STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1612

Marlene Typpo,
Respondent,

vs.

Goldstein Law Office, Inc.,
Relator,

Department of Employment and Economic Development,
Respondent.

Filed June 10, 2013
Affirmed
Cleary, Judge
Smith, Judge, dissenting

Department of Employment and Economic Development
File No. 2949303-3

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Marlene Typpo, St. Louis Park, Minnesota (respondent)

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Considered and decided by Smith, Presiding Judge; Cleary, Judge; and Huspeni, Judge.*

* 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

CLEARY, Judge

In violation of relator's mail policy, respondent attempted to retrieve a magazine from the incoming mail prior to its distribution. In doing so, respondent engaged in a brief struggle with a co-worker. After respondent's employment was terminated, the Minnesota Department of Employment and Economic Development concluded that respondent's actions constituted misconduct, and thus denied her unemployment benefits. On appeal, the unemployment law judge (ULJ) concluded that respondent's conduct was merely unsatisfactory, ruling that she is eligible for unemployment benefits. Because respondent's physical behavior in struggling for the mail does not establish misconduct, we affirm.

FACTS

Relator Goldstein Law Office (GLO) employed respondent Marlene Typpo as a paralegal. In January 2012, GLO instituted a new mail policy because employees, including Typpo, had occasionally taken pieces of just-delivered mail before attorney Charles Goldstein (Goldstein) was able to review it. This was problematic because GLO's mail often contained confidential and time-sensitive information. A memorandum regarding the new mail policy was e-mailed to GLO employees, including Typpo, and provided:

> Per [Goldstein], we are going to begin following a new procedure for all mail that the office receives. As soon as the mail comes in each day, the person working at or covering the front desk is to bring all mail to [Goldstein] right away. He

> will then direct where it is to go next. This will ensure that he sees everything that comes in each day as soon as it arrives.

The new mail procedure was also posted on a sign at the front desk: "New Mail Procedure: As soon as mail comes in, bring to [Goldstein] for review—he will direct where it goes next. This will ensure that he sees everything that comes in each day as soon as it arrives." Typpo admitted that she was aware of the mail policy.

On March 9, 2012, law clerk C.A. and a fellow law clerk were at the front desk when the mail was delivered. After C.A. retrieved the mail in order to carry it to Goldstein's office, Typpo entered the front desk area and grabbed hold of the mail by "lung[ing] forward" over the desk so that the top portion of her body was on the desk. However, C.A. held fast to the mail and a "struggle . . . ensued" for approximately 15 seconds. During the struggle, Typpo rifled through the mail while attempting to pull the mail from C.A.'s grip. C.A. held on to the mail and continually repeated that she was required to follow the mail policy and bring the mail to Goldstein. Typpo did not raise her voice when pulling the mail, but the witnessing law clerk described her manner as "very threatening." Eventually Typpo relented, returned to her office, and shut the door.

After the incident, C.A. was "extremely anxious and tense," and felt "assaulted." Typpo, challenging the testimony of C.A. and the witnessing law clerk, asserted that she was holding the mail when C.A. grabbed it from her. She also estimated that the struggle lasted only 5-8 seconds.

When Goldstein returned to GLO from an outside appointment, C.A. immediately reported the incident to him. After discussing what happened with C.A., and later the

witnessing law clerk, Goldstein spoke with GLO's human resources manager. Based on the human resources manager's advice, Goldstein decided to terminate Typpo's employment with GLO. Goldstein made the decision because Typpo's conduct "rose above the level of violating an office policy[,] which is important enough, but rose to a level of basically a physical altercation which [GLO] can't have occur . . . especially when it's causing great fear in [a fellow employee]." The next time that Typpo reported to work, the human resources manager informed Typpo that her employment was terminated.

Typpo subsequently applied for unemployment benefits, but was deemed ineligible because she was discharged for employment misconduct and her actions "displayed clearly a lack of concern for the employer's interests." Typpo appealed the determination of ineligibility and, following a hearing, prevailed on appeal. The ULJ found that "Typpo should have stopped" pulling the mail after C.A. reminded her of the mail policy, and noted that Typpo's actions were "unnecessary and caused apprehension and discomfort among the staff." The ULJ concluded that Typpo's actions, although unsatisfactory, did not rise to the level of misconduct, and therefore Typpo was eligible for unemployment benefits. The ULJ affirmed his decision after GLO sought reconsideration. This certiorari appeal followed.

D E C I S I O N

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Employment misconduct is "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). A knowing violation of an employer's directives, policies, or procedures constitutes employment misconduct because it demonstrates a willful disregard of the employer's interests. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806-07 (Minn. 2002).

Whether an employee engaged in conduct disqualifying that employee from benefits presents a mixed question of law and fact. *Schmidgall*, 644 N.W.2d at 804. Whether an employee committed a particular act is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We review a ULJ's factual findings in the light most favorable to the decision, and they will not be disturbed on appeal if there is evidence that substantially sustains them. *Id.* But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

A.

GLO contends that the ULJ erred by determining that Typpo's struggle for the mail was not misconduct. To support its assertion, GLO relies on *Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 872 (Minn. App. 2011), *review denied* (Minn. Nov. 15, 2011). In *Potter*, this court affirmed the ULJ's conclusion that the relator engaged in employment misconduct by "poking [a] coworker in the ribcage," holding that "employers may reasonably expect employees to refrain from engaging in even single acts of combative physical contact." *Id.* at 878. *Potter* noted that "violence in the

workplace, however minor, is a serious violation of an employer's reasonable expectations." *Id.* at 876.

The ULJ focused on C.A.'s lack of injury: "[C.A.] was not struck or injured by the magazines or any other object, or by Typpo. She did not fall. She did not sustain any injury from, for example, any jarring or loss of balance." But whether C.A. sustained injuries from the altercation is not the pertinent inquiry. *Potter* made no mention of injury sustained from the poking, but recognized that:

> [M]erely poking a coworker in anger is on the least shocking extreme in the range of physically combative workplace conduct. Extreme or not, however, an employee who intentionally physically contacts another in anger engages in employment misconduct; the conduct is "disruptive of the normal employer/employee relationship" and "interferes with the normal operation of a business," . . . adversely affecting the employer.

Potter, 805 N.W.2d at 877 (quoting *Shell v. Host Int'l (Corp.)*, 513 N.W.2d 15, 17 (Minn. App. 1994)). Typpo and respondent Minnesota Department of Employment and Economic Development (DEED) note that, unlike the employee in *Potter*, Typpo did not strike C.A. and Typpo's conduct did not involve physical contact.[1]

We conclude that the present matter is distinguishable from *Potter* and that the evidence in the record substantially supports the ULJ's factual findings. *See Skarhus*, 721 N.W.2d at 344. The record establishes that Typpo approached C.A. and attempted to pull the mail away from her in order to see if a trade magazine to which Typpo

[1] Typpo argues that GLO erroneously characterizes her conduct as a battery. But because the issue of whether Typpo's behavior constituted a civil battery is not before this court, we decline to analyze this issue.

subscribed had arrived. Although the ULJ described Typpo's action to be of an "aggressive nature," lasting "about 15 seconds," he noted that Typpo did not verbally threaten C.A. In *Potter*, the employee's aggressive behavior led to physical contact and was committed in retaliation for a perceived slight. 805 N.W.2d at 877. Here, Typpo resorted to physical behavior because she wanted to read a magazine. Although Typpo exhibited aggression by taking hold of the mail, she did not behave in that manner to intimidate, punish, or harm C.A., but instead did so to access the magazine. There is no evidence that she made physical contact with C.A. This was not, as the dissent alleges, "an act of workplace violence." The ULJ's conclusion that Typpo's physical behavior did not establish employment misconduct is supported by the findings and is not an error of law.

B.

We next address whether Typpo's violation of GLO's mail policy constituted misconduct. As a preliminary matter, it is difficult to separate the physical incident from the mail policy violation. The termination letter discussed the mail policy violation only as it related to the altercation, stating that "[Typpo] struggled for an extended period to take the office's mail "despite the known office policy that all mail was to be provided directly to [Goldstein]." The letter emphasized that, "[t]his policy was reiterated to you by the law clerk (and previously had been placed in writing)." A review of the record reveals that the physical altercation was the primary reason GLO terminated Typpo's employment. Even so, because we concluded that the mail grabbing did not constitute employment misconduct, we review the mail policy violation separately.

DEED concedes that Typpo violated GLO's mail policy, but argues that this violation was insufficient to be deemed misconduct. Minnesota law has established that a knowing violation of an employer's directives, policies, or procedures constitutes employment misconduct. *See Schmidgall*, 644 N.W.2d at 806. But there are statutory exceptions to the employment misconduct definition, one of which is "simple unsatisfactory conduct." Minn. Stat. § 268.095, subd. 6(b)(3) (2012). The simple unsatisfactory conduct exception is "reserved for failures to meet basic job performance standards." *Potter*, 805 N.W.2d at 877.

GLO instituted its mail policy to prevent work-related pieces of mail from being misplaced, which is of utmost importance to GLO based on the nature of its business. Here, however, Typpo was not attempting to circumvent the mail policy's overall purpose—ensuring work-related pieces of mail are distributed in an organized manner. She did not attempt to retrieve the mail for the purpose of reviewing some work-related mail before Goldstein did, but for the purpose of reading a trade magazine that she had sent to GLO's address. Although this action violates the mail policy, this single act is insufficient to establish disqualifying misconduct. *See* Minn. Stat. § 268.095, subd. 6(d) (2012) (stating that whether conduct is a single incident is an important fact to consider). It should be noted that, although this single act is insufficient to establish disqualifying misconduct for purposes of denying unemployment benefits, the employer had full authority to discharge the employee for her unsatisfactory performance. In any case, we conclude that the ULJ's decision that Typpo's mail policy violation was not misconduct for purposes of denying unemployment benefits is correct.

Because the facts do not establish that Typpo's physical conduct or mail policy violation warrant the designation of disqualifying employment misconduct, we affirm.

Affirmed.

SMITH, Judge (dissenting)

Because Marlene Typpo committed two acts of employment misconduct sufficient to establish her ineligibility for unemployment benefits, I respectfully dissent.

The ULJ made the following findings:

> Typpo's behavior on March 9 was unsatisfactory. She was aware of the policy, and there was no business reason for her to get the mail before Goldstein. Once [C.A.] reminded her about the policy and expressed an intent to take the mail to Goldstein, Typpo should have stopped. However, [C.A.] was not struck or injured by the magazines or any other object, or by Typpo. She did not fall. She did not sustain any injury from, for example, any jarring or loss of balance. The incident lasted for around 15 seconds and then Typpo relented. Typpo did not utter any threats or engage in verbal abuse. Typpo was motivated by a desire to look at the mail not to traumatize her co-worker.

The majority attempts to distinguish Typpo's physical altercation from that at issue in *Potter*. *See id.*, 805 N.W.2d at 872. As discussed by the majority, *Potter* noted that "violence in the workplace, however minor, is a serious violation of an employer's reasonable expectations." *Id.* at 876. Indeed, the *Potter* court applied this principle when it determined that an employee who poked a co-worker for only an instant had committed employment misconduct. *Id.* at 878.

Potter did not focus solely on the intent of the actor, as the majority does, but instead *Potter* identified that any violence is a serious violation of an employer's reasonable expectations. *See id.* at 876. When viewing Typpo's actions in light of *Potter*, her aggression was an act of workplace violence. In contrast to *Potter*'s instantaneous contact, Typpo engaged in a struggle with C.A. for 15 seconds. After the

event, C.A. was "really frightened and scared for her safety," felt "assaulted," and, because it was "a physical altercation[,] . . . was worried about what might happen" because Typpo was angry. Typpo's lunge over a desk, grasp of held items, and 15-second-struggle combine to constitute an act of workplace violence. Therefore, under *Potter*, Typpo committed workplace misconduct and is not entitled to unemployment benefits.

Violation of Mail Policy

In addition to the physical altercation, Typpo's violation of GLO's mail policy also constituted misconduct sufficient to disqualify her from receiving unemployment benefits. It is well established that a knowing violation of an employer's directives, policies, or procedures constitutes employment misconduct. *Schmidgall*, 644 N.W.2d at 806-07. In the present case, the mail policy was instituted in part because employees, including Typpo, had taken pieces of mail before Goldstein was able to review them. The ULJ found there had been "prior difficulties" with Typpo but that there had been no written warnings or reprimands. Typpo had, however, been made aware of the policy by e-mail and the policy was prominently displayed on a front desk sign.

GLO is a law firm and the practice of law demands diligence in handling communications. *See* Minn. R. Prof. Conduct 1.4(a). Therefore, GLO's substantial interest in maintaining an organized system for mail distribution prompted Goldstein to institute a mail-handling policy. Typpo, admittedly aware of the policy, proceeded to violate the policy. The facts do not support that Typpo's conduct fits into the "simple unsatisfactory conduct" statutory exception to misconduct. *See* Minn. Stat. § 268.095,

subd. 6(b)(3) (2012). An example of "simple unsatisfactory conduct" existed in *Bray v. Dogs & Cats Ltd.*, 679 N.W.2d 182, 185 (Minn. App. 2004). We held that Bray's failure to meet her employer's expectations of turning paperwork in on time, arranging meetings, disciplining workers, and managing schedules was simple unsatisfactory conduct. *Id.* In contrast to the present facts, in *Bray* we "glean[ed] from the record as a whole [that Bray] attempted to be a good employee but just wasn't up to the job and was unable to perform her duties to the satisfaction of the employer." *Id.* Therefore, Typpo's conduct does not meet the simple unsatisfactory conduct exception, which is "reserved for failures to meet basic job performance standards." *See Potter*, 805 N.W.2d at 877.

The majority's position that Typpo's violation did not circumvent the overall purpose of the policy—to protect work-related mail—places employers in the tenuous position of needing to establish that both the plain language and the "overall purpose" of the policy were violated. The mail policy did not dictate that only work-related mail be distributed by Goldstein. Instead it established "a new procedure for *all* mail that the office receives" and noted that "[t]his will ensure that [Goldstein] sees *everything* that comes in each day as soon as it arrives." (Emphasis added.) The majority's diminishment of Typpo's violation because she was searching for a magazine does not change the fact that she violated the policy. If anything, such a violation is more egregious because she was motivated by her desire to engage in leisure reading, rather than an urgency to act on an important work-related matter. In any event, Typpo's policy violation was sufficient to disqualify her from employment benefits.

If we are striving to maintain consistency in our decision making we are, in my opinion, left with the conclusion that either the majority is in error or, alternatively, that *Potter* was incorrectly decided. Based on the reasons discussed in this dissent, I conclude that the ULJ erred in determining that Typpo did not engage in employment misconduct. Therefore, I would reverse.