Unemployment Compensation

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The 2016 Presidential election was full of name-calling, insults, and inappropriate behavior. The workplace can be subject to the same behavior. This year, the Minnesota Court of Appeals has given mixed messages on how much of this behavior is too much such that it constitutes disqualifying misconduct.

Employee's Swearing and Rude, Unprofessional Behavior During Last Year of Her 10-Year Career Did Not Constitute Misconduct

Thurmer v. Attorney Edward R. Shaw, P.A., Dept. of Employment & Economic Development, A16-0050 (Minn. Ct. App., March 7, 2016) (unpublished)

Relator Marcia Thurmer worked as a paralegal at the Edward R. Shaw, P.A. law firm for ten years. By the firm's admission, Thurmer was a good employee until the last year of her employment. In her last year, there were two specific incidents of inappropriate conduct. According to the firm's office manager, Thurmer called her a "f—king a—hole" after the office manager transferred a call to Thurmer but did not identify the caller. This occurred four to ten months before Thurmer's termination. During the last month of Thurmer's employment, Thurmer stormed out of a client meeting. The client's wife expressed concern about why Thurmer was acting "so rude and condescending."

During the unemployment telephone hearing, Thurmer testified that in regards to the client meeting, she was "just taking a break" and that when she returned, she and the clients continued to work on the file and made good progress. Firm employees testified that in general, Thurmer was unable to control her anger which led to outbursts at coworkers and tension in the office. Firm employees also testified that Thurmer missed deadlines and appointments, misplaced client documents, was resistant to working with new technology, and resistant to working on cases other than the bankruptcy cases she traditionally handled. The firm warned Thurmer, in writing, about her behavior.

The Department of Employment and Economic Development found misconduct, disqualifying Thurmer from receiving unemployment benefits. The Minnesota Court of Appeals reversed.

The Court noted that Thurmer's performance issues of "misplaced documents, occasionally missed meetings and deadlines," "reluctancy to work with new technology," and "general mismanagement of her time" does not amount to employment misconduct. The Court wrote, "This conduct was the result of inefficiency, inadvertence, and simple unsatisfactory conduct and does not rise to the level of a 'serious violation of the standards of behavior the employer has the right to reasonably expect of an employee' or show 'a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6 (2014).

The Court found that witnesses could only cite to two specific instances where Thurmer acted in a rude and unprofessional manner: swearing at the office manager and walking out of a client meeting. Because the swearing incident occurred months before the termination and Thurmer's testimony that she and the clients worked well together after Thurmer came back into the room was uncontested, Thurmer's actions did not rise to the level of misconduct.

"Given Thurmer's longtime employment with the firm, the lack of specific evidence in the record, and the remedial nature of chapter 268, we conclude that the ULJ's determination that Thurmer was fired for misconduct was not supported by substantial evidence."

Employer Calling Relator a Racial Slur Did Not Excuse Relator's Reaction

Jourdain/Perpich Extended Care Facility, Inc. v. Dept. of Employment & Economic Development, A16-0050 (Minn. Ct. App., August 22, 2016) (unpublished)

Relator Debra Barrett worked in housekeeping at an extended care facility for 23 years. Barrett had a verbal disagreement with another employee. The argument escalated and the Director of Nursing told Barrett that she needed to go home.

While Barrett was preparing to leave, the Director of Nursing called Barrett a racially derogative term. In response, Barrett punched the Director of Nursing in the head, causing her to hit a copy machine and a chair. She was diagnosed with a concussion. Barrett does not remember punching the Director of Nursing but testified she "lost it" after being picked on at work and being called a racial slur.

The Department of Employment and Economic Development found misconduct, disqualifying Barrett from receiving unemployment benefits. The Minnesota Court of Appeals upheld the finding of misconduct.

The Court noted that it did not condone the Director of Nursing's use of a derogatory racial slur but found employment misconduct citing Minn. Stat. § 268.085, subd. 6(a)(1). The Court remanded the case back to the ULJ to determine whether Relator committed aggravated employment misconduct. Aggravated employment misconduct is "the commission of any act, on the job or off the job, that would amount to a gross misdemeanor or felony if the act substantially interfered with the employment or had a significant adverse impact on the employment." Minn. Stat. § 268.095, subd. 6a(a)(1). Such a finding would subject Relator to cancellation of the wage credits she would have earned from that employment.

Relator's Unprofessional Name Calling and Threats Constituted Misconduct

Jason Brennan v. Lubrication Technologies, Inc.; Dept. of Employment & Economic Development, A16-0088 (Minn. Ct. App., July 18, 2016) (unpublished)

Relator Jason Brennan worked as a chemist in a small office. Over the course of five months, management had spoken to Brennan about his unprofessional behavior. This included insulting another employee and inappropriate phone conversations described as "loud and discouraging to other employees in the office." Management instructed Brennan to go outside if he needed to vent.

A coworker transcribed and reported that during Brennan's phone conversations in May 2015, Brennan spoke unprofessionally. Brennan referred to a former manager as a "slippery son of a b-tch," stated the company "should actually think before we shoot at the hip," stated he could write a 30-page thesis "about how much stupidity is here" and that he would tell management to "eff off" if they asked

him for help.

The company gave Brennan a written performance warning outlining that the use of profanity and disparaging remarks lacked the level of professionalism the company expected and violated the company's employee conduct requirement. The day after Brennan received the written warning, a coworker reported that the previous day he overheard Brennan say during a phone conversation that a prior manager was a "worthless f---ing manager, and a d-ckbag of a tech director." This coworker reported that Brennan had stated, "Who says I can't manage my medication, I just take too much of it. Keeps me from killing all you f---s, I think I would just kill everyone." Another coworker also reported Brennan's call. Following these reports, the company terminated Brennan.

The Department of Employment and Economic Development found misconduct, disqualifying Brennan from receiving unemployment benefits. DEED found that Brennan's comment about killing everyone was threatening and, even if it was not threatening, Brennan's repeated offensive remarks in the workplace, on their own, constituted misconduct.

The Minnesota Court of Appeals upheld the finding of misconduct. The Court found that Brennan's statement about killing his coworkers was threatening. Brennan's comments concerned two coworkers enough to report the conversation. The coworkers testified that Brennan sounded angry and serious during the conversation.

The Court found that Brennan's comment about killing his coworkers amounts to employment misconduct even if it is not interpreted as threatening. "An employee's conduct can constitute employment misconduct – even if the conduct occurs as a single incident – if the employee "deliberately chooses a course of conduct that is adverse to the employer," *Schmidgall v. Filmtec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002) or, put differently, "is in willful disregard of an employer's interest . . . [in the] standards of behavior which the employer has a right to expect of his employee." *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981).

The Court further noted that prior to termination, the company had warned Brennan about his use of profanity and his negative actions in the workplace. The Court noted that despite these warnings, Brennan disregarded his manager's requests by criticizing the company, its management, making a threatening statement, and making all of the statements at a volume his coworkers could overhear. "His continued conduct constituted multiple violations for the company's rules that he had been warned not to violate. We therefore conclude that Brennan's conduct constituted employment misconduct."