

No. A10-1965

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State of Minnesota  
**In Court of Appeals**

ROGER POTTER,

*Relator,*

vs.

NORTHERN EMPIRE PIZZA, INC.,

*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, an individual who is discharged from employment for violating the standards of behavior the employer has a right to expect commits employment misconduct and is ineligible for unemployment benefits. Northern Empire Pizza d/b/a Domino's Pizza discharged Roger Potter because he, in a fit of anger, jabbed a coworker in the ribs with his fingers as the coworker walked by him. Was Potter discharged for committing an act that constituted employment misconduct under Minnesota law?

Unemployment Law Judge Bryan Eng found that Potter was discharged for employment misconduct and therefore ineligible for unemployment benefits.

## **Statement of the Case**

The question before this Court is whether Roger Potter is entitled to unemployment benefits. Potter established a benefit account with the Minnesota Department of Employment and Economic Development (the "Department"). A Department clerk initially determined that Potter was discharged from Northern Empire Pizza for employment misconduct and was ineligible for benefits.<sup>1</sup> Potter appealed that determination, and Unemployment Law Judge ("ULJ") Bryan Eng conducted a de novo hearing, in which both parties participated. The ULJ found that Potter seriously violated the standards of behavior his employer had a right to

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<sup>1</sup> E-1(1). Transcript references will be indicated "T." Exhibits in the record will be "E-" with the number following.

expect of him.<sup>2</sup> As a result, the ULJ decided that Potter's actions constituted employment misconduct and held Potter ineligible for benefits. Potter filed a request for reconsideration with the ULJ, who affirmed.<sup>3</sup>

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Potter under Minn. Stat. § 268.105, subd. 7(a) (2010) and Minn. R. Civ. App. P. 115. The Department is charged with the responsibility of administering and supervising the unemployment insurance program.<sup>4</sup> Unemployment benefits payable are paid from state funds, the unemployment insurance trust fund, not by an employer or employer funds.<sup>5</sup> Because unemployment benefits are state funds, the Department is the primary responding party in this case.<sup>6</sup> The Department does not represent the co-respondent in this proceeding, and this brief should not be considered advocacy for Northern Empire Pizza.

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<sup>2</sup> Appendix to Department's Brief, A5-A8.

<sup>3</sup> Appendix, A1-A4.

<sup>4</sup> Minn. Stat. § 116J.401, subd. 1(18) (2010).

<sup>5</sup> Minn. Stat. § 268.069, subd. 2 (2010).

<sup>6</sup> Minn. Stat. § 268.105, subd. 7(e) (2010).

## Statement of Facts

Roger Potter worked as a delivery driver for Northern Empire Pizza which operated a Domino's Pizza Outlet in Crookston from August 2008 until April 10, 2010.<sup>7</sup>

Potter worked the day shift, but at times crossed paths with [REDACTED] a younger coworker, who worked the night shift.<sup>8</sup> Potter and [REDACTED] did not get along; it was no secret that they “did not see eye to eye on things,” and both had been talked to about being able to get along at work.<sup>9</sup>

Potter understood that no physical altercations in the workplace would be tolerated.<sup>10</sup>

On April 9, Potter put his keys on a shelf where he frequently set them.<sup>11</sup> [REDACTED] picked up the keys, said they don't belong here and tossed them onto a nearby desk.<sup>12</sup> Potter was “ticked” that [REDACTED] had touched his keys, and as [REDACTED] was leaving the delivery area, he told Potter, who was in his way, to “move, now.”<sup>13</sup> As [REDACTED] passed by Potter, Potter, being upset because [REDACTED] touched his

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<sup>7</sup> T. 14.

<sup>8</sup> T. 20.

<sup>9</sup> T. 17.

<sup>10</sup> T. 20.

<sup>11</sup> T. 21.

<sup>12</sup> T. 21.

<sup>13</sup> T. 22.

keys, “jabbed” [REDACTED] in the ribs with his finger.<sup>14</sup> Additional words were exchanged.<sup>15</sup>

The next day, April 10, Potter was discharged because of the jab to [REDACTED] and [REDACTED] was suspended for his part in the incident.<sup>16</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 Potter’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>17</sup>

The Court of Appeals held in *Skarhus v. Davannis* that the issue of whether an employee committed employment misconduct is a mixed question of fact and law.<sup>18</sup> Whether the employee committed a particular act is a fact question and whether those facts amount to employment misconduct is a question of law.<sup>19</sup> The Court also held in *Skarhus* that it views the ULJ’s factual findings “in the light most favorable to the decision,” and that it will not disturb the findings when the

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<sup>14</sup> T. 22, 23.

<sup>15</sup> T. 23.

<sup>16</sup> T. 24, 25.

<sup>17</sup> Minn. Stat. § 268.105, subd. 7(d)(1)-(6) (2010).

<sup>18</sup> 721 N.W.2d 340, 344 (Minn. App. 2006).

<sup>19</sup> *Id.* (citing *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997)).

evidence substantially sustains them.<sup>20</sup> “Substantial evidence” is the relevant evidence that “a reasonable mind might accept as adequate to support a conclusion.”<sup>21</sup>

In *Ywswf v. Teleplan Wireless Services, Inc.*, the Court of Appeals reiterated the standard that the Court reviews de novo the legal question of whether the employee’s acts constitute employment misconduct.<sup>22</sup>

### **Argument for Ineligibility**

An applicant who is discharged from employment is ineligible for benefits if the conduct for which the applicant was discharged amounts to employment misconduct. The statute provides:

**Subd. 4. Discharge.** An applicant who was discharged from employment by an employer is ineligible for all unemployment benefits according to subdivision 10 only if:

- (1) the applicant was discharged because of employment misconduct as defined in subdivision 6...

The definition of “employment misconduct” reads:

**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.

\* \* \*

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<sup>20</sup> *Skarhus*, 721 N.W.2d at 344, 45 (citing *Lolling v. Midwest Patrol*, 545 N.W. 2d 372, 377 (Minn. 1996)).

<sup>21</sup> *Moore Assocs., LLC v. Comm’r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996).

<sup>22</sup> 726 N.W.2d 525 (Minn. App. 2007).

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

The Court of Appeals in *Shell v. Host International*,<sup>24</sup> recognized that violence in the workplace is disruptive of the normal employee/employer relationship and, citing *Hines v. Sheraton Ritz Hotel*,<sup>25</sup> that an employer has a right not to expect violent behavior from an employee. The Court went on to say that because violent behavior interferes with the normal operation of business, it constitutes misconduct.

On page 20 of the transcript, Potter admits that he understood that the employer expected no violence or a physical altercation in the workplace. Potter knew the standards expected of him, yet he violated those standards.

It's noted that the ULJ used the word "poked." Potter, in his initial statements to the Department, described it as "jabbed." Regardless of the word used to describe his action, Potter did the action because he was angry at [REDACTED]. That physical action, done in anger, violated the standards Potter knew was expected of him. The statute provides that a single incident amounts to misconduct if it is serious enough.<sup>26</sup> Violence is always serious and therefore a single incident of violence constitutes employment misconduct under the law.

Potter contends that because he had no plan, his action was not intentional. But simply because it was not premeditated doesn't mean it wasn't intentional. He

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<sup>23</sup> Minn. Stat. § 268.095, subs. 4 and 6 (2010).

<sup>24</sup> 513 N.W. 2d 15, 17 (Minn. App. 1994).

<sup>25</sup> 349 N.W.2d 329, 330 (Minn. App. 1984).

<sup>26</sup> Minn. Stat. §268.095, subd. 6(d).

knew what he was doing. There is nothing to suggest that Potter is unable to control himself. When he did the act, he wanted to do the act.

Potter's contention that an average reasonable employee would have done the same is ridiculous. Average reasonable employees don't jab coworkers in anger. Potter attempts to justify his action by referring to himself as a "senior," and that any "senior would have given [REDACTED] a slap, and then called (his) parents as I did."<sup>27</sup> No employee, regardless of age, slaps or jabs a coworker. Neither age, nor disparity in ages, justifies such conduct. To this day, Potter is not contrite but would apparently do the same thing if the situation arose.

Potter contends his conduct was a good faith error in judgment where judgment was required. No judgment on whether to strike another was required; it was not to be done.

Potter additionally seeks to justify his conduct by saying the manager should have taken action to limit the disharmony between he and [REDACTED]. The manager's lack of action does not justify Potter's conduct on April 19.

The public purpose behind unemployment benefits, as set out at Minn. Stat. §268.03, subd. 1, is to provide a temporary partial wage replacement to those unemployed through no fault of their own. Potter is not unemployed through no fault of his own. He is unemployed because, in a fit of anger, he jabbed a coworker in the ribs with his fingers.

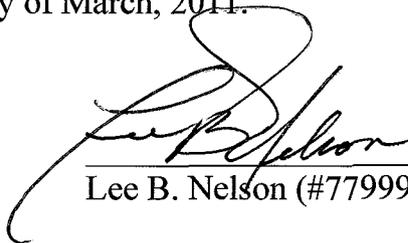
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<sup>27</sup> Relator's informal brief at p. 4.

## Conclusion

Unemployment Law Judge Bryan Eng correctly concluded that Roger Potter was discharged for employment misconduct. The Department requests that the Court affirm the decision of the Unemployment Law Judge.

Dated this 29<sup>A</sup> day of March, 2011.



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