STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1524

Denise J. Hommerding,
Relator,

vs.

Cold Spring Granite Co. (Corp.),
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed May 21, 2012
Reversed
Randall, Judge[*]
Schellhas, Judge, dissenting

Department of Employment and Economic Development
File No. 27593266-3

Denise J. Hommerding, Paynesville, Minnesota (pro se relator)

Paul Wocken, Willenbring, Dahl, Wocken & Zimmermann, PLLC, Cold Spring, Minnesota (for respondent Cold Spring Granite Co.)

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

Considered and decided by Kalitowski, Presiding Judge; Schellhas, Judge; and Randall, Judge.

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

U N P U B L I S H E D O P I N I O N

RANDALL, Judge

Relator challenges an unemployment law judge's (ULJ) decision on reconsideration that she was discharged for employment misconduct after she asked a coworker to punch in for her, in violation of her employer's time-card policy. We reverse because we conclude that in this very narrow set of circumstances—where an employee asks a coworker to punch in for her shift, the employee arrives at work before her shift begins, and the record does not show that the employee is paid for time she did not work—the employee does not commit a "serious violation" of the employer's reasonable standards of behavior.

FACTS

Respondent Cold Spring Granite Company (the company) terminated employment of relator Denise Hommerding, a 25-year employee, because Hommerding asked a coworker to punch in for her. Hommerding's shift began at 6:00 a.m. One morning she was running late, so she called a coworker and asked the coworker to punch in for her. The company's time clock records any punch between 5:45 a.m. and 6:00 a.m. as a 6:00 a.m. punch-in time. The time clock shows that Hommerding was punched in at 5:53 a.m. or 5:54 a.m., but Hommerding arrived at work at 5:58 a.m. or 5:59 a.m. Hommerding was not paid for time that she did not work.

The company's policy warned employees that "[i]mmediate termination may result if an employee clocks in or out for another employee." Both Hommerding and her coworker were terminated for violating the policy.

Hommerding filed for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development (DEED) determined Hommerding was ineligible. Hommerding appealed, and a hearing was held before a ULJ. The ULJ concluded that Hommerding's conduct was not a substantial violation of the company's policy, and thus that she was discharged for reasons other than employment misconduct and eligible for unemployment benefits.

The company requested reconsideration, which was assigned to another ULJ because the first ULJ no longer worked for DEED. This ULJ reasoned that the company had a reasonable expectation that Hommerding would be on the premises when she punched the time clock. According to the ULJ, common sense dictated that the policy would extend to those who enlist others to punch in and out for them, and Hommerding's action was "intentionally dishonest and negatively impacted the employer's ability to trust her" even though it was a single incident. The ULJ concluded that Hommerding was terminated for employment misconduct and she was ineligible for unemployment benefits.

Hommerding appeals.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand it for further proceedings, or reverse or modify it if the substantial rights of the relator have been prejudiced because the findings, conclusions, or decision is "affected by [an] error of law." Minn. Stat. § 268.105, subd. 7(d)(4) (2010).

Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). "[W]hether a particular act constitutes [employment] misconduct is a question of law that we review de novo." *Id.* Employees discharged for employment misconduct are ineligible for unemployment 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 . . . *a serious violation* of the standards of behavior the employer has the right to reasonably expect of the employee." *Id.*, subd. 6(a) (2010) (emphasis added).

Hommerding makes several arguments challenging the termination of her employment—the termination policy was unclear, her supervisor had underlying motives in firing her, and the incident was handled unprofessionally—but the question before this court is not whether Hommerding should have been discharged but rather whether Hommerding should receive unemployment benefits. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002) (noting that the issue in unemployment benefits cases is not whether relators' employment should have been terminated, but whether relators should receive unemployment benefits). Hommerding challenges the ULJ's ineligibility decision on three grounds: (1) the ULJ's decision was "legally incorrect"; (2) because a different ULJ handled Hommerding's request for reconsideration, Hommerding's case was not handled in her best interests; and (3) Hommerding's conduct was an isolated incident. Hommerding does not support any of her challenges with argument or authority. Such unsupported challenges are generally waived "unless prejudicial error is

obvious on mere inspection." *State v. Modern Recycling, Inc.*, 558 N.W. 770, 772 (Minn. App. 1997). In this case, prejudicial error is obvious upon mere inspection.

To fit under the statutory definition of employment misconduct, an employee must (1) engage in "intentional, negligent, or indifferent conduct" (2) that is a "serious violation" of (3) the employer's reasonable standards of behavior. Minn. Stat. § 268.095, subd. 6(a). Here, Hommerding's conduct satisfied the first and third elements of the employment-misconduct definition. Hommerding intentionally asked her coworker to punch in for her, and the company had a reasonable expectation that an employee would be present at work when she punched in, although the company's policy did not explicitly prohibit employees from asking coworkers to punch in for them. *See Brown v. Nat'l Am. Univ.*, 686 N.W.2d 329, 333 (Minn. App. 2004) ("We are aware of no law that requires that an employer have an express 'policy' regarding prohibited behavior for employees."), *review denied* (Minn. Nov. 16, 2004). Hommerding did intentionally violate the company's reasonable standards of behavior when she asked a coworker to punch in for her.

But Hommerding's conduct does not satisfy the second element of the employment-misconduct definition because it does not constitute a "serious violation." The statute does not define "serious violation." The phrase was inserted in a 2003 amendment. 2003 Minn. Laws ch. 3, art. 2, § 13, at 1473. Prior to 2003, the statutory definition of misconduct included "any intentional conduct . . . that disregards the standards of behavior that an employer has the right to expect of the employee." Minn. Stat. § 268.095, subd. 6(a) (2002). The 2003 amendment changed the definition of

misconduct to "any intentional, negligent, or indifferent conduct . . . that evinces a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." Minn. Stat. § 268.095, subd. 6(a) (Supp. 2003). After the amendment, the supreme court directed that whether an employee's actions, specifically absenteeism and tardiness, amount "to a serious violation . . . depends on the circumstances of each case." *Stagg*, 796 N.W.2d at 316. For example, in *Stagg*, the supreme court concluded that an employee "engaged in conduct that displayed clearly 'a serious violation of the [employer's] standards of behavior'" when the employee was aware of the employer's absenteeism and tardiness policy and violated it on "at least five occasions." *Id.* at 317.

Here, Hommerding did not commit a violation serious enough to disqualify her for unemployment benefits. Hommerding asked another coworker to clock in for her five minutes before she arrived at work. Unlike other timecard-fraud cases this court has decided, the record does not show that Hommerding was paid for work that she did not perform. *See McKee v. Cub Foods, Inc.*, 380 N.W.2d 233, 234-36 (Minn. App. 1986) (holding, under the common-law *Tilseth v. Midwest Lumber Co.*, 295 Minn. 372, 204 N.W.2d 644 (1973) definition of misconduct, that employee committed misconduct when she left her shift early but failed to clock out until fifteen minutes later and did not receive the required manager approval); *Ruzynski v. Cub Foods, Inc.*, 378 N.W.2d 660, 662-63 (Minn. App. 1985) (holding, under the *Tilseth* definition of misconduct, that employee committed misconduct when he left work by 9:50 p.m. but reported on his timecard that he left at 10:00 p.m.).

DEED argues that Hommerding's actions were serious because "her intent was to deceive the employer" and her "actions—if left undisciplined—would also threaten the integrity of the employer's attendance policy and time clock system" because other employees "would have little incentive to personally refrain" from abusing the time clock if they "learned that Hommerding was able to have a coworker punch her in without suffering any consequences."[1] DEED's argument is a "stretch," and worse, not factual. Hommerding did suffer consequences—she was terminated. The record shows no evidence that Hommerding's actions "threaten[ed] the integrity of the time clock system."

We are troubled that on reconsideration, a ULJ new to the case reversed the previous ULJ's determination that Hommerding was eligible for unemployment benefits. Viewed against the backdrop of changes made over the past decade to the process for challenging the denial of benefits, it seems clear that the involvement of a ULJ who did not conduct the evidentiary hearing prejudiced relator. One decade ago, a denial of benefits could be appealed to a ULJ, who would conduct an evidentiary hearing, and that decision, in turn, could be appealed to a commissioner's representative, for a de novo review. Minn. Stat. § 268.105, subds. 1, 2 (2002). In 2004, the senior unemployment-

[1] DEED cites to *Heilman v. United Dressed Beef Co.*, 273 N.W.2d 628 (Minn. 1978) for support. But that case is inapplicable because, unlike here, the employees were paid for work they did not perform. Under the *Tilseth* definition of misconduct, the court concluded that employees committed employment misconduct when they cut but failed to trim the ninth rib on nine-rib navels, which consisted of 4% of navels cut, because they forced the company to pay twice for doing work they took credit for doing, their conduct could have led other employees to not perform their work, and "the cumulative effect of their conduct was clearly injurious to their employer's interests." *Heilman*, 273 N.W.2d at 629-30.

review judge assumed the role of the commissioner's representative, and became responsible for conducting the de novo review of the decision issued after the evidentiary hearing. 2004 Minn. Laws ch. 183, § 71, at 305-06 (codified at Minn. Stat. § 268.105, subd. 2 (2004)).

In 2005, de novo review of the ULJ's decision was eliminated, although an aggrieved party may ask the ULJ to reconsider his or her own decision. 2005 Minn. Laws ch. 112, art. 2, § 34, at 704-07 (codified at Minn. Stat. § 268.105, subd. 2 (Supp. 2005)). In a marked departure from past practice, the current statute does not provide for de novo review of the ULJ's decision by another decision-maker, but for "reconsideration" by the same ULJ, unless he or she is no longer employed by the department, is on leave, or has been disqualified or removed. Minn. Stat. § 268.105, subd. 2(e) (2010). Although the record does not contain statistics on point, we know that it is rare that a ULJ "modifies or sets themselves aside" on reconsideration. Our review of hundreds of decisions denying reconsideration appealed to this court establishes that ULJs rarely change their decision after hearing arguments in support of reconsideration.

In this case, the original ULJ who heard Hommerding's testimony and the testimony of her employer at the evidentiary hearing, and was able to evaluate their credibility and the factual circumstances, determined that Hommerding's conduct did not rise to the level of a "serious violation." The determination was made that Hommerding's conduct was "serious" upon respondent's motion for reconsideration. Given the high probability that the original ULJ would have "affirmed himself" and affirmed the determination that Hommerding was eligible for benefits, the finding of

intentional dishonesty by a different ULJ who did not preside at the evidentiary hearing is less than compelling.

In this very narrow set of circumstances—where an employee asks a coworker to punch in for her shift, the employee arrives at work on time and before her shift begins, and the record does not show that the employee is paid for time she did not work—the employee does not commit a statutory "serious violation" of the employer's reasonable standards of behavior, and is eligible for unemployment benefits.

Reversed.

SCHELLHAS, Judge (dissenting)

I respectfully dissent from the majority's decision to reverse.

Hommerding telephoned a coworker and asked the coworker to punch in for her because she believed that she would arrive late for work. Her conduct violated the company's policy that provides: "Termination: Abuse of Time Clock. Immediate termination may result if an employee clocks in or out for another employee." Both Hommerding and her coworker, who punched in for her, were terminated. Although the majority agrees with the ULJ that the company had a reasonable expectation that an employee would be present at work when she punched in and that Hommerding violated the company's reasonable standards of behavior when she asked a coworker to punch in for her, the majority concludes that Hommerding's conduct does not constitute a "serious violation" and that she therefore is eligible for unemployment benefits. I disagree that Hommerding's abuse of the company's time-clock policy does not constitute a serious violation under Minn. Stat. § 268.095, subd. 6(a).

An employee's refusal to abide by an employer's reasonable policy constitutes employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002). Hommerding asked her coworker to punch in for her in an effort to deceive the company about her work-time arrival. The fact that she actually arrived at work on time is irrelevant and should not be the dispositive factor in our analysis. *See Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (stating that "the value of the stolen items is not the dispositive factor in our analysis" and that "[d]eciding whether the exemption [from the statutory definition of employment misconduct] applies based on the

value of the items involved in the theft would not only narrow the inquiry to an economic analysis that could, in many instances, require extensive fact-finding to determine whether a specific dollar value was significant for a particular employer, but also disregard the type of adverse impact that is not readily quantifiable"). Hommerding's honest and accurate use of the time clock was an essential function of her employment. As noted by the ULJ, "[Hommerding's] actions were intentionally dishonest and negatively impacted the employer's ability to trust her." I would conclude that this conduct is a serious violation that had an adverse impact on the company and is employment misconduct, and I would affirm the decision of the ULJ.