IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Spectrum Care LLC, Inc.,	)	
	)	
Petitioner,	)	Supreme Ct. No. 20060018
	)	
v.	)	Civil No. 04-C-0071
	)	
Marlene F. Stevick and,	)	
Job Service North Dakota	)	
	)	
Respondents.	)	

APPEAL FROM THE DISTRICT COURT
WARD COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT

HONORABLE WILLIAM W. MCLEES

BRIEF OF RESPONDENT-APPELLEE

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STATEMENT OF THE ISSUE

Marlene Stevick was employed to coordinate activities for residents of Spectrum Care's long-term care facility. She was not required to monitor an emergency call system. Stevick was asked by a co-worker to "listen for the telephone." Stevick was terminated because she did not monitor the call system as well. Unemployment benefits can be denied if an employee's actions are deemed misconduct. Job Service held a hearing and determined Stevick's actions did not constitute misconduct. Should the Court affirm Job Service's decision to award unemployment benefits?

STATEMENT OF THE CASE

Spectrum Care LLC ("Spectrum") appeals the decision of the district court, which affirmed the decision of Job Service North Dakota ("Job Service"). (Appendix ("App.") 50-53.) Job Service allowed unemployment benefits to Marlene Stevick ("Stevick") after she was terminated from her employment at Spectrum. (App. 11.) Spectrum appeals because Job Service determined Stevick was discharged for reasons not constituting misconduct under N.D.C.C. § 52-06-02(2). (*Id.*, App. 56.)

Stevick was terminated from her job as an activity aide at Spectrum's long-term care facility on October 2, 2003, because she left an emergency call center area unattended. (*Id.* at 16.) A Job Service deputy determined that Stevick should be given unemployment benefits because her actions did not constitute misconduct. (*Id.* at 11.) Spectrum requested an administrative appeal of the deputy's decision. (*Id.* at 13.) A Job Service appeals referee held a hearing on November 12, 2003, and affirmed the deputy's decision on November 17, 2003. (*Id.* at 15-18; Appellee Appendix ("Appellee App." 1-58.) Stevick's conduct did not disqualify her from receiving unemployment benefits. (App. 17-18.) Spectrum requested a review of the referee's decision on November 28,

2003. (*Id.* at 19.) Job Service affirmed the decision of the referee on December 19, 2003. (*Id.* at 25.)

Spectrum appealed the decision to the district court pursuant to N.D.C.C. § 52-06-27. (App. 26-27.) The appeal was held in abeyance because an Order for Leave of Court to Allow Hearing Officer to Receive Additional Evidence was issued by Judge Gary Holum on September 9, 2004. (*Id.* at 28-29.) Additional testimony and evidence was received by the appeal's referee at a hearing on May 23, 2005. (Appellee App. 59-155.) The referee determined, again, that Stevick's conduct did not rise to the level of misconduct. (App. 43-47.) Spectrum requested that Job Service review the referee's decision. (Appellee App. 156.) And, again, Job Service affirmed the referee's decision in July 2005. (App. 42.)

Spectrum appealed the decision to the Ward County District Court on July 22, 2005, pursuant to N.D.C.C. § 52-06-27. (App. 48-49.) On December 20, 2005, the district court issued its Memorandum and Order affirming the final decision of Job Service. (*Id.* at 50-53.) Order for Judgment was entered on December 30, 2005. (*Id.* at 54.) Judgment was entered on January 4, 2006. (*Id.* at 55.) Notice of Entry of Judgment was issued on January 10, 2006. (Appellee App. 157.) Spectrum appealed the district court's decision, filing a Notice of Appeal with the Clerk of the Ward County District Court dated January 16, 2006. (App. 56.)

STATEMENT OF THE FACTS

Stevick began working for Spectrum on September 7, 2001. (Appellee App. 7.) She was employed as an Activity Aide at Spectrum's long-term care facility. (*Id.*) Her primary duties were facilitating activities for the residents (*e.g.*, bingo, bridge, cribbage) and helping in the dining room. (*Id.* at 35, 37, 52.) The salary range for Stevick's position was $6.75 to $8.00 per hour. (App. 24.)

Stevick was terminated from her job by Spectrum on October 2, 2003, because of an isolated incident where she did not monitor an emergency call light system. (App. 8.) The Spectrum facility has a call system that residents can activate if needed: a light goes off in the control area that alerts staff if the system is activated. (Appellee App. 12, 17.) But Stevick's job description did not include monitoring the call system. (App. 24; Appellee App. 37.) And Stevick testified that she was unaware of the consequences for failing to monitor the call system, or that she was even required to monitor the system. (Appellee App. 42-43, 46.) Not only that, Stevick testified that she believed another Spectrum employee, one whose job description actually included monitoring the system, was monitoring the system when Stevick briefly stepped out for a smoking break. (*Id.* at 37-38, 53.)

On September 27, 2003, Stevick was asked by Teressa Edwards ("Edwards"), a Resident Service Aide (RSA), to listen for the telephone at Spectrum's facility. (Appellee App. 38.) Stevick testified that she was not aware that this *specific* request could have meant to also monitor the call system. (*Id.* at 52.) Stevick was preparing to play bridge with the residents when she was asked to listen for the telephone. (*Id.* at 48.) Stevick was not asked or told to monitor the call system. (*Id.* at 52.) She was not told why she was asked to listen for the telephone. (*Id.* at 38.) It was later determined that Edwards and another RSA, Becky Ferguson ("Ferguson"), were tending to the needs of one of the residents. (*Id.* at 8-9, 53.) But Stevick was unaware of this because neither RSA informed Stevick of the situation. (App. 5, 8; Appellee App. 38, 53.)

Edwards, the RSA who asked Stevick to listen for the phones, did not tell Stevick that both RSA's were leaving the call system area to assist a resident. (Appellee App. 48-49, 53.) Stevick testified that she believed the other RSA, Ferguson, was monitoring the call system. (*Id.* at 53.) She assumed this

because only Edwards had asked her to listen for the phones and Stevick believed that Ferguson was monitoring the call system. (*Id.*) Though a handwritten note, purportedly written by Edwards, was admitted into evidence, Stevick testified that the note was not what had taken place. (App. 6; Appellee App. 36-37.) No testimony was ever given by Edwards as to her interpretation of the events.

Stevick decided to take a break because no residents joined her for bridge. (Appellee App. 39-40.) She had been instructed by Spectrum to take short breaks rather than longer ones whenever she could. (*Id.* at 38-39.) Stevick left the building to take a smoking break. (*Id.* at 9, 40.) In the "approximately 2 minutes" Stevick was outside, the call system was unknowingly left unmonitored. (*Id.* at 9, 50.) After returning from her break, Stevick had a conversation with Edwards and apologized for taking a break and forgetting to listen for the telephone. (*Id.* at 40.)

Stevick was unaware of Spectrum's alleged policy requiring her to monitor the call system. (Appellee App. 37-38, 42-43, 47, 52.) Stevick testified that she was not present for the entire August 20, 2003, staff meeting and was not present when it was announced a RSA was fired because she failed to monitor the call system and her attitude toward resident safety. (App. 3, Appellee App. 42.) Spectrum did not provide any documentation indicating Stevick attended this meeting. Because Stevick worked a different shift than the RSA who was fired, and did not really know her, Stevick was only aware that the RSA was fired because "she was not following policies." (App. 3; Appellee App. 43, 51) Stevick testified that she was never made aware of the specific policy the RSA violated. (Appellee App. 43.) Although Stevick did not review the staff meeting minutes until after she was terminated, they were unspecific as to the reason the RSA was terminated. (App. 3; Appellee App. 43.)

Stevick was unable to attend many staff meetings because Spectrum had scheduled them during her activity time with residents. (Appellee App. 42.) In fact, for the entire first year of her employment, Stevick was not able to attend **any** staff meetings. (*Id.*) Stevick, however, was able to attend about two or three staff meetings before she was terminated. (*Id.* at 42-43.) She testified that there was never a discussion as to a policy requiring at least one staff person to be in the call system area. (*Id.* at 43.)

Stevick was given an opportunity to provide an explanation to Spectrum after she was terminated. (Appellee App. 44.) Stevick maintained that her momentary lapse of memory to listen for the telephones was absolutely unintentional. (App. 5; Appellee App. 44.) Stevick, at the request of Spectrum, completed an "Employee Status Report" upon her termination. (App. 5). Stevick denied the assertion that she was asked to monitor the call system because the two RSAs were tending to a resident. (*Id.*) Stevick stated: "Teressa, a med aid, asked me to 'LISTEN FOR THE TELEPHONE' as I was sitting at a table in the activity garden waiting for an activity to start. She, (Teressa) DID NOT ask me to listen for the emergency call lights, nor did she tell me she was going to go to a resident[']s apartment." (*Id.*) Stevick also offered the following in her "Discharged-Fired" statement to Job Service:

> I was asked to listen for the telephone when my activity was completed and residents had left the activity area. When the residents left the activity area I then left to take my break. I had forgotten that I was to answer the phone. It was not intentional, I just forgot. I have not been warned about this prior to this incident. I have been told before to take my breaks when I can squeeze them in. I was told that there were no emergency lights flashing during the time I was gone. I was asked to only listen for the telephone, not watch for the emergency call lights.

(App. 8.)

Spectrum provided witness testimony that contradicted Stevick's testimony; the hearing officer took this into consideration. It was alleged that

Stevick was present at the staff meeting where Spectrum explained why an RSA was fired. (App. 31, 36, 40.) Spectrum alleged that Stevick knew it was her job to monitor the call system if asked, even though it was not a written requirement and Spectrum failed to produce any documentation showing Stevick was aware of the policy. (Appellee App. 76.)

Stevick was an exemplary employee. She had never been sanctioned or warned by Spectrum for not completing the specific tasks of her job before she was terminated. (Appellee App. 15, 41-42.) This incident was the sole incident that caused Spectrum to terminate Stevick's employment. (Appellee App. 15.)

LAW AND ARGUMENT

A. Standard of Review

A determination of an administrative agency is presumed to be correct. *Turnbow v. Job Serv. N.D.*, 479 N.W.2d 827, 828 (N.D. 1992). This Court's review of Job Service decisions is governed by N.D.C.C. § 28-32-46, which requires the Court to review an appeal from the determination of an administrative agency based only on the record filed with the Court.

In addition, N.D.C.C. § 28-32-46 requires the Court to affirm an agency order unless if finds one of the following:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

The Court is required to affirm an administrative decision, unless one of the enumerated reasons listed in this section is found. *Stepanek v. North Dakota Workers Comp. Bureau*, 476 N.W.2d 1, 3 (N.D. 1991).

The Court has explained the standard that courts must follow when reviewing administrative agency decisions:

> "(1) [W]e do not make independent findings of fact or substitute our judgment for that of the agency, but determine only whether a reasoning mind could have reasonably determined that the factual conclusions were supported by the weight of the evidence; (2) we exercise restraint when we review administrative agency findings; (3) it is not the function of the judiciary to act as a super board when reviewing administrative agency determinations; and (4) we will not substitute our judgment for that of qualified experts in the administrative agencies."

Sonterre v. Job Serv. N.D., 379 N.W.2d 281, 283-84 (N.D. 1985) (citations omitted).

B. Job Service's Findings are Supported by the Preponderance of the Evidence.

As finder of fact, Job Service resolves conflicting testimony and determines credibility of witnesses. *Lovgren v. Job Serv. N.D.*, 515 N.W.2d 143, 145 (N.D. 1994); *Otto v. Job Serv. N.D.*, 390 N.W.2d 550, 553 (N.D. 1986) (Vande Walle, J., concurring). This Court's role is not to make independent findings of fact or substitute its judgment for that of Job Service, but to determine only whether a reasoning mind could have reasonably determined that Job Service's factual conclusions are supported by the weight of the evidence. *Sonterre*, 379 N.W.2d at 283. The Court's duty is to apply the "preponderance standard for review" and

determine only whether a reasoning mind could have reasonably determined that Job Service's factual conclusions are supported by the weight of the evidence. *Hins v. Lucas W.*, 484 N.W.2d 491, 494 (N.D. 1992); *Sonterre*, 379 N.W.2d at 283.

Spectrum asserts that its testimony is more credible than the testimony of Stevick. Rather than review Job Service's decision, Spectrum is requesting that the court usurp Job Service's fact finding responsibility and make independent findings of fact or substitute its judgment for that of Job Service. But it is the role of Job Service, not the Court, to determine credibility of witnesses. *Lovgren*, 515 N.W.2d at 145; *Otto*, 390 N.W.2d at 553. This Court should decline Spectrum's request that it act as a super administrative agency and make its own independent findings of fact.

In the present case, the referee made several reasonable findings and conclusions. He concluded that Stevick was asked *only* to "listen for the telephone" by an RSA. (App. 45, 47.) Though Stevick had monitored the call system on three or four occasions during her employment, her job description did not include monitoring the call system. (*Id.* at 24, 45.) Stevick believed that a second RSA was monitoring the call system when she stepped out for a break. (*Id.* at 45-46.) Stevick had never been issued any written or verbal warnings regarding her job performance. (*Id.* at 45, 47.)

Based upon the testimony, a reasonable person could reasonably find that Stevick was not aware at the time of the incident that she must monitor the call system. (App. 45-47.) Stevick's testimony was that she believed the other RSA was monitoring the system. (Appellee App. 53.) This finding supports Job Service's conclusion of law that Stevick was not discharged for misconduct, and the conclusion of law supports Job Service's decision awarding Stevick unemployment compensation benefits. There was no evidence that not

answering the telephone was dangerous. (App 46.) It was reasonable for Job Service to conclude that Stevick did not manifest any willful or wanton intent to violate the alleged unwritten policy to monitor the call system.

C. Stevick's Failure To Monitor The Call System Did Not Rise To The Level Of Misconduct

North Dakota unemployment compensation law provides that an individual shall be disqualified from receiving benefits if the individual is discharged for misconduct in connection with employment. N.D.C.C. § 52-06-02(2). The employer has the burden to establish by a preponderance of the evidence that the employee's acts constituted misconduct that would result in disqualification of benefits. *Schadler v. Job Serv. N.D.*, 361 N.W.2d 254, 257 (N.D. 1985). Misconduct that would be grounds for dismissal is not necessarily grounds for disqualification from unemployment compensation benefits. *Steele v. Job Serv. N.D.*, 445 N.W.2d 635, 642 (N.D. 1989); *Perske v. Job Serv. N.D.*, 336 N.W.2d 146, 148 (N.D. 1983).

In *Hulse v. Job Service North Dakota*, 492 N.W.2d 604 (N.D. 1992), the Court shed additional insight into the meaning of the term "misconduct." The Court explained that the disqualification provisions of N.D.C.C. § 52-06-02 should be narrowly, but reasonably, construed. *Id.* at 607. Thus, to constitute misconduct, the claimant's actions must come within the clear meaning of the language contained in the definition of "misconduct." *Id.* at 607-08. Accordingly, a claimant is not disqualified absent evidence of culpability rising to the level of a willful or wanton disregard of the employer's interest, wrongful intent or evil design, or an intentional and substantial disregard of the employer's interest or the employee's own duties and obligations. *Id.* at 608.

Termination for misconduct is "an exception to this state's remedial unemployment compensation laws," and will be narrowly construed in favor of

awarding benefits. *Id.* at 607. The term "misconduct" is not defined in the North Dakota Unemployment Compensation statutes. This Court has adopted the following definition of misconduct:

> "Misconduct is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."

Johnson v. Job Serv. N.D., 1999 ND 42, ¶ 11, 590 N.W.2d 877 (citation omitted).

Misconduct is a mixed question of fact and law. *Steele*, 445 N.W.2d at 642; *Marion v. Job Serv. N.D.*, 470 N.W.2d 609, 612 (N.D. 1991); *Medcenter One, Inc. v. Job Serv. N.D.*, 410 N.W.2d 521, 524 (N.D. 1987). Though, ordinarily, this determination is a factual question for Job Service to determine. *Blueshield v. Job Serv. N.D.*, 392 N.W.2d 70, 73 (N.D. 1986). In *Blueshield*, this Court stated: "While there are occasions, because of the clarity of the particular facts and indisputability of the inferences drawn from those facts, when we can determine that a particular conduct does or does not constitute 'misconduct' as a matter of law, ordinarily the determination of whether or not particular conduct is 'misconduct' is a question of fact." *Id.* The determination of whether conduct is misconduct "depends upon the facts and circumstances of each individual case and such is subject to the judgment of Job Service and its expertise." *Id.* For Job Service's decision to be affirmed, the evidence must support the agency's findings of fact, which must support the agency's conclusion regarding misconduct. *Medcenter One*, 410 N.W.2d at 524. The record in this case contains ample evidence supporting Job Service's conclusion, based on disputed

facts meted out by the Job Service *fact finder*, that Stevick's conduct, though grounds for termination, was not misconduct that would deny her unemployment benefits.

1. *Stevick did not knowingly violate the alleged policy.*

To demonstrate an employee's violation of a work rule constitutes misconduct, the employer has the burden of showing that the former employee knowingly violated a reasonable and uniformly enforced rule. *Harker v. District of Columbia Dep't of Employment Servs.*, 712 A.2d 1026, 1029-30 (D.C. 1998); *Browning-Ferris Indus. v. Review Bd.*, 693 N.E.2d 1351, 1353 (Ind. Ct. App. 1998). Spectrum failed to meet its burden that Stevick knowingly violated a job requirement in this case.

This Court has held that an isolated incident may constitute misconduct. *See Stalcup v. Job Serv. N.D.*, 1999 ND 67, 592 N.W.2d 549 (single incident of testing positive for marijuana was misconduct); *Johnson*, 1999 ND 42, 590 N.W.2d 877 (executive director's refusal to answer questions at meeting of board of directors concerning grievance filed against her was misconduct); *ProServe Corp. v. Rainey*, 536 N.W.2d 373 (N.D. 1995) (employee's violent actions with a butcher's knife in response to a coworker's attack with pot constituted disqualifying misconduct); *Blueshield*, 392 N.W.2d at 74-75 (employee's single incident of physical force against a co-worker near dangerous machinery held misconduct); *Schadler*, 361 N.W.2d at 257 (failure of nurse's aide to call in sick so as to excuse absence, as set out by the employer's clear policy, held misconduct). The nature of the employee's work, including the harm done, or possible harm, to the employer by the misconduct, should be considered in determining whether or not the particular action constitutes misconduct. *Johnson*, 1999 ND 42, ¶ 12; *Schadler*, 361 N.W.2d at 257; *Blueshield*, 392 N.W.2d at 75 (Levine, J., concurring).

All of the above cited cases involved isolated instances where the employee knowingly acted in a way that counteracted a known employer policy. But an isolated instance of poor judgment is misconduct "only if the facts and circumstances of the case require it." *Johnson*, 1999 ND 42, ¶ 13. This Court has held, *specifically*, that it is the "duty" of Job Service to determine whether specific facts in a specific case constitute misconduct; and it is this Court's "duty" to affirm Job Service's decision if supported by a preponderance of the evidence. *Blueshield*, 392 N.W.2d at 74.

This case is distinguishable from the above cited cases involving single incidences of misconduct. The above cases all have one thing in common that this case lacks: a conscientious effort on the part of the claimant to violate a set rule or policy. In this case, Job Service found that on September 27, 2003, Stevick was asked to "listen for the phones" and she replied by saying she would. (App. 47.) After a short period of time, however, she left the area. (*Id.*) Testimony was disputed as to the emergency call system policy. (*Id.* at 45-47.) Stevick asserts, and always has, that she was unaware of such policy required her to monitor the call system. (Appellee App. 46.) As a result, Job Service reasonably could have determined that Stevick was not aware that she was violating a company policy; therefore, her actions did not rise to the level of misconduct. (App. 18)

This Court's decision in *Tehven v. Job Service North Dakota*, 488 N.W.2d 48 (N.D. 1992), can be contrasted with the current case. Tehven was a clerk in the medical records department of a hospital. *Id.* at 49. She had been employed in this department for more than eight years. *Id.* She knew of the importance of confidentiality of patient records. *Id.* at 51. Tehven had even signed a form acknowledging that she could be terminated if she breached the confidentiality of medical records. *Id.*; *see also Brief for Appellee at 5, Tehven, 488 N.W.2d. 48 (N.D. 1992) (No. 910372).* (stating that the confidentiality form included the

following language: "I understand that any intentional or involuntary violation of the confidentiality of medical information may result in punitive action, which may include termination of employment."). When Tehven attempted to take medical records of her soon to be ex-husband, and was caught, Tehven knew she had violated clear hospital policy. *Tehven*, 488 N.W.2d at 52. Tehven's employer had "the right to expect" a "standard of behavior" from Tehven not to divulge confidential medical records. *Id.* Tehven's actions were deemed misconduct by Job Service and this Court. *Id.*

Unlike the hospital in *Tehven*, Spectrum did not have a policy on monitoring the call system. Stevick's job description, according to Spectrum, essentially amounted to playing games with residents. (App. 24.) Stevick did not know her position included monitoring the call system; Tehven knew her position was to maintain the confidentiality of the records. Stevick did not know that when she was asked to listen for the telephone it meant to monitor the call system; Tehven knew that taking the records was a violation. And, most importantly, Stevick actually believed that another employee, one who was actually charged with monitoring the call system, was monitoring the call system when Stevick took a break; Tehven knew that she alone was responsible for maintaining the confidentiality of the records. The facts here are sufficiently distinct from *Tehven* to allow this Court to affirm Job Service's decision.

Stevick reasonably assumed another person was monitoring the call system. (Appellee App. 53.) Job Service concluded that Stevick "believed that the secondary residential aid was available to watch [the emergency call] system. . . ." (App. 46.) Stevick "was not aware that she would have been required to monitor the emergency call system in this instance" when she believed another employee was doing so. (*Id.* at 47.) Though Stevick had been specifically asked to monitor

the system on three or four prior occasions, Job Service determined that her job description did not include monitoring this system. (*Id.* at 45.)

None of Spectrum's witnesses that testified had direct knowledge as to the conversation between Stevick and Edwards when Edwards asked Stevick to listen for the phone. Edwards did not testify. (App. 47.) As a result, the referee relied on Stevick's testimony that she was asked to listen for the phone and believed the other RSA (Ferguson) was monitoring the call system. (Id.)

Based upon the testimony, Job Service could reasonably conclude Stevick did not knowingly or willfully violate Spectrum's alleged, and unwritten, policy. Spectrum did not demonstrate by a preponderance of the evidence that Stevick knowingly violated the alleged unwritten call system policy. Therefore, the Job Service determination must be affirmed.

2. *Misconduct includes conduct evidencing a willful or wanton disregard of the employer's interests.*

Stevick's failure to listen for the telephone was an isolated incident of poor performance on her part that can be attributed to ordinary negligence. She "forgot" to listen for the telephone. (App. 8.) Stevick did not do it intentionally, and she did not willfully intend to put the residents in danger. (Appellee App. 44.) Therefore, Job Service was correct in its determination that Stevick's actions did not rise to the level of misconduct and awarded her benefits.

Even assuming, arguendo, that Stevick was aware of the call system policy, she was still unaware that she was the only person responsible to monitor the call system at the time of the incident. (Appellee App. 53.) Stevick believed she was only to listen for the telephone. (*Id.*) Though Stevick was negligent in failing to listen for the telephone when she took a break, she did not willfully or wantonly disregard her employer's interests because she believed an RSA was monitoring the call system at the time. (App. 46-47.)

Stevick's employment record was clean; she did not have any indication that she was performing her job in a manner anything but exemplary in the two years she was employed there. (App. 15; Appellee App. 41-42.) Stevick had no reason to go against Spectrum's alleged unwritten policy. Though it was Spectrum's right to terminate Stevick's employment, no misconduct has been proven by Spectrum. Because it is Spectrum's burden to prove this, and they have failed to do so, the Court must affirm the Job Service determination.

3. *Denying Stevick benefits would be contrary to the policy behind the Unemployment Compensation Law.*

The policy behind North Dakota Unemployment Compensation Law is to provide benefits to those who become unemployed through no personal fault. N.D.C.C. § 52-01-05. A claimant is unemployed through the claimant's own fault if unemployment results from misconduct. N.D.C.C. § 52-06-02. In the present case, Stevick made every reasonable effort to maintain her employment. She disputed Spectrum's reasoning for discharging her from the outset. (App. 5, 8.) The policy behind the unemployment compensation law demands that she receive benefits.

CONCLUSION

Job Service respectfully requests that this Court affirm Job Service's determination that Stevick be awarded unemployment benefits because Spectrum has failed to prove by a preponderance of the evidence that she was terminated for misconduct.

Dated this 28th day of March, 2006.

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