STATE OF MINNESOTA
IN COURT OF APPEALS
A10-555

Alex Chhoun,
Relator,

vs.

Lake Region Mfg., Inc.,
Respondent,

Department of Employment
and Economic Development,
Respondent.

Filed December 21, 2010
Affirmed
Crippen, Judge[*]

Department of Employment and Economic Development
File No. 23813693-3

Paul W. Onkka, Jr., Southern Minnesota Regional Legal Services, Shakopee, Minnesota (for relator)

Pamela M. Harris, Martin and Squires, P.A., St. Paul, Minnesota (for respondent Lake Region Mfg., Inc.)

Amy R. Lawler, Kathryn Short (certified student attorney), Department of Employment and Economic Development, St. Paul, Minnesota (for respondent Department of Employment and Economic Development)

Considered and decided by Lansing, Presiding Judge; Minge, Judge; and Crippen, Judge.

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[*] 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

CRIPPEN, Judge

Relator challenges an employment misconduct determination, contending that the unemployment law judge (ULJ) failed to articulate a valid basis for his decision and erred by rejecting relator's claim that the conduct constituted inadvertence. Because the ULJ's articulation was adequate and relator's conduct was negligent rather than inadvertent, we affirm.

FACTS

Relator Alex Chhoun worked in a clean-room environment for respondent Lake Region Manufacturing, which assembles medical components. Respondent's policies specifically prohibit clean-room operators from wearing clothing containing fuzz or glitter in order to maintain a noncontaminated environment. On November 4, 2009, relator wore a shirt to work that depicted a glitter drawing. This policy violation subsequently cost respondent approximately $40,000 to remedy. Relator's employment was terminated on November 10 based solely on the November 4 glitter incident.

Determining that relator's actions constituted employment misconduct, the agency denied relator's unemployment compensation benefits application, which relator then appealed. At the hearing before the ULJ, relator testified that she did not notice glitter on the shirt when she bought it or when she chose to wear it to work. In December 2009, the ULJ issued a decision affirming the denial of relator's application on grounds that her negligent conduct constituted employment misconduct. Upon reconsideration early in

2010, despite acknowledging that he initially applied an older version of the employment misconduct statute, the ULJ affirmed the decision under the current statutory language.

D E C I S I O N

If a ULJ's decision was affected by an error of law, unsupported by substantial evidence in the record, or otherwise arbitrary or capricious, we are authorized to reverse or modify the decision. Minn. Stat. § 268.105, subd. 7(d) (2008).

Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). The occurrence of a particular act is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). A ULJ's factual findings are reviewed in the light most favorable to the decision and will not be disturbed on appeal if there is evidence that reasonably tends to sustain those findings. *Schmidgall*, 644 N.W.2d at 804. But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat § 268.095, subd. 4(1) (2008). Employment misconduct is "intentional, negligent, or indifferent conduct"; it must be a "serious violation of the standards of behavior the employer has the right to reasonably expect of the employee" or otherwise display a "substantial lack of concern for the employment." *Id.*, subd. 6(a) (Supp. 2009). Employment misconduct is not "inefficiency or inadvertence," "simple unsatisfactory conduct," "poor performance because of inability

or incapacity," or "good faith errors in judgment if judgment was required." *Id.*, subd. 6(b) (Supp. 2009).

1.

Relator argues that the ULJ misapplied the misconduct statute by failing to articulate a valid basis for his decision other than the adverse impact of this single incident. This presents a question of law, which we review de novo.

In his initial decision, the ULJ erroneously applied the 2008 version of the employment misconduct statute, which states that a single act does not constitute misconduct if it "does not have a significant adverse impact on the employer." Minn. Stat. § 268.095, subd. 6(a) (2008). The ULJ decided that the single incident rose to the level of misconduct solely because of its adverse impact.

In his decision on reconsideration, the ULJ noted the error in the initial decision and cited the 2009 version of the statute, which says that if there was only a single incident that it "is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct . . . ." *Id.*, subd. 6(d) (Supp. 2009). But the ULJ decided that relator's conduct constituted employment misconduct even under the 2009 version of the statute, which did not require measuring only adverse impact.

Relator contends that the ULJ did not articulate a particular reason to support his conclusion under the current statute, and that therefore he implicitly relied on the same basis as his initial decision. But the ULJ recited the current statutory mandate requiring consideration of whether the misconduct involved only a single incident and he

acknowledged that this consideration was not complete upon examining only the adverse impact of relator's conduct. The ULJ's order further detailed the higher duty of care that was appropriate when working in the clean-room environment and relator's knowledge of respondent's related policies.

The plain language of the 2009 version of Minn. Stat. § 268.095, subd. 6(d), gives the ULJ broader discretion to find misconduct from a single incident than the previous version of that statute but does not prohibit the ULJ from giving weight to significant adverse impact. *See* Minn. Stat. § 645.08(1) (2008) (requiring that statutory terms be given their plain meaning unless specifically defined). The glitter incident resulted in significant actual harm, requiring respondent to evacuate the facility, send employees home, and bring in cleaning crews, at a cost of approximately $40,000. *Cf. Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 776 (Minn. App. 2008) (holding that a single incident can constitute misconduct even if the adverse impact did not lead to "actual resulting harm"), *review denied* (Minn. Oct. 1, 2008). Moreover, as the ULJ determined, respondent reasonably imposed higher expectations on its clean-room employees, and made those expectations clear. Relator worked in a clean-room environment for almost four years and attended annual training sessions regarding contamination prevention, including a session two weeks before the glitter incident. Relator knew or should have known of the policies prohibiting glittered shirts and the potential for significant harm. We affirm the ULJ's denial of relator's unemployment benefits application.

2.

Relator also argues that the ULJ erred by determining that her conduct did not constitute inadvertence under Minn. Stat. § 268.095, subd. 6(b)(2), which expressly excludes "inadvertence" from the definition of employment misconduct.

In *Lawrence v. Ratzlaff Motor Express Inc.*, relator truck driver argued that the loss of his driver's license, which led to his employment termination, was unintentional and therefore not employment misconduct; he contended that he was unaware that his income-withheld child support payments were insufficient or that he could lose his license for nonpayment. 785 N.W.2d 819, 821-22 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010). We rejected that argument, concluding that the evidence established that relator knew or should have known that his payments were insufficient. *See id.* at 823. Similarly, here, the record establishes that relator was aware of respondent's policy prohibiting glittered clothing, and thus supports the ULJ's findings regarding relator's knowledge.

It is reasonable for an employer to expect a higher standard of care from employees working on medical devices in a clean-room environment, and we give some deference to the standard of care established by medical field employers. *Cf. MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 717 (Minn. 2008) (explaining that the standard of care in medical malpractice claims is based on the standard of care recognized by the medical community). Under these circumstances, we affirm the ULJ's

determination that relator's failure to follow reasonable higher expectations was negligent and constituted employment misconduct.

Affirmed.