MINNESOTA STATE LAW LIBRARY

CASE NO. A05-2470

State of Minnesota
In Court of Appeals

DIMA CORPORATION (1992),

Appellant,

vs.

LEE A. PIERCE,

Respondent,

MINNESOTA DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

PETERSON, FRAM & BERGMAN
Warren E. Peterson, Esq.
Attorney Registration No. 86423
50 East Fifth Street
Suite 300
Saint Paul, Minnesota 55101
(651) 291-8955

Attorney for Appellant Dima Corporation (1992)

LINDA A. HOLMES, ESQ.
Attorney Registration No. 027706X
First National Bank Building
332 Minnesota Street
Suite E200
Saint Paul, Minnesota 55101
(651) 282-6216

Attorney for Respondent Minnesota Department of Employment and Economic Development

LEE A. PIERCE
#4 Cordoniz Court
Los Lunas, New Mexico 87031
(505) 401-1664

Respondent-Employee

2006-EXECUTEAM / LAWYER SERVICES DIV., 2573 No. Hamline Ave., St Paul, MN 55113 651-633-1443 800-747-8793

TABLE OF CONTENTS

STATEMENT OF LEGAL ISSUES. 1

STATEMENT OF THE CASE. 2

STATEMENT OF FACTS. 2

ARGUMENT. 5

I. MR. PIERCE'S ACTIONS VIOLATED APPELLANT'S POLICY CONCERNING CASH REGISTER ACCESS AND CONSTITUTE MISCONDUCT UNDER MINN. STAT. §268.095, SUBD. 4. 6

A. APPELLANT HAS A RIGHT TO EXPECT SCRUPULOUS ADHERENCE BY EMPLOYEES TO ITS MONEY HANDLING PROCEDURES 7

B. SINGLE INCIDENTS THAT VIOLATE AN EMPLOYER'S REASONABLE CASH HANDLING POLICIES CONSTITUTE MISCONDUCT. 9

CONCLUSION. 11

TABLE OF AUTHORITIES

CASES

Dean v Allied Aviation Fueling Company,
381 N.W 2d 80 (Minn. Ct. App. 1986). 7, 8

Kalberg v. Park & Recreation Bd.,
563 N .W.2d 275 (Minn. Ct. App.1997). 5

Marty v. Digital Equip. Corp.,
345 N.W.2d 773, 775 (Minn.1984). 4

McDonald v. PDQ,
341 N.W.2d 892, (Minn. Ct. App. 1984) 7

McGowan v. Executive Express Transp. Enter., Inc.,
420 N.W.2d 592, 596 (Minn. 1988). 9

Nieszner v. Minnesota Dep't of Jobs & Training,
499 N.W.2d 832, 839 (Minn. Ct. App 1993). 10

Ress v. Abbott Northwestern Hosp., Inc.,
448 N.W.2d 519, (Minn.1989). 5

Scheunemann v. Radisson S. Hotel,
562 N.W.2d 32, 34 (Minn.App.1997). 5

Schmidgall v. FilmTec Corp.,
644 N.W.2d 801, 804 (Minn. 2002). 5, 9

STATUTES

Minnesota Statute § 268.095 subd. 4 (2005) 6

Minnesota Statute §268.095 subdivision 6 (2005). 6, 9

STATEMENT OF LEGAL ISSUES

I. Whether the Senior Unemployment Review Judge's decision that Dima Corporation discharged Lee A. Pierce from employment for reasons other than employment misconduct is reasonably supported by the record?

Mr. Pierce was terminated because he violated Appellant's policy regarding cash register transactions and this constitutes misconduct as defined in Minn. Stat.§268.095, Subd. 4.

Most apposite authorities:

Minn. Stat. § 268.095 subd. 4 (2005);
Minn. Stat. § 268.095 subd. 6(a) (2005);
McDonald v. PDQ, 341 N.W.2d 892 (Minn. Ct. App. 1984);
Schmidgall v. Filmtec Corp., 644 N.W.2d 801 (Minn. 2002).

Applicable Rule:

Minn. Stat. § 268.105 subd. 2 (2005).

STATEMENT OF THE CASE

Appellant, on March 15th, 2005, terminated Mr. Pierce because of his violation of a company policy regarding proper use of cash registers. (Tr. at p. 9). The Commissioner for the Minnesota Department of Employment and Economic Development determined Mr. Pierce's termination was for reasons of misconduct. Mr. Pierce appealed the department's determination and on May 19th, 2005, a hearing was held before Unemployment Law Judge William Dixon. Judge Dixon found Mr. Pierce's termination was for reasons other than misconduct. This decision was appealed and Senior Unemployment Review Judge, Lee B. Nelson, affirmed. Appellant appeals this decision on the grounds that the decision is unsupported by the record and is inconsistent with Minn. Stat. §268.096, Subd. 4 (2005). Accordingly, Mr. Pierce was terminated for misconduct and, therefore, is not entitled to unemployment compensation.

STATEMENT OF THE FACTS

Appellant is a Minnesota corporation engaged in the business of selling novelties. Mr. Pierce worked for Appellant as a cashier and sales clerk for approximately 3 years and 10 months. (*Id.* at pp. 6). He was terminated on March 15, 2005 for violating the companies money handling procedures. (*Id.* at pp. 10-11).

Appellant has specific company polices regarding its cash registers. Each time a cash register is accessed, a record of that transaction must be made. (*Id.* at

p. 8). The most common record is through a sale transaction. This occurs when a sale takes place and either a cash, check or credit card payment is received.

Access to the cash register must also be recorded when a non-sale transactions occurs. This transaction is commonly known as a "no-sale" transaction and access is completed through a "no-sale" key on the register. Upon this occurrence, a "no-sale" record is made on a detail slip. *Id.*

Appellant's main and most important policy regarding cash register access requires employees to sign the "no-sale" slips. As a result, Appellant can track "no-sale" access, discover who accessed the register and verify the reason for their access. *Id.* Mr. Pierce was aware of this company policy. (*Id.* at p. 13). However, Mr. Pierce knowingly violated the company policy, accessed the cash register without leaving a record and prevented the company from tracking access to its cash registers. (*Id.* at p. 8).

On March 14th, 2005, during a shift change, an employee, Tanya, discovered she had lost a credit card slip. In an attempt to help her look for the lost credit card slip, Mr. Pierce decided to open the cash register. (*Id.* at p. 12). However, instead of following the company procedure to carry out this simple task, Mr. Pierce used a third method of opening the drawer. He used an emergency switch which is located under the cash register. (*Id.* at p. 8). The emergency release button is accessed by picking up the cash register and then sliding/triggering a button that mechanically opens the cash register without any record. By using this method, Mr. Pierce was able to access the cash register

without leaving a record of its access. (*Id.* at p. 8). The employer learned of Mr. Pierce's violation when it reviewed the security tape. (*Id.* at p. 10). The reason the employer was reviewing the security video is that they were missing a rather large credit card receipt. (*Id.* at p. 10).

None of the employees are trained to open the register by way of the emergency release button. The emergency release button is only used if the power goes out. This allows the drawer to be opened and put into the safe while waiting for the power to come back on. It is a spring-release rather than an electronic release. Only managers are authorized to use the emergency button. (*Id.* at p. 9). Using the emergency release button defeats the purpose of having a cash register.

Mr. Pierce claims his actions were due to "not quite thinking clearly," having a rough day, an accident and mere oversight. (*Id.* at pp. 6, 9 and 13). In addition to violating company policy, Mr. Pierce showed a new employee how also to defeat the integrity of Appellant's cash register policies. Mr. Pierce's failure to heed the company policies and recognize their significance led to his termination the day following his violations. (*Id.* at p. 9).

ARGUMENT

When reviewing a certiorari appeal, the court examines the decision of the commissioner's representative, and not that of the unemployment law judge. *Kalberg v. Park & Recreation Bd.,* 563 N .W.2d 275, 276 (Minn. Ct. App.1997). The commissioner's factual findings in Mr. Pierce's termination are reviewed in the light most favorable to the commissioner's decision. *See Ress v. Abbott Northwestern Hosp., Inc.,* 448 N.W.2d 519, 523 (Minn.1989). The court should not disturb these findings when reasonable evidence sustaining them is provided. *Id.* Conclusions made by the commission are not binding upon the court unless reasonably supported by the findings. *Marty v. Digital Equip. Corp.,* 345 N.W.2d 773, 775 (Minn.1984).

"Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Schmidgall v. FilmTec Corp.,* 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel,* 562 N.W.2d 32, 34 (Minn.App.1997). Conversely, "[w]hether a particular act constitutes disqualifying misconduct is a question of law, which this court reviews de novo." *Schmidgall,* 644 N.W.2d at 804.

The Commissioner's determination Mr. Pierce's actions constituted misconduct under Minnesota Statute § 268.095 subdivision 4 was overturned by the Unemployment Law Judge, William M. Dixon, and his decision was affirmed by the Review Judge, Lee B. Nelson. The court must decide whether Mr. Pierce's

actions constitute misconduct which would result in a denial of unemployment compensation.

I. MR. PIERCE'S ACTIONS VIOLATED APPELLANT'S POLICY CONCERNING CASH REGISTER ACCESS AND CONSTITUTE MISCONDUCT UNDER MINN. STAT. §268.095, SUBD. 4.

Minnesota Statute § 268.095 subdivision 4 (2005) states:

> "An applicant who was discharged from employment by an employer shall be disqualified from all unemployment benefits according to subdivision 10 only if: (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 in subdivision 6(a)."

Employment misconduct is defined in Minnesota Statute §268.095 subdivision 6 (2005). It states:

> "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."

In summary, misconduct occurs when an employee displays intentional conduct that seriously violates the standards of behavior the employer has the right to reasonably expect. A single incident which does not have a serious adverse impact on the employer is not deemed to be employment misconduct. Although Mr. Pierce's actions involved only a single incident, these actions show a

substantial lack of concern for Appellant's interests and create an adverse impact on the employers ability to monitor cash register operations. Therefore, the Senior Unemployment Review Judge's decision should be overturned and the commissioner's ruling affirmed.

A. APPELLANT HAS A RIGHT TO EXPECT SCRUPULOUS ADHERENCE BY ITS EMPLOYEES TO ITS MONEY HANDLING PROCEDURES.

The Courts have consistently concluded that cash handling procedures are to be scrupulously followed. *McDonald v. PDQ*, 341 N.W.2d 892, 892 (Minn. Ct. App. 1984); *Dean v. Allied Aviation Fueling Company*, 381 N.W.2d 80, 84 (Minn. Ct. App. 1986). Similarly, Appellant has a right to have its cash handling and cash register policies to be scrupulous followed. *See McDonald*, 341 N.W.2d at 892. Mr. Piece's violation of this policy shows "a substantial disregard for his employer's interests and his duties and obligations to his employer." *See Id.*

The *McDonald* court based its decision on simple facts. Mr. McDonald violated company policy for failing to ring up purchases immediately and was fired. *Id.* The policy was clear and known by Mr. McDonald. *Id.* Recognizing the importance of company policies regarding money, the court stated that all cash handling procedures should be scrupulously followed. *Id.* These policies insure money is not misplaced or stolen. *Id.*

The *McDonald* decision was reaffirmed in *Dean*. 381 N.W.2d at 84. In *Dean* the court found an employee's violation of the airline's policies regarding excess baggage charges to be misconduct. *Id.* Company policy required Mr. Dean,

a skycap, to request and verify each passenger's ticket, check passenger baggage and track excess baggage. *Id.* Skycaps did not even handle money. *Id.* at 84. However, Mr. Dean failed to account for a passenger's excess baggage, violating the company policy that insured the airline received proper reimbursement for excess baggage. *Id.* Mr. Dean was fired and his actions were deemed misconduct. *Id.*

Mr. Pierce violated Appellant's policy insuring all cash register access can be monitored. The senior review judge stated that Mr. Pierce disputed the policy that he was required to use the "no sale" key. This is incorrect. Mr. Pierce did not dispute the fact that the register was to be opened by the "no sale" key in the event of an uncashed transaction. However, Mr. Pierce did testify that a memo was sent out (apparently from the main office) stating that the no-sale slip did not have to be signed. (Tr. at p. 13). However, Mr. Pierce did admit that this directive was inconsistent with the requirements of his on-sight manager, Nancy.

In addition, this policy insures money is not misplace or mishandled. By accounting for all access to its cash registers, Appellant can monitor all cash handling. In the event the register is accessed upon a "no sale," Appellant verifies the reason for access by requiring employees to sign the "no sale" slip.

Mr. Pierce accessed the cash register in violation of company policy. No record of this access was made and it completely undermined the integrity of Appellants cash register policy. Appellant would not have discovered the violations had it not viewed the video tape, which was prompted by the search for

the lost credit card slip. The reason or result of Mr. Pierce's violation is unimportant. What's important is Appellant's right to expect scrupulous adherence to its procedure when employees handling its funds. Both *McDonald* and *Dean* support a finding that Mr. Pierce actions display intentional conduct that seriously violates the standards of behavior the employer has the right to reasonably expect. Therefore, Mr. Pierce's actions constitute misconduct and he is not entitled to unemployment compensation.

B. SINGLE INCIDENTS THAT VIOLATE AN EMPLOYER'S REASONABLE CASH HANDLING POLICIES CONSTITUTE MISCONDUCT.

Single incidents can constitute misconduct when an employee deliberately chooses a course of conduct that is adverse to the employer. *Schmidgall*, 644 N.W.2d at 806. The legislature revised Minnesota Statute § 268.095 subd. 6 in 2003 by stating "a single incident that does not have a significant adverse impact on the employer" does not constitute misconduct.[1] An employee's deliberate, calculated, and intentional refusal to carry out a directive of the employer is misconduct. *McGowan v. Executive Express Transp. Enter., Inc.*, 420 N.W.2d 592, 596 (Minn. 1988). In addition, misconduct includes an employees knowing violation of a reasonable policy. *Schmidgall*, 644 N.W.2d at 806.

Implicit in the *McDonald* cases involving cash handling policies, the courts find all knowing violations of company money policies significantly adverse to the employer and misconduct. Appellant has a reasonable cash register policy

ensuring proper access to its cash registers. "Generally, where an employer makes a reasonable request that does not impose an undue burden on the employee, the employee's refusal to comply with the request constitutes misconduct." *Nieszner v. Minnesota Dep't of Jobs & Training*, 499 N.W.2d 832, 839 (Minn. Ct. App. 1993). Appellant made a reasonable request and Mr. Pierce was not unduly burdened for accessing the cash register with the "no sale" button.

The essence of the senior review judge's decision is that this was a single incident which would not have a significant impact on the employer. As set forth in the cases cited herein, it is undisputed that the Court has recognized the seriousness of controlling employees' access and their behavior as it relates to the employer's funds. Any deviation from required procedure is forbidden.

We suggest that in analyzing the question as to whether a single incident has a substantial impact on an employer, the Court consider the nature of the action. We believe that violating money handling procedures are deemed to be, per se, misconduct. The following illustrates this point:

> What if the employee steals $1.00 from the till. Is this a one-time incident that did not have a serious impact on the employer - - certainly the theft of $1.00 will not have a serious impact on the employer's economic status. What if the theft was for $10.00, $100.00, $1,000.00, $2,000.00, etc.

---

[1] The "single incident" line of cases do not deal with employer's policies regarding money Cases involving money policies follow the *McDonald* line of cases.

It seems clear that each of these single incidents have a serious impact on the employer. Accordingly, we submit that the rule should be one violation of cash handling procedures is deemed to be misconduct as it must be construed to have a serious impact on the employer. Thus, Mr. Pierce's knowing violation of Appellant's cash register policy constitutes employee misconduct.

CONCLUSION

Mr. Pierce's actions display intentional conduct that seriously violates the standards of behavior Appellant has the right to reasonably expect for its cash register policies. A single incident involving money handling procedures has a serious adverse impact on the employer even though there is no economic impact. This alone is consistent with the courts decision in *McDonald* and *Dean*. Therefore, the Senior Unemployment Review Judge's decision should be overturned and the commissioner's ruling affirmed.

PETERSON FRAM & BERGMAN, P.A.

Dated: February 15, 2006 By:

Warren E. Peterson, Atty. Lic. No. 86423
50 East Fifth Street, Suite 300
St. Paul, MN 55101
Telephone: 651-291-8955

Attorney for Appellant

CERTIFICATE PURSUANT TO RULE 132.01

Warren E. Peterson, being first duly sworn upon oath, does hereby depose and state that: This Brief of Appellant complies with the word count limit set forth in Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure. The Brief of Appellant was prepared utilizing Microsoft Word, and consists of 2,338 words, less than the 14,000 words permitted under the Rule. This Brief of Appellant further complies with the typeface requirement of the Rules, utilizing Times New Roman typeface and 13 point font.

PETERSON FRAM & BERGMAN, P.A.

Dated: February 15, 2006 By:

Warren E. Peterson, Atty. Lic. No. 86423
50 East Fifth Street, Suite 300
St. Paul, MN 55101
Telephone: 651-291-8955

Attorney for Appellant

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).