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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0674**

Craig Venske,
Relator,

vs.

Yesterdays Gone, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 19, 2013
Reversed
Klaphake, Judge ***

Department of Employment and Economic Development
File No. 29018689-3

Craig Venske, Randall, Minnesota (pro se relator)

Yesterdays Gone, Brainerd, Minnesota (respondent employer)

Lee B. Nelson, Amy R. Lawler, Minnesota Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Larkin, Presiding Judge; Kalitowski, Judge; and
Klaphake, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KLAPHAKE, Judge

This is a certiorari appeal from a decision by an unemployment law judge (ULJ) that relator Craig Venske was ineligible for unemployment benefits because he had been discharged for employment misconduct after submitting inaccurate food-cost estimates for a private party held at respondent-employer's restaurant. Relator argues that his conduct was not employment misconduct because he did the job to the best of his ability. Because relator's conduct relates to his inability to perform the work required of him, we reverse.

DECISION

In unemployment cases, we may reverse, remand, or modify a decision of a ULJ if, among other reasons, the decision is unsupported by substantial evidence, affected by an error of law, or is arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2012). This court reviews questions of law de novo but will not disturb findings of fact unless unsupported by substantial evidence. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011); *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Employment misconduct means “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2012).

Whether an employee committed misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* This court reviews the ULJ's factual findings "in the light most favorable to the decision" and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

The ULJ found that relator's job duties as kitchen manager for respondent Yesterdays Gone, LLC, a restaurant and bar, included composing food-cost estimates, called "party proposals," for private parties held at the restaurant. Relator provided a party proposal that his supervisor determined to be inaccurate; in response to his supervisor's request to recalculate the party proposal, relator inaccurately recalculated the party proposal twice. The ULJ concluded that relator's "indifferent" conduct and "failure to make more of an effort to get accurate numbers was a serious violation of the standards of behavior an employer has a right to reasonably expect of an employee." Thus, the ULJ concluded that relator was discharged for employment misconduct.

Relator contends that his conduct was not employment misconduct because he "did the job to the best of his ability," and he "admitted his shortcomings in his experience and requested assistance with creating quotes for private parties which was not provided." We agree. Conduct that was the consequence of inability or "simple

unsatisfactory conduct” is not employment misconduct. Minn. Stat. § 268.095, subd. 6(b)(3), (5) (2012).

Here, the record reflects that the duty of providing food-cost estimates entailed “look[ing] up the food costs, find[ing] the costs of what it would take to feed [a] party, and then com[ing] up with a price for the food for the party to charge the customer.” In accomplishing this task, relator was required to access a distributor’s website and “look up the cost of the food” to provide an accurate proposal. But the record also indicates that this task required specific training and experience to properly execute. Relator had no experience in making food-cost estimates, and relator received no training to do so.

Relator testified that he contacted the distributor’s representative to obtain price quotes because the distributor’s website did not include an accurate price range and because “each food rep . . . make[s] their own prices within a certain range.” Relator also testified that he told his employer in his interview that he could (1) improve their food quality, (2) lower their food costs, and (3) reduce the down time of the kitchen staff. There is nothing in the record indicating that he told his employer that he was adept at making food-cost estimates for private parties. Without any evidence that relator had experience or training to calculate these food-cost estimates, relator’s conduct, as a matter of law, was a consequence of his “inability” and constituted “simple unsatisfactory conduct” and does not rise to the level of employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(3), (5) (stating that simple unsatisfactory conduct or conduct that is the consequence of an inability to perform a job is not employment misconduct). The

ULJ erred by concluding that relator was discharged for employment misconduct. We therefore reverse.

Reversed.