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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-1833**

Cindy Tomczak,  
Respondent,

vs.

Gearhart, Melanie J.,  
Relator,

Department of Employment and Economic Development,  
Respondent.

**Filed May 12, 2014  
Affirmed  
Crippen, Judge\***

Department of Employment and Economic Development  
File No. 31221008-3

Cindy Tomczak, International Falls, Minnesota (pro se respondent)

Molly J. French, Shermoen & Jaksa, PLLP, International Falls, Minnesota (for relator)

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

Considered and decided by Hooten, Presiding Judge; Ross, 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.

## **UNPUBLISHED OPINION**

**CRIPPEN**, Judge

Relator employer challenges the determination by the unemployment-law judge (ULJ) that respondent applicant was not discharged for employment misconduct. We affirm.

### **FACTS**

Respondent Cindy Tomczak began working for relator Melanie Gearhart, owner of Gearhart Floral and Gifts, in October 2009. In early 2013, Gearhart hired Dawn Monrean as a bookkeeper and gave some of Tomczak's duties to Monrean. Tomczak felt marginalized and confused by this shift and began acting distant. She was not as helpful or friendly as she had been in the past and often had a short, unfriendly tone toward coworkers. Gearhart warned Tomczak about her conduct, but Tomczak continued to be withdrawn and distant. On May 13, 2013, Gearhart discharged Tomczak.

Tomczak applied to the Minnesota Department of Employment and Economic Development (DEED) for unemployment benefits. DEED determined that Tomczak is eligible for benefits. Gearhart appealed. After an evidentiary hearing at which Gearhart, Monrean, and Tomczak testified, the ULJ determined that Tomczak was discharged for reasons other than employment misconduct and therefore is eligible for benefits. Gearhart sought reconsideration, and the ULJ affirmed. This certiorari appeal follows.

### **DECISION**

When reviewing a ULJ's eligibility decision, we may affirm the decision, remand for further proceedings, or reverse or modify the decision if the substantial rights of the

relator have been prejudiced. Minn. Stat. § 268.105, subd. 7(d) (2012). We review the ULJ's factual findings in the light most favorable to the decision and defer to the ULJ's credibility determinations. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). We will not disturb the ULJ's factual findings when the evidence substantially sustains them. *Id.*

An employee is ineligible for unemployment benefits if he or she was discharged for employment misconduct. 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.” Minn. Stat. § 268.095, subd. 6(a) (2012).

Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether the employee committed a particular act is a question of fact, but whether the act constitutes employment misconduct is a question of law, which we review de novo. *Peterson*, 753 N.W.2d at 774.

Gearhart argues that Tomczak committed employment misconduct because she engaged in aggressive, unkind, hostile, and rude behavior, which continued after she had been warned to correct her attitude. The ULJ rejected this characterization of Tomczak's behavior, finding instead that Tomczak was honest, confused, hurt, and withdrawn. The record amply supports the ULJ's finding.

Gearhart testified that Tomczak was “rude” and “nasty” and “hostile.” When the ULJ asked her to explain or give examples of Tomczak’s conduct, however, she did not substantiate those characterizations. Gearhart testified that Tomczak had “negative” body language, a “short” tone, and was not helping with jobs she used to do without being asked. Gearhart testified to an incident in which Tomczak told Gearhart that she would just come to work and perform her assigned tasks, rather than filling various roles as needed, like she had in the past. Gearhart also testified to an incident when Tomczak started to leave while others were still finishing up work for the day. Gearhart asked Tomczak where she was going, Tomczak asked Gearhart if she should stay, and Gearhart—frustrated with Tomczak’s attitude—told her to go. Tomczak substantially agreed with Gearhart’s testimony about these incidents and that she was less friendly toward coworkers than in the past, explaining that she felt marginalized by the changes at the shop and uncertain what her role was. Overall, this record substantially supports the ULJ’s finding that Tomczak’s conduct “is better described as withdrawn, not ‘hostile’ or ‘nasty.’”

While Gearhart may have expected friendlier, more helpful conduct from Gearhart’s employees, on the ULJ’s findings of fact, we agree with its determination that Tomczak’s conduct was not a serious violation of this expectation. Accordingly, Tomczak did not commit employment misconduct.

**Affirmed.**