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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1574**

Susan Tietz,  
Relator,

vs.

Rogers Enterprises, Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed May 29, 2012  
Affirmed  
Connolly, Judge**

Department of Employment and Economic Development  
File No. 27183544-3

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(respondent)

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Considered and decided by Connolly, Presiding Judge; Crippen, Judge;\* and Harten, Judge.\*

## **UNPUBLISHED OPINION**

**CONNOLLY**, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that relator is ineligible for unemployment benefits because she was discharged for employment misconduct. Because substantial evidence supports the ULJ's factual findings, because the ULJ did not err in determining that relator committed employment misconduct, and because the ULJ did not abuse his discretion in not ordering another evidentiary hearing to consider an affidavit submitted after the initial hearing, we affirm.

### **FACTS**

In February 2008, relator Susan Tietz began to work for respondent Rogers Enterprises Inc. (Rogers), an operator of jewelry stores, as a store manager. She received a copy of the company's Code of Conduct. It provided that, because of the nature of the business and the valuable merchandise handled every day, "any breach of trust among our associates cannot and will not be tolerated" and that associates could be dismissed for:

1. Dishonesty, including falsifying paperwork for the purpose of company-wide, market or department wide, store, fellow associate, guest, or personal gain. This includes but is not limited to inventory control records, timekeeping records,

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

sales transactions, bonuses, commissions/TIPS, business expense reports, and employment applications.

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13. Failing to promptly report security violations or any other violation of the company's integrity standards to any member of Management, District Management, Human Resources, Officer of the Company, or the JSA hotline.

As a store manager, relator was paid a base salary, commissions on sales she made, and bonuses for such accomplishments as her store meeting its monthly sales quota.

In the late afternoon of November 30, 2010, the store had not made its monthly sales quota, and there were no customers in the store. An \$8,299 ring was purchased in a transaction handled by the office manager, who listed her boyfriend as the customer. The ring was charged to the credit card of a sales associate, who planned to return the ring at a later date. The sale was credited to both the sales associate and relator, and it put the store over the amount needed to meet its monthly quota.

After relator left work that evening, a bona fide customer came in and made a purchase of \$5,988, an amount sufficient to meet the quota. The \$8,299 ring was therefore returned.

During an audit of relator's store in January 2011, relator was interviewed and shown the invoice for the November 30, 2010, transaction. Relator said she remembered the transaction. When she was asked to write out a statement about matters discussed during the interview, she wrote:

I feel this is not my shining moment. I've been a very dedicated hard working employee who has made a few very bad decisions and feel morally very bad about these. I take great pride in being a manager for this company and developing teams.

On the 30th of November [a sales associate] purchased a ring under the name of [the office manager's boyfriend] and [it] was returned on the same day. This was not an actual guest [customer]. We returned this because we actually made our month.

Relator was suspended and discharged soon afterwards. She was told that the reason for her discharge was violating company policy.

Relator applied for unemployment benefits. On her application, she said she was discharged for not following company policy, that she did not know what policy she violated, that she was not aware of the policy because it was not in the manual or employee handbook and she was following the instructions of her boss. Rogers was asked for information about relator's discharge and said she "was discharged for violation of [a] company rule. Specifically, [relator] made fraudulent transactions to increase the store's sales figures. [Her] actions were within [her] control and are considered a willful disregard of the employer's best interest." Relator was determined to be ineligible for benefits because she had committed misconduct when she "violated a company policy or did not follow instructions or procedure."

Relator appealed, giving as her reason "I did not commit misconduct. I did as instructed by my superiors regarding policy issues and did not allow an associate to make a sale for an illegitimate purpose." She said she would have one witness, the sales associate whose card had been charged for the ring and who, with relator, had been credited with the fraudulent sale.

During the telephone hearing, relator was represented by an attorney, and Rogers was represented by its loss-prevention agent and by relator's supervisor, a district

manager. After the hearing, the ULJ determined that relator had committed misconduct and was not eligible for benefits. Relator requested reconsideration and submitted an affidavit from the office manager, whom she had not asked to have present at the hearing and who had not been at the hearing. The ULJ declined to schedule an evidentiary hearing based on this affidavit and affirmed his previous decision.

On appeal, relator argues that the ULJ's findings are not sustained by substantial evidence, that he erred in determining that she had committed misconduct, and that he abused his discretion by not ordering a second evidentiary hearing.

## D E C I S I O N

### 1. Factual Findings

This court views the ULJ's factual findings in the light most favorable to the decision and gives deference to the ULJ's credibility determinations. *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Id.* at 345.

The ULJ found that:

Rogers alleged that [relator] knew about the transaction when it occurred or before she left work because she was at the store at the time of the transaction, she admitted that[,] at month-end[,] individual and store sales quotas usually are subject to scrutiny by the store manager, and that it was unlikely that a \$8,299 sale would not have been discussed by the associates with the store manager, knowing that the store had been short of its quota. [Relator] denied knowing about the transaction until the next day, but *Rogers's evidence was more convincing*. Even if [relator] did not know about the transaction until the next day, she had an obligation to report this transaction as a security issue because the office manager

in her store and a sales associate had created a sham sale to reflect that the store had met its quota.

(Emphasis added.)

Substantial evidence supports these findings. Respondent's loss-prevention agent submitted a memo she had written shortly after discovering the fraudulent sale during the audit. The memo said:

The transaction was processed by [the] office manager . . . . The name on the receipt is . . . . the name of [her] boyfriend. The transaction was rung up at 4:32 p.m. [A] Sales Associate . . . walked up to the office cash wrap, handed [the office manager] a \$8299 ring and instructed her to ring up a sale. [The sales associate] used her own American Express card to pay for the purchase. There was no customer in the store. [Relator] . . . and [the sales associate] were used as the salespeople receiving commission for the sale. [Relator] was aware of the sale and was in the store at the time of processing. The intent of the sale was to make the store's sales quota. This sale was to be returned if a legitimate guest came in later that evening to make a large purchase. At 9:11 p.m., a legitimate guest came in and made a purchase of \$5988. At 9:15 p.m., a return was processed and credit issued back to [the sales associate's] American Express card.

When relator's attorney asked the loss-prevention agent, "[Relator] participated in a fraudulent sale. That is not a factually accurate statement, is it[?]," the loss-prevention agent replied, "I believe she participated. She was aware, she had an opportunity to reverse it before she left for the day, she had an opportunity to inform management, higher management that this had occurred, that there should be disciplinary action against her associates for doing this with or without her knowledge." Relator's supervisor testified that "The reason for [relator's] termination was by allowing another associate to purchase a ring in order to make the store[']s sales quota."

Relator, when asked how she could not have known that over \$8,000 had been added to her store's sales numbers that day although there were no customers in the store, said only that "It was the last day of the month, – as a store manager there's many tasks that you have to do." When asked, "So at no point from 4 p.m. until you left at 7 p.m. you did not look to see where your store was in making the monthly quota for that month and noticing that you had plus \$8000 in and not asking anybody in your store who came in and where was I [?]" relator replied, "Not that I recall." When asked, "[S]o when the sale occurred[,] . . . no one came to you and said . . . wow we made the month . . . ?" relator answered, "[O]nce again, I had no knowledge of that sale taking place, correct." When asked, "So you had no knowledge when you left at 7 p.m. . . . if your store made their quota or not[?]," she replied, "I had no knowledge of that sale, correct." When asked if she reported the sales associate for making the sham sale, relator said, "I did not . . . . In hindsight I probably should have but at that moment I did not."

Substantial evidence supports the ULJ's findings that relator would have known about the \$8,299 sham sale before she went home on the day it occurred and that relator did not report the sham sale.

## **2. Misconduct**

Whether an act committed by an employee constitutes misconduct is a question of law, subject to de novo review. *Id.* It is undisputed that relator did not report the sham sale to anyone. The ULJ noted that, "Counsel for [relator] argued that her failure to report this transaction was simply a lack of judgment. But the policy doesn't indicate that a store manager has the discretion to ignore security violations or integrity violations."

Relator argues that she had no obligation to report the violation because, as a store manager, she was a “member of management” and the Code of Conduct mandates reporting violations to “any member of Management, District Management, Human Resources, Officer of the Company, or the JSA hotline.” We disagree. Moreover, relator cites nothing in support of her view that, because others could report violations to her, she had no obligation to report violations at all, and the code specified three superiors to whom she could have reported the violation. The ULJ did not err in determining that relator violated Rogers’s company policy by not reporting the violation and thereby engaged in “intentional, negligent, or indifferent conduct that displays clearly [(1)] a serious violation of the standard of behavior that the employer has the right to reasonably expect of the employee or . . . [(2)] a substantial lack of concern for the employment.” *See* Minn. Stat. § 268.095, subd. 6(a) (2010) (defining misconduct as “intentional, negligent, or indifferent conduct . . . 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”).

Relator also argues that she is subject to the single-incident exception to misconduct. *See id.*, subd. 6(d) (“If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct under paragraph (a).”). But a violation of an employer’s policy amounting to misconduct was found when, in a single incident, an employee stole food valued at less than four dollars

because the employee was a cashier required to handle money and accurately account for items sold. *Skarhus*, 721 N.W.2d at 344.

[The employer] could no longer entrust her with those responsibilities. Thus, [the employer's] ability to assign the essential functions of the job to its employee was undermined by the employee's conduct. Under these circumstances, we conclude that [the employee's] theft constitutes a single act that had a significant adverse impact on the employer.

*Id.* Analogously, relator's failure to report a sham transaction arranged by employees to make it appear that the store had met its monthly goal was a single act that had a significant adverse impact on Rogers.

There is no error in the ULJ's determination that relator's act in failing to report the sham sale fell under the statutory definition of misconduct.

### **3. Affidavit of the Office Manager**

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; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

Minn. Stat. § 268.105, subd. 2(c) (2010). Relator submitted an affidavit from the office manager in connection with her request for reconsideration. The ULJ determined that

[Relator] has not shown why this information could not have been presented at the hearing on April 4, 2011, other than to state, without explanation, that the affiant was unable to attend the hearing. Additionally, this information would not necessarily change the outcome of the case. There is no basis to order an additional evidentiary hearing and no basis to change the decision in this case.

“A reviewing court accords deference to a ULJ’s decision not to hold an additional hearing and will reverse that decision only for an abuse of discretion.” *Skarhus*, 721 N.W.2d at 345.

Relator argues that “[The office manager] was unavailable for the hearing on April 4, 2011 and it was unforeseeable that false testimony would be offered that could only be challenged by having [her] present.” But the office manager was not listed as a witness relator proposed having at the hearing; only the sales associate was listed. Moreover, after relator’s attorney objected to not having been informed of the witnesses Rogers would call, the ULJ told her that “If at some point during the testimony you feel that you need more time to prepare you may raise that at that time.” The ULJ also told all participants that “[Relator] has the right to request rescheduling the hearing to obtain a subpoena for documents or witnesses.” During the hearing, relator’s attorney did not mention that the office manager’s testimony was necessary or request rescheduling.

Moreover, the office manager’s affidavit did not concern relator’s violation of company policy by failing to report the sham sale. The ULJ’s conclusions that the affidavit “would not necessarily change the outcome of the case” and that relator had not shown why the office manager’s testimony could not have been presented at the hearing were not an abuse of discretion.

Substantial evidence supports the ULJ’s findings; the ULJ did not err in determining that relator had committed misconduct; and there was no abuse of discretion

in the ULJ's decision not to hold a second evidentiary hearing on the office manager's affidavit.

**Affirmed.**