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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0995**

Arnold E. Zenzen,
Relator,

vs.

Motel 6 Operating L P,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 1, 2008
Reversed
Stoneburner, Judge**

Department of Employment and Economic Development
File No. 2648 07

Arnold E. Zenzen, P.O. Box 84, Foreston, MN 56330-0084 (pro se relator)

Motel 6 Operating, L.P., c/o Frank Gates Service Co., P.O. Box 16580, Columbus, OH
43216-6580 (respondent employer)

Lee B. Nelson, Colleen A. Timmer, Department of Employment and Economic
Development, Suite E200, 1st National Bank Building, 332 Minnesota Street, St. Paul,
MN 55101-1351 (for respondent DEED)

Considered and decided by Stoneburner, Presiding Judge; Lansing, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Relator challenges the decision of an unemployment law judge (ULJ) that he is disqualified from receiving unemployment benefits because he was discharged for misconduct. Because the record does not demonstrate that relator's single incident of misconduct had an adverse impact on his employer, we reverse.

FACTS

Relator Arnold E. Zenzen was employed as a maintenance worker at a Motel 6 from April 21, 2004, until his employment was terminated on January 5, 2007. Zenzen customarily arrived at work several hours before his 8:00 a.m. shift because he got a ride from his wife. He had his employer's permission to sleep in the employee-break room until his shift began. On January 4, 2007, Zenzen arrived at work at approximately 4:45 a.m. Because he was experiencing some pain, he took a pain pill and a muscle relaxer prior to lying down on the break-room floor. At approximately 8:20 a.m., manager Fran Robbins, unaware that Zenzen was still asleep in the break room, opened the door from her office to the break room. The door struck Zenzen. According to Robbins, Zenzen became angry and called Robbins an obscene name. Robbins discharged Zenzen the following day. Zenzen denies that he called Robbins an obscene name, but asserts that Robbins deliberately hit him with the door and fired him in retaliation for reports that he had made to the area manager about Robbins's conduct on the job.

Zenzen applied to respondent Minnesota Department of Employment and Economic Development (DEED) for unemployment benefits. DEED determined that

Zenzen was discharged for misconduct and therefore disqualified from receiving benefits. Zenzen appealed. After a hearing, the ULJ found that Zenzen was discharged for misconduct and not qualified for benefits. Zenzen requested reconsideration, and the ULJ modified the order to correct a factual error, but affirmed the decision as legally correct. This appeal by writ of certiorari followed.

D E C I S I O N

On certiorari appeal, this court may affirm the ULJ's decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights "may have been prejudiced because the findings, inferences, conclusion, or decision are . . . affected by [] error of law" or "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(4), (5) (2006). Whether an employee committed misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

"Whether the employee committed a particular act is a question of fact." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court reviews findings of fact in the light most favorable to the ULJ's decision, giving deference to the ULJ's determinations of credibility. *Id.* This court will not disturb the ULJ's factual findings when those findings are supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5); *Skarhus*, 721 N.W.2d at 344. But whether an employee's act constitutes disqualifying misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

Employment misconduct is “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.” Minn. Stat. § 268.095, subd. 6(a) (2006). However, for a single incident to constitute employment misconduct, it must have a significant adverse impact on the employer. *Id.*

Here, the ULJ found, and Motel 6 does not dispute, that Zenzen was discharged solely for calling Robbins an obscene name on January 4, 2007. In determining whether an employee’s single incident of misconduct had an adverse impact on the employer, courts are to examine the conduct in the context of the employee’s responsibilities. *Skarhus*, 721 N.W.2d at 344. In *Skarhus*, this court held that a cashier’s petty theft had a significant adverse impact on the employer because the employer could no longer trust her to handle cash; thus her conduct undermined the employer’s “ability to assign the essential functions of the job to its employee.” *Id.* But, absent evidence of a significant adverse impact upon the employer, a single act does not constitute disqualifying misconduct. *Pierce v. DiMa Corp.*, 721 N.W.2d 627, 630 (Minn. App. 2006).

No published cases have concluded that a single incident of profanity, without other behavior, had a significant adverse impact on the employer. *Cf. Tester v. Jefferson Lines*, 358 N.W.2d 143, 145 (Minn. App. 1984) (finding employee committed misconduct when employee used profanity and stood in front of a bus, preventing employer from moving the bus, until employee was forcibly removed by a police officer). In this case, the ULJ’s order does not contain any findings addressing any significant

adverse effect that Zenzen's remark had on Motel 6, despite the ULJ's duty to "ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2006).

Robbins testified that Zenzen's remark was "upsetting," but there is no evidence in the record that Zenzen's remark affected operations or was heard by any of the guests. Zenzen completed his work on January 4, 2007, without incident. Robbins testified that when she called her area manager and described the incident, the area manager told her to terminate Zenzen. Robbins told the area manager: "I don't know whether he will hit me or what will happen," but there is no evidence in the record that Zenzen ever threatened physical violence. Because the ULJ failed to find a significant adverse impact, and because nothing in the record supports a finding that the single incident of swearing had a significant adverse impact on Motel 6, we reverse the determination that Zenzen's behavior constituted disqualifying misconduct. Because we are reversing, we do not reach Zenzen's procedural challenges or his assertion that the ULJ made an erroneous fact finding.

Reversed.