Cmty. Council, Inc.*, 366 N.W.2d 671, 674 (Minn. App. 1985).

Here, respondent was discharged from employment as a sales associate at the Unique Thrift Store following a store manager's concern that respondent took too long to clean four aisles. Citing four specific incidents, relator contends that respondent was discharged for employment misconduct, because she deliberately worked slowly and inefficiently despite a series of oral and written warnings.

Talking to customer

Respondent received a written warning after a store manager observed her having a "leisurely conversation" with a customer while cleaning hangers. The record shows that the customer approached respondent and engaged her in a conversation. Respondent did not leave her work, but continued to clean hangers during the conversation. Furthermore, respondent testified that she was not aware of relator's policy prohibiting

casual conversations with customers and the ULJ appears to have credited this testimony. *See Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (providing that this court defers to the ULJ's credibility determinations). Although respondent's conduct may have been inefficient or unsatisfactory to the employer, it was not a knowing violation of relator's policies or directives. Thus, the ULJ properly determined that respondent's conduct did not amount to employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(2), (3) (providing that inefficient or simple unsatisfactory conduct is not employment misconduct); *Schmidgall*, 644 N.W.2d at 806 (stating that knowing violation of employer's policy is employment misconduct).

Slow stapling

Respondent received a written warning for working too slowly when stapling price tags onto clothing. Relator argues that respondent's slow pace was not due to incapacity, but that she "just wasn't trying." Specifically, relator contends that after respondent was warned, she improved her speed for days or weeks at a time before falling back to her slow pace, thus demonstrating that she had the ability to work faster. But the record supports the ULJ's determination that respondent's slow pace was due to incapacity or inability. Respondent had been on medical restrictions related to a repetitive-stress condition that prevented her from using the stapler only nine days earlier, and following this incident, respondent obtained a note from her doctor again restricting her from using the stapler. Respondent testified that the stapling aggravated her repetitive-stress symptoms, and that she was unable to perform the task as quickly as everyone else. Thus, the ULJ properly concluded that respondent's slow stapling was not employment

misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(5) (providing that poor performance because of inability or incapacity is not employment misconduct).

Carrying only one hanger

Respondent received an oral warning after a store manager observed respondent "moving a single hanger on her finger, walking from one area to the other." Relator contends that this conduct demonstrates respondent's deliberate inefficiency and indifference towards her employment. But evidence in the record indicates that respondent was trying to find hangers in order to continue hanging clothes, and was following the directions of a more experienced coworker. The ULJ properly concluded that "[i]t is not employment misconduct for an employee who needs hangers to do her job to look for hangers." *See* Minn. Stat. § 268.095, subd. 6(a) (defining employment misconduct); (b)(2), (3) (providing that inefficient or simple unsatisfactory conduct is not employment misconduct).

Slow cleaning

A store manager discharged respondent after he perceived that respondent cleaned four aisles of the store too slowly. The store manager testified that relator expected employees to clean the aisles prior to the store opening in 15-20 minutes, and that respondent took 30 minutes to clean her aisles. Respondent testified that she completed the task in a careful, thorough manner, straightening clothing on hangers and organizing the clothing by size. Although respondent's conduct may have been inefficient or unsatisfactory, relator fails to show that respondent taking 30 minutes to clean four aisles of clothing constitutes employment misconduct. *See* Minn. Stat. § 268.095, subd.

6(b)(2), (3) (providing that inefficiency and simply unsatisfactory conduct are not employment misconduct).

Cumulative effect

Relator argues that the ULJ erred by failing to consider the cumulative effect of the four incidents. Specifically, relator argues that respondent received progressive warnings about her slow pace and inefficiency, and that her failure to clean the aisles quickly was the "last straw" resulting in her termination. *See Gilkeson v. Indus. Parts & Serv., Inc.*, 383 N.W.2d 448, 450-52 (Minn. App. 1986) (concluding that employee was discharged for employment misconduct because of "his pattern of failing to follow policies and procedures and ignoring directions and requests" when he was repeatedly tardy, refused to carry his pager, spoke to the manager in a profane manner, argued with the president, and refused to obey directives); *Drellack*, 366 N.W.2d at 674 (concluding that employee's conduct as a whole constituted employment misconduct where employee failed to respond to an employer's inquiry while on suspension for falsifying timecards and lying to her manager).

Here, the ULJ considered each of the four incidents in determining that respondent was not discharged for employment misconduct. And unlike the employees in *Drellack* and *Gilkeson*, respondent's conduct considered as a whole does not show a substantial disregard for her employment. Therefore, we conclude that the ULJ did not err by determining that respondent's conduct did not constitute employment misconduct.

Affirmed.