

No. A05-2470

State of Minnesota
In Court of Appeals

DI MA CORPORATION (1992),

Relator,

vs.

LEE A. PIERCE,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

Warren E. Peterson (#86423)
PETERSON, FRAM & BERGMAN, P.A
50 EAST 5TH STREET, SUITE 300
ST. PAUL, MINNESOTA 55101-1197
(651) 290-6901
Attorney for Relator-Employer

Lee A. Pierce
#4 CORDONIZ COURT
LOS LUNAS, NEW MEXICO 87031
(505) 401-1664
Respondent-Applicant -Pro se

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

TABLE OF CONTENTS

I. LEGAL ISSUE1

II. STATEMENT OF THE CASE.....1

III. STATEMENT OF FACTS2

IV. ARGUMENT3

 A. SUMMARY OF ARGUMENT3

 B. STANDARD OF REVIEW3

 C. DISQUALIFICATION FROM UNEMPLOYMENT BENEFITS WHEN DISCHARGED
 ONLY IF BECAUSE OF EMPLOYMENT MISCONDUCT.....4

V. CONCLUSION.....9

APPENDIX.....11

TABLE OF AUTHORITIES

CASES

Colburn v. Pine Portage Madden Bros., Inc., 346 N.W.2d 159 (Minn. 1984) -----4

Houston v. International Data Transfer Corp., 645 N.W. 2nd 144 (Minn. 2002) --5

Lolling v. Midwest Patrol, 545 N.W.2d 372 (Minn. 1996)-----4

Markel v. City of Circle Pines, 479 N.W.2d 382 (Minn. 1992) -----3

Ress v. Abbott Northwestern Hosp., Inc., 448 N.W.2d 519 (Minn. 1989) -----4

Scheunemann v. Radisson South Hotel, 562 N.W.2d 32 (Minn. App. 1997)-----4

Schmidgall v. FilmTec Corp., 644 N.W.2d 801 (Minn. 2002)-----3, 4

Whitehead v. Moonlight Nursing Care, Inc., 529 N.W.2d 350 (Minn. App. 1995) 3

STATUTES

Minn. Stat. § 268.095, subd. 4 (2004)-----4

Minn. Stat. § 268.095, subd. 6 (2004)-----5

Minn. Stat. § 268.105, subd. 7(a) (2004)-----2

OTHER AUTHORITIES

Laws 2004, Ch. 183, sec. 64-----4

RULES

Minn. R. Civ. App. P. 115 -----2

I. LEGAL ISSUE

Employees who are discharged due to employment misconduct are disqualified from receiving unemployment benefits. A single incident that does not have a significant adverse impact on the employer is specifically exempted from the definition of misconduct. Did Lee A. Pierce commit employment misconduct by using the wrong procedure to open the employer's cash register on one occasion, where no records went missing, nothing was taken, and there was no suggestion that he did so for any reason other than an error?

II. STATEMENT OF THE CASE

This case involves whether Lee A. Pierce is entitled to unemployment benefits. Pierce established a benefit account with the Minnesota Department of Employment and Economic Development. A department adjudicator initially determined that Pierce was discharged for employment misconduct, and was disqualified from receiving benefits. (D1)¹ Pierce appealed that determination, and a de novo hearing was held. A department unemployment law judge reversed the initial determination, holding that Pierce was discharged for reasons other than employment misconduct. Upon further appeal by Di Ma, a senior unemployment review judge, Lee B. Nelson, issued the final agency decision, affirming the unemployment law judge and finding that Pierce was discharged for reasons other

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

than employment misconduct and was disqualified from receiving benefits.
(Appendix to Department's Brief, A1-A3)

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

III. STATEMENT OF FACTS

Lee A. Pierce worked for Di Ma at its adult novelty store from May 2001 until April 14, 2005. (T.6-7) The general manager was Mark Van Gelder. (T.2)

When employees at the store needed to open the cash register, the procedure was to use the no-sale key, and then to initial the register slip. (T.8) There was also a manual release switch to open the cash drawer without using the no-sale key, but the correct procedure was to use the no-sale key. (T.8)

On the night of April 14th, 2005, at approximately 1:00 AM, Pierce was working with a new employee. (T.9) The new employee was setting up her till for the beginning of a shift and realized that a credit-card slip was missing. (T.12) In helping to look for the lost slip, Pierce used the manual switch to pop the drawer open, purely for the purpose of looking for the lost slip, which was not found. (T.12) Later, Van Gelder reviewed surveillance tapes because of the lost credit card slip, and when he saw that Pierce had opened the drawer with the manual switch, he discharged Pierce. (T.12) This incident was the only reason for the discharge. (T.12)

IV. ARGUMENT

A. SUMMARY OF ARGUMENT

The legislature has provided by statute that a single incident without a significant adverse impact on the employer is not employment misconduct. There is no dispute that this is a single incident. The only issue is whether using the wrong method to open a drawer while helping to look for a missing credit card slip, in and of itself, irrespective of anything else, has a significant adverse impact on the employer. It does not. This was not misconduct.

B. STANDARD OF REVIEW

The scope of the court's review in unemployment insurance cases is limited. It is a very narrow scope of review. *Markel v. City of Circle Pines*, 479 N.W.2d 382, 383-84 (Minn. 1992). The senior unemployment review judge's factual findings are reviewed in the light "most favorable to the decision and [the court] will not disturb them as long as there is evidence that reasonably tends to sustain those findings." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

When witness credibility and conflicting evidence are at issue, the court defers to the senior unemployment review judge's ability to weigh the evidence and make those determinations. It does not weigh the evidence on review. *Whitehead v. Moonlight Nursing Care, Inc.*, 529 N.W.2d 350, 352 (Minn. App. 1995).

The courts exercise independent judgment on issues of law. *Ress v. Abbott Northwestern Hosp., Inc.*, 448 N.W.2d 519, 523 (Minn. 1989). The issue of whether an employee committed misconduct, and the senior unemployment review judge's determination of that issue, is a mixed question of fact and law. *Schmidgall, supra* at 804, 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. DISQUALIFICATION FROM UNEMPLOYMENT BENEFITS WHEN
DISCHARGED ONLY IF BECAUSE OF 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)² 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.

² Under Laws 2004, Ch. 183, sec. 64, the 2004 amendments apply.

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."³

Di Ma rests its argument on case law demonstrating that an employer has the right to expect scrupulous adherence to procedure in the handling of money.⁴ Certainly, this is the case. However, it does not end the inquiry. It is circular to suggest, as Di Ma does, that because an employer has the right to expect something, the failure to do that thing automatically has a significant adverse impact on the employer. Were that the case, there would be no reason for the exception for single incidents to exist.

³ The statutory amendments effective August 1, 2003 overturned the analysis set out in *Houston v. International Data Transfer Corp.*, 645 N.W. 2nd 144 (Minn. 2002), replacing that analysis with an objective standard.

⁴ The statutory provision in question was adopted subsequent to the Court’s indication of the rights of an employer to that expectation. Regardless, the Department does not suggest that the legislature intended to abrogate the Court’s pronouncement.

Irrespective of anything else in the definition, the legislature has made it the law that a single incident that does not have a significant adverse impact on the employer is not employment misconduct. As stated above, this is obviously a single incident; the only question is whether it had a significant adverse impact.

Not only is there no significant adverse impact on the employer in this case, but this is precisely the type of case for which the statutory language was clearly created. There was no harm to the employer from Pierce momentarily popping the drawer open to see if the missing slip was stuck in the drawer somewhere. It was an error. He did not do precisely as he had been told to do, and that is what makes it an “incident” in the first place. But Di Ma presents no argument as to what the impact is, other than to repeat the assertion that money-handling, as a general matter, is important and employers have the right to expect great care. Again, that addresses the matter of the employer’s reasonable expectations, but it does nothing to address the *impact* of an isolated violation by an employee of nearly four years, where everyone agrees that the only thing of any significance arising from the incident was the missing credit-card slip, which was missing before Pierce opened the drawer.

There is no claim here that Pierce did anything intentionally dishonest. There is certainly no useful analogy between this issue and theft, as Di Ma’s brief attempts to argue. There is no theft here. There is no money missing. There is no accusation that Pierce was attempting to do anything other than help another employee find a credit-card slip. He was not trying to help her avoid

embarrassment by covering her mistake; he was trying to help her avoid embarrassment by helping her actually fix the problem and find the missing slip.

It is telling that in a brief in which the entire issue is the presence or absence of a significant adverse impact on the employer, Di Ma never states clearly what it believes that the significant adverse impact is. It explains what the importance of its procedures are, in that proper procedure “insures money is not misplace [*sic*] or mishandled.” (Rel. Br. 8) Here, money was not misplaced or mishandled as a result of Pierce’s mistake. The notion that a one-time manual opening of a cash register to peek in and see if a missing slip is stuck in the drawer “completely undermined the integrity of Appellants cash register policy” (Rel. Br. 8) is absurd. A single, apparently completely innocent slip-up that has absolutely no effect on anything at any time does not completely undermine the integrity of a policy. The reason Di Ma “would never have discovered the violations had it not viewed the video tape” is that the incident made absolutely no difference. It is precisely the lack of any impact at all, significant or otherwise, that would have rendered this particular mistake so completely undetectable.

Di Ma states, “The reason or result of Mr. Pierce’s violation is unimportant.” (Rel. Br. 9) The statute says otherwise, in plain language that the department has no authority to ignore. The reason or result is very important, and in a case involving a single incident, it makes the difference between a finding of misconduct and a finding of no misconduct, as it did here. If there is no significant

adverse impact on the employer from a single incident, there is no misconduct. That is the case here.

Somehow, Di Ma reads into past cases involving cash handling a finding that “all knowing violations of company money policies significantly adverse to the employer and misconduct.” (Rel. Br. 9) Those cases did not address that issue. They addressed what employers have a right to expect. Those cases provide a clear answer in favor of a finding of misconduct in a case where the courts find that an employee habitually ignored cash-handling policies, but claims, for instance, that it didn’t matter, or that he was always very careful in spite of ignoring policies. There, the cash-handling cases clearly indicate that “scrupulous adherence” can be expected, and misconduct will be found. But where there is a *single incident* that motivates an employer to fire an employee, the legislature dictates that if the single deviation from policy has absolutely no effect on anything, as it did here, then there is no misconduct.

Ultimately, Di Ma states, “We believe that violating money-handling procedures are deemed to be, per se, misconduct,” and uses a slippery-slope argument involving theft of increasing amounts of money to support its argument. As stated above, intentional theft presents a completely different question than an employee using the wrong button to open a drawer. Theft is not misconduct because it is a violation of cash-handling policies; it is misconduct because it is *theft*. How large of a theft is “significant,” and whether there is a de minimis

exception where theft is concerned, are questions that may be interesting for another day, but have no application here.

There is no dispute as to what happened in this case. An employee of nearly four years made a single deviation from policy that made no difference to the employer in any terms it can articulate, except by repeating that its policy was violated. If making an error were itself a significant adverse impact on the employer, the statutory language at issue would be meaningless. Pierce made a mistake; he does not dispute that, and neither did the senior unemployment review judge. But under the statute, not all mistakes are misconduct. This mistake was not.

V. CONCLUSION

The senior unemployment review judge correctly concluded that Pierce's behavior was not employment misconduct under the statute.

The department respectfully requests that the Court affirm the agency decision.

Dated this 15th day of March, 2006.



Linda A. Holmes (# 027706X)

Department of Employment and
Economic Development
1st 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).