



CASE NO. A10-1003

---

STATE OF MINNESOTA

IN COURT OF APPEALS

---

CMAK Corp.,

Realtor,

Joan Dourney,

Respondent,

The Department of Employment  
and Economic Development,

Respondent.

---

**REALTOR'S BRIEF AND APPENDIX**

---

Deno W. Berndt, Esq., #215636  
Berndt Law Offices, PLLC  
Attorneys for Realtor  
101 Union Plaza  
333 Washington Avenue North  
Minneapolis, MN 55401  
Telephone: (612) 746-1500  
Facsimile: (612) 746-4777

Joan Dourney  
Respondent  
4908 Meadow Lane  
Shoreview, MN 55126-2076

Lee B. Nelson, Esq., #77999  
Attorney for Respondent Department  
Department of Employment and  
Economic Development  
1<sup>st</sup> National Bank Building  
332 Minnesota Street, Suite E200  
St. Paul, MN 55101-1351  
Telephone: (651) 259-7280  
Facsimile: (651) 284-0170

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

## STATEMENT OF THE FACTS

CMAK Corp., Realtor in the above-mentioned matter, discharged Respondent Joan Dourney for employee misconduct. During the week of January 17, 2010, Respondent failed to ask for identification in response to a patron ordering an alcoholic beverage at Panino's Restaurant. Respondent assumed the patron was older than the legal drinking age, and brought her the beverage. CMAK Corp.'s owner Joanne Kurtz saw Respondent bring the alcoholic beverage to the patron and asked if Respondent checked the patron's birth date. Respondent declared that she had not asked for identification, and went back to the patron and took away her drink.

On February 16, 2010, the Unemployment Law Judge (hereinafter "ULJ") issued his initial findings. He found that Respondent was not eligible for unemployment benefits because Respondent was charged with misconduct due to Respondent's serious violation of standards and procedures. The ULJ found that Respondent was aware, or should have been aware, of the policy, procedure or instructions given to her by her employer. Panino's policy is, and always has been, to require all customers who order alcoholic beverages to provide appropriate identification. The customer in question looked young enough to be under the legal drinking age.

Respondent requested reconsideration. On March 5, 2010, ULJ William Dixon heard the matter via telephone. Realtor was not present.<sup>1</sup> On March 11, 2010, new Findings of Fact were issued, which reversed the ULJ's initial determination of ineligibility. (See Appendix p. A-1.) Realtor filed a request for reconsideration. The March 11th decision was subsequently affirmed. Realtor filed a timely Petition for Writ of Certiorari and Writ of Certiorari. (See Appendix p. A-11.)

### ARGUMENT

On appeal from a denial of unemployment benefits based on misconduct, the determination of whether an employee committed misconduct is a mixed question of fact and law. *Colburn v. Pine Portage Madden Bros., Inc.*, 346 N.W.2d 159, 161 (Minn.1984). Whether an employee committed particular acts is a fact question, and the determination of whether those acts constitute misconduct is a question of law. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn.App.1997).

An employee who is discharged for misconduct is not eligible to receive unemployment benefits. Minn.Stat. 268.095, subd. 4(1) (2008). Employment

---

<sup>1</sup> Realtor was waiting for the hearing, but was unable to connect with the ULJ and Respondent.

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. *Wayne Nelson v. Gales Auto Body Inc.*, 2010 WL 1286878 (Minn.App.) (citing Minn.Stat. 268.095, subd. 6(a) (2008)).

Minnesota Courts have held that 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.* Employment misconduct includes intentional or negligent conduct that seriously violates the standards the employer may reasonably expect the employee to meet or that clearly demonstrates a substantial lack of concern for the job. Minn.Stat.268.095, subd.6 (2006). As a general rule, an employee’s knowing violation of an employer’s policies, rules, or reasonable requests constitutes employment misconduct. *Montgomery v. F & M Marquette Nat’l Bank*, 284 N.W.2d 602, 604 (Minn.App.1986). The Minnesota Court of Appeals has held that even a single incident can be misconduct if it represents a sufficient enough

disregard for the employer's expectations. *Blau v. Masters Restaurant Assocs.*, 345 N.W.2d 791, 794 (Minn.App.1987).

Generally, an employee's "knowing violation of an employer's policies, rules, or reasonable requests constitutes misconduct. *Montgomery v. F & M Marquette Nat'l Bank*, 384 N.W.2d 602, 604-5 (Minn.App.1986). For violation to constitute misconduct, the rules must be reasonable and not impose an unreasonable good-faith misunderstanding of rules or policies is not misconduct. *Tuckerman Optical Corp. v. Thoeny*, 407 N.W.2d 491,493 (Minn.App.1987). Furthermore, in *James M. Zangl v. Ridgedale Automotive Inc.*, 2002 WL 417240 (Minn.App.), the Court of Appeals held that the employee was aware of his employer's policy or did not make a good faith mistake because he testified that he knew about the policy, he violated it, and it was a mistake. *Id.* The Court ultimately held that the employer's policy was reasonable and the employee committed misconduct was therefore not entitled to unemployment benefits. *Id.*

Even a single incident may constitute misconduct disqualifying an employee from unemployment benefits. *Wilson v. Comfort Bus Co., Inc.*, 491 N.W.2d 908, 911 (Minn.App.1992). *Tuckerman Optical Corp. v. Thoeny*, 407 N.W.2d 491,493 (Minn.App.1987). In *O'Donnell v. Hennepin Faculty Associates*, 2010 WL 2813424 (Minn.App.), the Court found that the employer was ultimately

discharged for a single violation of a policy, but the Unemployment Law Judge found that the violation caused concern that the employee might ignore the policy again. *Id.* at 2.

Moreover, an incident is not required to lead to an actual resulting harm in order to have a significant adverse effect on the employer, within meaning of single-incident exception to employment misconduct, for purposes of qualification for unemployment benefits. Minn.Stat.268.095 (6)(a). In *Wayne Nelson*, the court found that although there initially seemed to be no significant adverse effect on the employer, that the employer ultimately could no longer trust the employee to complete tasks as assigned. *Id.* at 2. The court also found that the incident seriously jeopardized the employer's relationship with clients. *Id.* In *O'Donnell v. Hennepin Faculty Associates*, 2010 WL 2813424 (Minn.App.), the court found that the employer was ultimately discharged for a single violation of a policy, but the Unemployment Law Judge found that the violation caused concern that the employee might ignore the policy again. *Id.* at 2.

In *Lori J. Peterson v. Transport Corp. of America Inc.*, the Court of Appeals found that the employee (who violated a policy requiring all employees to take a mandatory break) had worked for the company for nearly seven years and knew of the mandatory requirement posted and advertised regularly by the employer. 2008

WL 4299934, at 2 (Minn. App.). The court held that the employee committed an incident of misconduct which did not qualify her for unemployment benefits and reasoned that violating the break requirement is not an excepted act from the statute because failing once to follow the requirement created a substantial safety concern with a significant adverse impact on the employer. *Id.* at 3. Recent case law supported the court's conclusion (citing *Skarhus v. Divanni's Inc.*, 721 N.W.2d 340, 344 (Minn.App.2006) where an employer could no longer entrust the employee with responsibilities to carry out her duty as a cash register). *Id.*

In the case at hand, Realtor had in place a reasonable policy, which was required by Minnesota state law asking for identification for a patron is a relatively simple task, but the importance of doing so resonates throughout a restaurant's policies, as mandated by Minnesota law.<sup>2</sup> The significance of Realtor's particular policy was emphasized to Respondent during her ten years of employment at Panino's Restaurant, and Realtor had a right to expect Respondent to abide by that particular regulation. The court in *Lori J. Peterson* found that the employee who violated a policy had worked for the company for nearly seven years and knew of

---

<sup>2</sup> Minn. Stat. 340A.503 holds that it is illegal for a minor under the age of 21 to purchase or consume alcohol. The statute guides persons in respect to requiring identification.

the posted policies, which were regularly advertised by the employer. This court should find the same.

In *Blau*, the Minnesota Court of Appeals held that a single incident can be misconduct if the act represents enough disregard for the employer's expectations. Like in *Blau*, Respondent consciously disregarded Realtor's expectation that she properly ask for identification. Respondent in this case, like the Respondent in *James M. Zangl*, had practiced Realtor's policy before. It can be inferred that Respondent believed it to be a reasonable – she was well aware that the policy existed, and had allegedly practiced it before.

Actual harm is not necessary to find misconduct. Realtor has a reasonable concern that Respondent's violation causes concern that Respondent might ignore the policy again. Respondent believed the patron to be of legal drinking age, however stated her age to look around 20, 23 or 24 years old. (Tras. ¶ 9). The young age of the patron gave Realtor more reason to be concerned with Respondent's violation of the mandatory policy of requiring identification before serving alcoholic beverages. Another violation could cause serious financial and legal difficulties for Panino's Restaurant.<sup>3</sup> The court in *O'Donnell* found that this

---

<sup>3</sup> Minn. Stat. 340A.501 holds that every licensee is responsible for the conduct by an employee authorized to sell alcoholic beverages on the premises.

type of concern is valid, and constitutes enough of an adverse effect on the employer that the employee is ineligible for benefits. Like the court in *Wayne Nelson*, this court should find that Realtor could no longer trust Respondent to complete required tasks.

### CONCLUSION

Based upon the foregoing arguments, the standard of review, and the overwhelming support of case law, the Realtor respectfully submits that the decision of the ULJ be reversed.

Respectfully submitted,

BERNDT LAW OFFICES, PLLC

Dated: 08-24, 2010 By 

Deno W. Berndt, Esq., #215636  
Attorneys for Realtor  
101 Union Plaza  
333 Washington Avenue North  
Minneapolis, MN 55401  
Telephone: (612) 746-1500  
Facsimile: (612) 746-4777