

No. A10-1003

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State of Minnesota  
In Court of Appeals

CMAK CORP,

*Relator,*

vs.

JOAN DOURNEY,

*Respondent,*

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

*Respondent.*

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RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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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).

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## **Legal Issue**

Under the law, inadvertent conduct is not employment misconduct mandating the denial of unemployment benefits. Joan Dourney, a waitress who had worked at Panino's restaurant for ten years, was thinking about a food order and failed to obtain identification from a young woman who ordered an alcoholic beverage. The young woman turned out to be at least 23 years old. For this single incident, Dourney was discharged. Was her action inadvertent and therefore not employment misconduct?

Unemployment Law Judge William Dixon concluded that Dourney was discharged for other than employment misconduct and was not ineligible for unemployment benefits.

## **Statement of the Case**

Following her discharge from CMAK Corporation d/b/a Panino's Restaurant, Joan Dourney applied for unemployment benefits. Under Minn. Stat. §268.101, subd. 2, a Department clerk initially determined that Dourney was discharged for employment misconduct and ineligible for benefits.<sup>1</sup> Dourney appealed.

Under Minn. Stat. § 268.105, subd. 1, the matter was then scheduled for a de novo evidentiary hearing before Unemployment Law Judge ("ULJ") William

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<sup>1</sup> Relator is uninformed when it refers to a ULJ as having made the February 16, 2010, determination of ineligibility. Relator's brief, p. 1. See Minn. Stat. § 268.035, subd. 12c.

Dixon. Only Dourney – and her attorney – appeared.<sup>2</sup> ULJ Dixon reversed the initial Department determination and held that Dourney was discharged for reasons other than employment misconduct, was not ineligible for benefits, and that benefits paid would be used in computing Panino's future experience rating.<sup>3</sup> Panino's requested reconsideration.<sup>4</sup>

On reconsideration, ULJ Dixon issued an order affirming his prior decision.<sup>5</sup> Panino's now comes to the Court of Appeals on a writ of certiorari obtained under Minn. Stat. § 268.105, subd. 7, and Minn. R. Civ. App. P. 115.

### Statement of Facts

Joan Dourney started working for CMAK Corporation d/b/a Panino's Restaurant in North Oaks in August of 1999.<sup>6</sup> She worked as a waitress, during

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<sup>2</sup> While relator, in a footnote on page 2 of its brief says “realtor” (sic) was waiting by the phone to be connected to the hearing, on reconsideration relator refers to “miscommunication.” But the transcript shows relator never provided the ULJ its contact information, i.e., its telephone number and persons participating. The Notice of Hearing instructs the parties how to communicate this to the ULJ before the date of the hearing. But regardless, relator does not request a rehearing. Further, there is no dispute in the determinative facts.

<sup>3</sup> Appendix to Department’s Brief, A5-A9. Under Minn. Stat. § 268.105, subd. 3a(c), Dourney’s entitlement to the benefits paid have vested. However, because of the duration of federal extensions, future benefits may still be at issue. Further, only a conclusion of employment misconduct will, under Minn. Stat. § 268.047, subd. 3(3) relieve Panino's of the effect that benefits paid would have on its future experience rating.

<sup>4</sup> Panino's offered a number of new factual arguments on reconsideration, but additional evidence is not allowed at that stage. *See* Minn. Stat. § 268.105, subd. 2(c).

<sup>5</sup> Appendix A1-A4.

<sup>6</sup> T. 7. Transcript references will be indicated “T.” Exhibits in the record will be “D-” with the number following.

the lunch shift, Monday to Friday.<sup>7</sup> During her ten years of work for Panino's, Dourney had never been warned or reprimanded for not obtaining identification from patrons who ordered an alcoholic beverage.<sup>8</sup>

On January 21, 2010, a former employee - who Dourney knew was over 21 years of age - came into the restaurant with a young woman.<sup>9</sup> The young woman "looked 20, like 3 or 24 years old," to Dourney, but Dourney didn't know her age.<sup>10</sup> They ordered food and then ordered some alcoholic beverages.<sup>11</sup> Panino's had a new menu, and Dourney was trying to figure out what they wanted; Dourney had their drinks made and served them.<sup>12</sup> Dourney always "cards" everybody, but, as she testified, "...I do not know why I didn't card that day."<sup>13</sup> The owner saw Dourney deliver the drinks and immediately asked Dourney if she had gotten identification, and Dourney said, "No, I haven't," apologized and said she would take care of it.<sup>14</sup> Dourney immediately went to the table and asked the young woman for her identification, and when she said she didn't have any with her, Dourney said she was sorry but that without identification she could not leave the drink, and Dourney took the drink away.<sup>15</sup> At that point, the former employee

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<sup>7</sup> T. 7.

<sup>8</sup> T. 11.

<sup>9</sup> T. 10.

<sup>10</sup> T. 10.

<sup>11</sup> T. 9.

<sup>12</sup> T. 9.

<sup>13</sup> T. 10.

<sup>14</sup> T. 9, 11.

<sup>15</sup> T. 9, 11.

said, “She’s two years older than I am...” But Dourney replied that without identification it was the policy not to serve the drink.<sup>16</sup>

The owner then told Dourney to go home, and later that same day the owner called Dourney and discharged her for failing to get identification from the young woman prior to serving her an alcoholic beverage.<sup>17</sup> Dourney had received specific training from a third party hired by Panino's in 2007 on checking “...younger people for legal and valid I.D’s...”<sup>18</sup> Dourney was aware of Panino's policy to obtain identification before serving alcoholic beverages.<sup>19</sup>

### **Standard of Review**

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceeding, reverse, or modify the decision if Panino's substantial rights were prejudiced because the decision of the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.<sup>20</sup>

There is no dispute in the determinative facts. The only question before the Court is the application of law, and as the Court of Appeals stated in *Ywswf v.*

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<sup>16</sup> T. 10, 11.

<sup>17</sup> T. 8, 9, 10.

<sup>18</sup> D-5; T. 10.

<sup>19</sup> D-3; T. 10, 11.

<sup>20</sup> Minn. Stat. § 268.105, subd. 7(d)(1)-(6) (2009).

*Teleplan Wireless Services, Inc.*, the Court reviews de novo the legal question of whether an employee's acts constitute employment misconduct.<sup>21</sup>

### **Argument for Eligibility**

Joan Dourney was discharged from her waitress job of ten years for, on one occasion, not obtaining identification from a young woman before serving her an alcoholic beverage. As the Supreme Court made clear in *Auger v. Gillette Co.*, the question is not whether Dourney should have been discharged, but now that she has been discharged, whether she is to be denied unemployment benefits.<sup>22</sup> The ULJ concluded that Dourney did not commit an act which constitutes employment misconduct. But whether Dourney's action constitutes employment misconduct is a question of law, and the Court considers the application of law de novo. Regardless of why or how, or on what basis, the ULJ reached his legal conclusion, the Court must address the application of law as the Court sees it, applying the statute appropriately to the facts. Applying the law to the facts leads to the conclusion that the ULJ reached the right result.

Minn. Stat. § 268.095, subd. 4 provides that an individual who is discharged from her employment is eligible for unemployment benefits except when she has been discharged for conduct that amounts to employment misconduct, as that term is defined in the statute. That statutory definition reads:

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<sup>21</sup> 726 N.W.2d 525 (Minn. App. 2007).

<sup>22</sup> 303 N.W.2d 255, 257 (Minn. 1981).

**Subd. 6. Employment misconduct defined.**

(a) Employment misconduct means 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.

(b) Regardless of paragraph (a), the following is not employment misconduct:

\* \* \*

(2) inefficiency or inadvertence;...

\* \* \*

(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).

\* \* \*

(e) The definition of employment misconduct provided by this subdivision is exclusive and no other definition applies.<sup>23</sup>

The Legislature has made clear that there is no common law denial of unemployment benefits,<sup>24</sup> and that the statutory provisions must be liberally read and applied in favor of awarding benefits.<sup>25</sup>

Although Panino's exact policy on seeking identification is not entirely clear from the record, it is undisputed that Dourney should have obtained identification from the young woman on January 21 before serving her an alcoholic beverage. Certainly that requirement was reasonable, but not every slip-up amounts to employment misconduct. Panino's can expect its wait staff to ask "younger people"<sup>26</sup> for identification, but they can't expect perfection. People

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<sup>23</sup> Minn. Stat. § 268.095, subd. 6 (2009).

<sup>24</sup> Minn. Stat. § 268.069, subd. 3.

<sup>25</sup> Minn. Stat. § 268.031, subd. 2.

<sup>26</sup> D-5.

make mistakes, they get distracted, and their minds can be on other things. A single incident in ten years of service is not a serious violation of the standards of behavior that an employer can reasonably expect. While the Supreme Court in *Ress v. Abbott Northwestern Hosp., Inc.*, recognized military-like adherence to protocol when dealing in the healthcare arena,<sup>27</sup> no similar expectation has ever been applied to restaurant workers.

But even if the expectation applies, the legislature has called for special consideration when the conduct is a single incident. Here, Dourney was distracted and failed to ask for identification only once, in ten years of employment. While certainly important to Panino's, one failure to get identification in ten years of serving thousands of patrons does not rise to the statutorily-required threshold.

Relator does not argue that Dourney serving the young woman violated the law, and indeed the available evidence is that the young woman was at least 23 years of age. Nor does relator argue that Dourney had previously been warned about the same conduct, or that she had failed to request identification more than once. The question here involves one violation of Panino's policy on identification after ten years of continuous employment.

While relator repeatedly references cases involving a single incident, the only recent published cases addressing the specific predecessor statute - *Frank v.*

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<sup>27</sup> 448 N.W.2d 519, 523 (Minn. 1989).

*Heartland Auto Services*<sup>28</sup> and *Skarhus v. Davannis*<sup>29</sup> - address single incidents of dishonesty as it relates to an employer's need to rely on an employee's integrity. That is not involved here. Relator also cites a series of unpublished cases, but these are fact-specific and are not precedential. Relator's reliance on such cases, which are not analogous, is misplaced. Here, there is no hint of deliberate, intentional action on Dourney's part, which is what occurred in each unpublished case upon which relator relies. Dourney's action was not deliberate, nor was it intentional. Under relator's argument, an individual who was late for work once has committed employment misconduct because she could never be trusted to appear for work on time in the future. And while this case does not involve attendance, one slip up on identification, in ten years, is not a prescription for the future.

But even if the Court, liberally construing the statute against denial, were to conclude the thresholds of paragraph (a) have been met, conduct still does not constitute employment misconduct if it was "inadvertence" as called for in paragraph (b). Here, it certainly was inadvertence. That is the legal conclusion the Court should, in this case, come to.

The young woman came into the restaurant with a former employee Dourney knew was over 21 years of age. Dourney was trying to get their food order right, which required greater concentration than normal, as she was working

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<sup>28</sup> 743 N.W.2d, 626, 630-631 (Minn. App. 2008).

<sup>29</sup> 721 N.W.2d 340, 344 (Minn. App. 2006).

with a new menu. As she was taking and relaying the customers' orders, her mind was focused on the new menu. As Dourney testifies, she always has asked for identification. But this time she didn't. Dourney's testimony was incredibly honest when she testified, "...I do not know why I didn't card that day."<sup>30</sup>

When the owner asked Dourney if she had gotten identification, Dourney admitted she hadn't, apologized and immediately took action. Her actions are consistent with an inadvertent act, and the logical legal conclusion is that Dourney's failure to get identification from the young woman on January 21 was simply inadvertent.

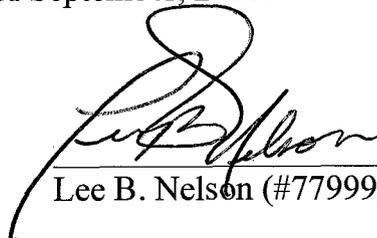
### **Conclusion**

Joan Dourney was discharged for a single incident of inadvertence, which is not employment misconduct under the law. The Department therefore requests that the Court of Appeals affirm the decision of the Unemployment Law Judge.

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<sup>30</sup> T. 10.

Dated this 23<sup>rd</sup> day of September, 2010.



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