

No. A05-1995

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State of Minnesota  
In Court of Appeals

SARAH L. SKARHUS,

*Relator,*

vs.

DAVANNIS INC.,

*Respondent,*

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

*Respondent.*

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RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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*Sarah L. Skarhus*  
6525 MARKWOOD DRIVE NORTH  
CRYSTAL, MINNESOTA 55427  
(763) 535-8981  
*Relator - Pro se*

*Davannis Inc.*  
DAVANNIS PIZZA & HOT HOAGIES  
ATTN ACCOUNTS PAYABLE  
1100 XENIUM LANE NORTH  
PLYMOUTH, MINNESOTA 55441-4405  
(612) 332-5551  
*Respondent- Employer -Pro se*

*Linda A. Holmes (#027706X)*  
MINNESOTA DEPARTMENT OF EMPLOYMENT  
AND ECONOMIC DEVELOPMENT  
1<sup>ST</sup> NATIONAL BANK BUILDING  
332 MINNESOTA STREET, SUITE E200  
ST. PAUL, MINNESOTA 55101-1351  
(651) 282-6216  
*Attorney for Respondent-Department*

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## **I. LEGAL ISSUE**

Employees whose conduct shows a serious violation of the employer's reasonable expectations, or whose conduct shows a substantial lack of concern for their employment, are disqualified from receiving unemployment benefits. Sarah L. Skarhus was discharged for failure to properly ring \$3.41 worth of food she ordered for herself. Is Skarhus disqualified from receiving benefits?

## **II. STATEMENT OF THE CASE**

This case involves whether Relator Sarah L. Skarhus is entitled to unemployment benefits. Skarhus established a benefit account with the Minnesota Department of Employment and Economic Development. A department adjudicator initially determined that Skarhus was discharged from employment with Davanni's for employment misconduct and so was disqualified from receiving benefits. (D1)<sup>1</sup> Skarhus appealed that determination, and a de novo hearing was held. A department unemployment law judge affirmed the initial determination, finding that Skarhus had been discharged for employment misconduct and was disqualified. (Appendix to Department's Brief, A3-A5)

Skarhus filed a request for reconsideration with the unemployment law judge, and the unemployment law judge issued an order affirming the decision. (Appendix, A1-A2)

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<sup>1</sup> Transcript references will be indicated as "T." Exhibits in the record will be "D" for the department, with the number following.

Effective June 25, 2005, the legislature eliminated the process of de novo review by the senior unemployment review judge, replacing it with a process of reconsideration by the unemployment law judge who considered the initial case.

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Skarhus under Minn. Stat. § 268.105, subd. 7(a) (2004 and Supp. 2005) and Minn. R. Civ. App. P. 115.

### **III. STATEMENT OF FACTS**

Sarah L. Skarhus worked as a kitchen worker for Davanni's, paid \$7.75 per hour, from March 2005 until July 6, 2005. (T.11) The general manager was John Stephens. (T.6) Christine Miller was the assistant manager. (T.10)

Store policy provided that when employees purchased food from the restaurant, they could ring it in themselves. Management would later retrieve the electronic record of the purchase, discount the food 40 percent, and take the amount out of the employee's check.

On July 5, 2005, Skarhus came into the restaurant on her day off. (T.13) She ordered two sandwiches and cheese bread. She also wrote up the order slip that was submitted to the kitchen. (T.13) She wrote on the order slip that she wanted extra beef on one of the sandwiches, but she failed to ring up extra beef on the receipt, and thus the charge for the extra beef did not show up. (T.13) Also, she ordered cheese bread, which did show up on the receipt, but she used the button for what the restaurant called "Just 'Cuz" cheese bread, which was free cheese

bread provided to customers who were waiting, rather than using the button for a regular order. (T.14)

The order slip was submitted to the kitchen, where employee Joel Lawson, Skarhus's ex-boyfriend, was working. (T.14) Lawson reported Skarhus for trying to get extra beef and cheese bread without paying for it. (T.14) The extra beef would have cost \$2.20 before the discount, and the cheese bread would have cost \$3.49 before the discount. After the discount, Skarhus would have paid \$3.41 for the beef and the cheese bread.

Stephens approached Skarhus and confronted her, asking her, "what were you thinking?" (T.17) Skarhus said she hadn't been thinking and had been stupid, and asked if the restaurant would consider keeping her on. (T.17) She was discharged that day. (T.17) There had been no other similar incidents in the time Skarhus was employed. (T.19)

#### **IV. ARGUMENT**

##### **A. SUMMARY OF ARGUMENT**

Skarhus violated her employer's procedures and failed to pay for \$3.41 worth of food. As it was clearly a single incident, this case presents the simple question of what constitutes a "significant adverse impact" on an employer.

##### **B. STANDARD OF REVIEW**

Effective for unemployment law judge decisions issued on and after June 25, 2005 that are directly reviewed by the Court of Appeals, the legislature

restated the standard of review at Minn. Stat. § 268.105, subd. 7(d) (Supp. 2005)

as follows:

(d) The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.

The issue of whether an employee committed misconduct, and the unemployment law judge's determination of that issue, is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W. 2d 801, 804 (Minn. 2002), citing *Colburn v. Pine Portage Madden Bros., Inc.*, 346 N.W.2d 159, 161 (Minn. 1984). Whether or not the employee committed an act alleged to be misconduct is a fact question, but whether that act is employment misconduct is a question of law. *Scheunemann v. Radisson South Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether or not an employee's acts constitute employment misconduct is a question of law on which a reviewing court remains "free to exercise its independent judgment." *Lolling v. Midwest Patrol*, 545 N.W. 2d 372, 377 (Minn. 1996).

### C. EMPLOYMENT MISCONDUCT

An applicant who is discharged from employment is disqualified from benefits only if the conduct for which the applicant was discharged amounts to employment misconduct. Minn. Stat. § 268.095, subd. 4 (2004)<sup>2</sup> provides:

Subd. 4. **Discharge.** An applicant who was discharged from employment by an employer shall not be disqualified from any unemployment benefits except when:

- (1) the applicant was discharged because of employment misconduct as defined in subdivision 6, or
- (2) the applicant was discharged because of aggravated employment misconduct as defined under subdivision 6a.

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 (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.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

\* \* \*

(e) The definition of employment misconduct provided by this subdivision shall be exclusive and no other definition shall apply."<sup>3</sup>

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<sup>2</sup> Under Laws 2004, Ch. 183, sec. 64, the 2004 amendments apply.

<sup>3</sup> The statutory amendments effective August 1, 2003 overturned the analysis set out in *Houston v. International Data Transfer Corp.*, 645 N.W. 2d 144 (Minn. 2002), replacing that analysis with an objective standard. See Laws 2003, 1<sup>st</sup> Sp. Session, ch. 3, art. 2, sec. 13.

There is no question that employers at a restaurant have a right to expect employees not to steal food, and to comply scrupulously with the employer's procedures when they want to order and ring food for themselves. The unemployment law judge did not credit Skarhus's written statement that she believed she would wind up being charged for the food because it was indicated on the order slip and receipt, and found that she had therefore intended to take the food without paying for it. Conceptually, it is not difficult to argue that intentionally taking food without paying is, in and of itself, a serious violation of the expectation that employees comply with procedure – where, for instance, inadvertent errors in serving oneself might not be.

The question presented in this case is fairly straightforward: the arguably applicable exception to misconduct is the exception for a single incident without a significant adverse impact on the employer. There is no dispute that this was a single incident: in the nearly two years that Skarhus had worked for Davanni's, there is no indication that anything like this had ever happened in the past.

The issue becomes whether the \$3.41 of which the employer was deprived constituted a "significant adverse impact," or whether something else about Skarhus's behavior had such an impact. This is relatively new statutory language that this court has not had abundant opportunities to construe. Clearly, the purpose of the statutory exception is to create a "de minimis" exception covering employee conduct that, while it perhaps violates policy, does so in a way so limited in adverse consequences to the employer that it cannot be considered misconduct.

The question is then what is “significant.” One could argue that \$3.41 simply does not have a significant impact on a business such as Davanni’s – in fact, the complimentary cheese bread routinely offered to make waiting customers happy was otherwise priced at \$3.49, perhaps suggesting that absorbing that amount was not a hardship for the business.

It is also not clear whether setting a straight dollar amount for situations such as this is helpful. Is the impact of simply grabbing five dollars from the till different from the impact of covertly nibbling five dollars worth of merchandise? Is “theft” in the form of an employee making \$20 per hour fudging his timecard by 15 minutes the same as an employee grabbing \$5 out of petty cash?

This court has suggested in at least one unpublished case that \$2.00 – even when intentionally taken from the personal funds of vulnerable adults rather than improperly taken as unpaid-for food from a restaurant – would not be a large enough dollar amount to constitute a “significant adverse impact.” *Zeno v. Turning Point, Inc.* (No. A03-1246, Filed May 25, 2004, n.2) (stating that under the single-incident exception, had it been in effect at the time Zeno was discharged, intentionally withholding \$2.00 from vulnerable adults contrary to policy and without authorization “is clearly not grounds for denying benefits”). (Appendix, A6-A12)

Thus, it appears that this case is a close one with regard to the proper threshold for a “significant adverse impact.” The agency decision in this case takes

the position that the attempted food theft in this case was adequate to constitute misconduct.

There may, of course, be other adverse impacts on the employer besides the monetary loss. It does not appear that the statute would allow an employer to aggregate a single incident by showing that the behavior would be harmful if everyone did it – such a construct would substantially swallow the statutory exception entirely. But employee theft of merchandise is such a serious issue, particularly for restaurants and other establishments that offer food, that there is an argument to be made that the mere act of violating the employer’s trust and showing a willingness to steal has an adverse impact by forcing the employer to subject itself to future losses if the employee is retained.

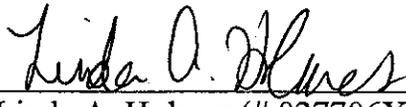
Evaluating what sort of impact is “significant” is a very difficult exercise. The department seeks guidance from the court as to this question, because it seems clear that taking a penny would have no “significant adverse impact,” and clear that taking \$100 would, but where the line is drawn between those extremes is not entirely clear from the statutory language. The department’s position is that Skarhus’s behavior in this case constitutes misconduct; this legal conclusion may be reviewed by the court *de novo*.

**V. CONCLUSION**

The unemployment law judge correctly concluded that Skarhus's attempted theft of her employer's product constituted employment misconduct under the statute.

The department respectfully requests that the Court affirm the decision of the unemployment law judge.

Dated this 19<sup>th</sup> day of January, 2006.

  
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Linda A. Holmes (# 027706X)

Department of Employment and  
Economic Development  
1<sup>st</sup> National Bank Building  
332 Minnesota Street, Suite E200  
Saint Paul, Minnesota 55101-1351  
(651) 282-6216

Attorney for Respondent Department

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) (with amendments effective July 1, 2007).