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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0088**

Loretta Day,  
Relator,

vs.

Summit Childcare Center Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed April 8, 2008  
Affirmed  
Lansing, Judge**

Department of Employment and Economic Development  
File No. 12474 06

Loretta Day, 3200 Oakland Avenue, Apt. 3, Minneapolis, MN 55407 (pro se relator)

Summit Childcare Center Inc., 1015 Olson Memorial Highway, Minneapolis, MN 55405  
(respondent)

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Development)

Considered and decided by Lansing, Presiding Judge; Ross, Judge; and Johnson,  
Judge.

## UNPUBLISHED OPINION

LANSING, Judge

By writ of certiorari, Loretta Day appeals an unemployment law judge's determination that she was discharged from her employment at a childcare center for actions that constituted employment misconduct and is therefore disqualified from receiving unemployment benefits. Because substantial evidence supports the determination that Day was discharged for violating the childcare center's policy by twice using physical force to correct a child's behavior, we affirm.

### FACTS

Summit Childcare Center Inc. employed Loretta Day as a childcare worker from March 2005 to July 2006. Summit discharged Day on July 18, 2006, after receiving a letter from a parent reporting that Day had used physical force to restrain a three-year-old child at naptime by placing her hand on the child's neck and holding her down on her cot. Day applied for unemployment benefits. An agency acting on behalf of Summit failed to provide information on Day's separation from employment, and a Minnesota Department of Employment and Economic Development adjudicator found that employment misconduct had not been established. Summit appealed and requested a hearing.

At the evidentiary hearing, Summit's executive director testified that Day had, in many respects, performed her job well, but incidents during her employment prompted a series of written warnings, reprimands, and suspensions for neglecting children under her care and for using physical force to correct the children's behavior. The executive director said that she had tried to help Day work through her employment problems but

that Summit no longer had a choice and was compelled to discharge Day in response to the safety concerns of the parents.

Two parents of children who were enrolled at Summit testified to incidents of inappropriate physical force. The parent of the three-year-old child who was restrained at naptime testified that, in July 2006, her child reported that Day choked her to make her lay down because she was playing around on her cot during naptime. The parent said that the child's report of the incident had been consistent when she repeated it to her grandmother and to Summit's executive director. Another parent testified that when he picked up his child from Summit in December 2005, he saw Day separate two scuffling children and then slap one of the children on the hand.

The "choking" incident was confirmed by other testimony. The executive director testified that after she received the parent's report, she reviewed the videotape from the room's surveillance camera. The videotape showed Day "forcibly putting her hands on the child" by "grab[bing] this child and hold[ing] her hand around her neck."

A Summit lead teacher from the pre-kindergarten class also testified that on May 24, 2006, she reported an incident in which she saw Day pick a child up and "slam her down to the ground." The teacher's report was part of a series of exhibits introduced at the hearing. The remaining exhibits included specific reports stating that Day had left children alone in a room or otherwise failed to supervise children in her care.

Day testified and denied that she had used physical force to correct any child's behavior. She acknowledged that she occasionally awakened "hard sleepers" by gently shaking them or rolling them off the cot. She also said that she had separated two

children in December 2005 after one bit the other, but she had not slapped a child's hand. Day questioned the credibility of Summit's witnesses and claimed that she was discharged because of a personal conflict with another employee.

The unemployment law judge (ULJ) concluded that Day was discharged because of employment misconduct. The ULJ found that Summit had a policy prohibiting the use of physical force to correct a child's behavior and that Day "knew this policy." The ULJ found that Day had received warnings for neglecting children under her care and had received a written warning and suspension for slapping a child's hand on December 9, 2006. The ULJ also found that in mid-July 2006, Day "forced a child back down on[] her cot by placing her hand on the child's neck."

Day filed a request for reconsideration and submitted letters as character references. The ULJ affirmed the disqualification. Day now petitions, by writ of certiorari, for review of the order of affirmation.

## **D E C I S I O N**

We review an unemployment law judge's (ULJ) decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence in view of the entire record. *See* Minn. § 268.105, subd. 7(d) (2006) (providing bases on which this court may reverse or modify ULJ's decision). Day's argument for reversal is based primarily on whether substantial evidence supports the ULJ's determination that she was discharged for misconduct.

Employment misconduct is any intentional 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.” Minn. Stat. § 268.095, subd. 6(a)(1) (2006). Employment misconduct is also negligent or indifferent conduct, on the job or off the job, that demonstrates “a substantial lack of concern for the employment.” *Id.*, subd. 6(a)(2) (2006). An employee’s refusal to abide by an employer’s reasonable policies and requests is employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). A discharge for misconduct results in disqualification from unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006).

The determination of whether specific actions equate to employment misconduct is a question of law, subject to de novo review. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). Whether the employee engaged in these actions is a factual question. *Schmidgall*, 644 N.W.2d at 804. We review a ULJ’s factual findings in the light most favorable to the decision. *Jenkins*, 721 N.W.2d at 289. Our deference to the ULJ’s determination also extends to credibility assessments. *See Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996) (deferring to credibility assessment).

The ULJ based the employment-misconduct decision on the executive director’s testimony about the complaint letter; the executive director’s previous written warnings issued to Day; the executive director’s review of a videotape that showed Day holding the child down on a cot; testimony of the parent on her child’s account of the “choking” incident and her testimony that the child was consistent in her reports about the incident; testimony of another parent who observed Day slap a child’s hand; testimony of a

Summit lead teacher who witnessed Day use physical force to correct a child's behavior; and exhibits that included written warnings and complaints.

The testimony of Summit's witnesses and the written warnings submitted as exhibits provide substantial evidence supporting the ULJ's decision.

Day challenges the credibility of Summit's witnesses and argues that she was discharged because of a personal conflict with another employee. Although Day's testimony and the testimony of the other witnesses provide conflicting accounts, the ULJ specifically stated that his decision was based on credibility determinations and further stated that Summit's evidence and the testimony of Summit's witnesses was more credible than Day's denials. *See* Minn. Stat. § 268.105, subd. 1(c) (2006) (requiring that “[w]hen the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the [ULJ] must set out the reason for crediting or discrediting that testimony”).

Day also argues that the ULJ should have considered character references submitted with her request for reconsideration. The ULJ found that Day had not shown good cause for failing to provide the character evidence at the evidentiary hearing. *See Id.*, subd. 2(c)(1) (2006) (conditioning reconsideration on party's showing good cause for not having previously submitted evidence). The ULJ also found that even taking character evidence into account, the result would be the same. *Id.* (conditioning reconsideration on party's showing that evidence would change outcome). The ULJ's findings on the reconsideration request are supported by the record.

Based on the substantial evidence contained in the entire record, the ULJ was justified in determining that Day was terminated for employment misconduct. Day's conduct constituted a violation of behavior standards that the daycare facility justifiably expected from their childcare workers—refraining from using physical force to correct or punish a child's behavior. Refusal to abide by this policy was employment misconduct.

**Affirmed.**