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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1854**

Marlene LaNae Dendinger,
Relator,

vs.

Surrey Hotel Management, LLC - Doubletree Park Place,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 23, 2012
Affirmed
Stoneburner, Judge**

Minnesota Department of Employment and Economic Development
File No. 27928986-3

Marlene LaNae Dendinger, Elk River, Minnesota (pro se relator)

Surrey Hotel Management, LLC - Doubletree Park Place, St. Louis Park, Minnesota
(respondent)

Lee B. Nelson, Minnesota Department of Employment and Economic Development, St.
Paul, Minnesota (for respondent department)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and
Willis, Judge.*

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

UNPUBLISHED OPINION

STONEBURNER, Judge

Relator challenges the determination of an unemployment-law judge (ULJ) that she is not eligible to receive unemployment benefits because she was discharged from employment for misconduct. We affirm.

FACTS

Relator Marlene LeNae Dendinger worked as Director of Catering at Surrey Hotel Management LLC - DoubleTree Park Place (DoubleTree) from February 25, 2008, until her employment was terminated on June 13, 2011. On May 13, 2011, Rania Hammad, an employee under Dendinger's direct supervision, filed a harassment complaint against Dendinger with Dendinger's supervisor. The complaint alleged that Dendinger had "intentionally mocked [Hammad's] accent in front of [other employees]," made previous comments about Hammad's accent, and handled complaints by Hammad and other employees in an unprofessional manner.

Jeffrey DeMars, director of human resources, interviewed Dendinger on May 25, 2011, regarding the allegations. On May 26, 2011, Dendinger filed a harassment complaint with human resources claiming code-of-conduct violations by Hammad, including "harassment threats of job loss" and insubordination. In describing the "harassment threats" the complaint states that, on more than one occasion, Hammad notified Dendinger that there were others in the company who wanted Dendinger fired and that she should be careful. The insubordination claim contains an allegation that

Hammad failed “to receive instruction on BEO compliance.” No dates were provided for the incidents of which Dendinger complained.

On May 31, 2011, Dendinger received a written warning called a “Counseling/Disciplinary Record” for an incident that occurred on May 27, 2011, involving her failure to follow the correct procedure for booking events. The warning states that Dendinger’s failure to correct her actions could lead to “further disciplinary action up to and including [t]ermination.” On June 3, 2011, a 30-day performance improvement plan (PIP) was instituted for Dendinger requiring that Dendinger improve her “Guest Satisfactory Scores” immediately. The PIP was to be reviewed by both Dendinger and her supervisor on July 11, 2011. The PIP provides that “additional disciplinary action up to and including immediate termination may result.” On June 13, 2011, DoubleTree terminated Dendinger’s employment for code-of-conduct and harassment-policy violations, violations of the PIP, and “[e]mployee conduct unbecoming of a Highgate employee.” Dendinger’s disciplinary record states:

With [Dendinger’s] harassment on 5/12/11 towards Rania, retaliatory behavior towards Rania on 5/26/11 and general work performance below Highgate Standards which has resulted in a 30 day Performance Improvement Plan, we are terminating [] Dendinger’s employment with the DoubleTree Hilton Minneapolis – Park Place effective immediately, 6/13/11.

Dendinger applied for unemployment benefits and was initially found eligible to receive benefits by respondent Minnesota Department of Employment and Economic Development (DEED). Double Tree appealed.

DoubleTree stated at the hearing that the main reason for terminating Dendinger's employment was the retaliatory claim against Hammad, although DoubleTree also noted that Hammad's harassment allegation and Dendinger's overall performance, detailed in the PIP, contributed to the termination decision. After the hearing, the ULJ concluded that Dendinger had been discharged for employment misconduct and therefore is ineligible to receive unemployment benefits. The ineligibility determination resulted in an overpayment of benefits in the amount of \$4,046. The ULJ affirmed the decision on reconsideration. This certiorari appeal followed.

D E C I S I O N

This court may affirm, remand, reverse, or modify the decision of the ULJ if it concludes that the substantial rights of the relator may have been prejudiced because of findings or a decision affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2010).

Employees discharged for employment misconduct are disqualified from receiving unemployment-compensation benefits. Minn. Stat. § 268.095, subd. 4(1) (2010).

Employment misconduct is "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." *Id.*, subd. 6(a) (2010). Employment misconduct does not include inefficiency or inadvertence, simple unsatisfactory conduct, poor performance because of inability or incapacity, or good-faith errors in judgment. *Id.*, subd. 6(b).

The question of whether an employee engaged in employment misconduct is a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). “Whether the employee committed a particular act is a question of fact,” which this court will not disturb if substantially supported by the evidence. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether that act constitutes employment misconduct is a question of law, which this court reviews de novo. *Stagg*, 796 N.W.2d at 315.

The ULJ found that Dendinger’s complaint against Hammad was retaliatory in nature and constituted employment misconduct. The evidence supports the ULJ’s finding. Dendinger’s complaint against Hammad was made one day after human resources interviewed Dendinger regarding the harassment allegations that Hammad made against her; the complaint asserts acts by Hammad that do not constitute harassment or insubordination; Dendinger could not provide a good reason for not having handled or reported her concerns earlier as they arose; and although Dendinger denies the harassment complaint was retaliatory, she testified that she decided to report things about Hammad only after seeing what Hammad had said about her.

The ULJ then concluded that “[t]he filing of the harassment claim against a subordinate in retaliation for having a claim filed against her by that subordinate was a serious violation of the standards of behavior the employer has a right to reasonably expect of Dendinger, and further showed a substantial lack of concern for the employment.” Under the circumstances of this case, we agree.

In determining whether an employee committed employment misconduct, the employee's conduct "must be considered in the context of her job responsibilities." *Frank v. Heartland Auto. Servs., Inc.*, 743 N.W.2d 626, 630 (Minn. App. 2008) (citing *Skarhus*, 721 N.W.2d at 344). Dendinger was Hammad's supervisor. Among other duties, as a supervisor, Dendinger was required to "train, develop, empower, coach and . . . discipline as appropriate" the associates she supervised. Dendinger had a duty to resolve the issues she had with Hammad at the time the issues arose rather than in a complaint filed only after Hammad made a claim against Dendinger.

DoubleTree has a "Harassment-Free Workplace Policy" that states that "[a]ny employee who reports unlawful harassment or cooperates in the investigation of a complaint will be protected from retaliatory action." Dendinger signed this policy on March 19, 2008. DoubleTree's Associate Handbook specifically states that it "will not take any retaliatory action nor permit [any] retaliation against an associate who makes a good-faith complaint of sexual harassment or other harassment." Dendinger violated this policy by filing a complaint against Hammad in retaliation for Hammad's complaint against Dendinger. A supervisor who violates the employer's anti-harassment policies violates the standards of behavior the employer has a right to expect of the employee.

Dendinger makes several arguments in support of her claim that the ULJ erred by concluding that she committed employment misconduct. First, she argues that there can be no finding of misconduct because the harassment complaint against her was not proved by DoubleTree. The record documenting the termination of Dendinger's employment states that "[o]n 5/12/11, [Dendinger] made an offensive comment about a

subordinate's [] . . . accent which was verified by two separate witnesses.” The record therefore demonstrates that DoubleTree concluded that there was merit to Hammad's allegations against Dendinger, even though this event was not the primary reason for ending Dendinger's employment and is not the event that the ULJ determined to be employment misconduct.

Second, Dendinger argues she was fired before she had an opportunity to comply with her performance plan. Although failure to comply with the PIP was a factor in the termination of Dendinger's employment, it was not the primary reason for termination of her employment and is not the factor that the ULJ found to constitute employment misconduct.

Third, Dendinger contends that the “conduct unbecoming of a [DoubleTree] employee,” as DoubleTree termed the filing of Dendinger's harassment complaint against Hammad, was never addressed or identified by DoubleTree and is not misconduct. When DoubleTree labeled the filing of the retaliatory harassment complaint by Dendinger “unbecoming,” it implicitly described one of its “standards of behavior” and a violation of that standard. The ULJ identified that behavior as “a serious violation of the standards of behavior the employer had a right to reasonably expect of Dendinger.” Contrary to Dendinger's assertion, the filing of the complaint was addressed.

Fourth, Dendinger argues that, because she did not make the harassment complaint against Hammad in retaliation, it was not misconduct. But the ULJ's factual findings are viewed in the light most favorable to the decision and require the appellate court to defer to that decision if the evidence substantially sustains them. *Skarhus*, 721 N.W.2d at 344.

Given the timing of the complaint, Dendinger's failure to address the complained-of issues with Hammad when they arose, and her testimony that she acted on the complaint after seeing what Hammad said about her, the record contains substantial evidence to support the ULJ's finding that the complaint was retaliatory. And we conclude that the ULJ correctly determined that, based on DoubleTree's anti-harassment policy, a retaliatory complaint constitutes employment misconduct, making Dendinger ineligible to receive unemployment benefits.

Affirmed.