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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2130**

Mary Skottegaard,
Relator,

vs.

Comcast Cablevision Corporation,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 4, 2012
Reversed
Kalitowski, Judge**

Department of Employment and Economic Development
File No. 25933399-6

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Considered and decided by Chutich, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Relator Mary Skottegaard challenges the decision of an unemployment-law judge (ULJ) that she is ineligible for unemployment benefits because she was discharged for employment misconduct. Relator argues that: (1) the ULJ's finding that her conduct was not a consequence of her mental illness is unsupported by the record; and (2) the ULJ's findings as to her course of conduct do not support his conclusion. We reverse.

DECISION

We may reverse the decision of a ULJ if the relator's substantial rights were prejudiced because the findings, conclusion, or decision are unsupported by substantial evidence or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2010).

An employee who is discharged is ineligible to receive unemployment benefits if the discharge was because of employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2010). 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) (2010). But regardless of subdivision 6(a), "conduct that was a consequence of the [employee's] mental illness or impairment" is not misconduct. *Id.*, subd. 6(b)(1) (2010).

A challenge to a misconduct determination presents a mixed question of fact and law. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether the employee committed particular conduct is a question of fact, and we view factual

findings in the light most favorable to the decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether conduct constitutes employment misconduct under the statute is a question of law, which we review de novo. *Stagg*, 796 N.W.2d at 315.

Relator was discharged by respondent Comcast Cablevision Corporation in August 2010 under a progressive-discipline policy after a cash-shortage error and a series of attendance violations. Relator's final violation occurred on July 31, 2010, when she overslept and then did not report to work or call in because she believed she would be discharged.

The ULJ determined that relator was discharged for employment misconduct. Relator requested reconsideration, arguing that her conduct did not constitute misconduct because it was a consequence of her mental illnesses. She indicated that she suffered from anxiety, depression, insomnia, and posttraumatic stress disorder (PTSD), which arose out of a 2009 incident in which she was robbed at gunpoint while working for Comcast. She attached to her reconsideration request a letter dated October 2010 from her treating psychiatrist, Dr. Paul Ziemer. The ULJ affirmed his decision.

On appeal, this court reversed and remanded, holding that the ULJ abused his discretion by refusing to order an additional evidentiary hearing to receive the new evidence. *Skottegaard v. Comcast Cablevision Corp.*, No. A10-2196, 2011 WL 3654446, at *3-4 (Minn. App. Aug. 22, 2011). Reasoning that the phrase "conduct that was a *consequence* of the [employee's] mental illness or impairment" is broad, and observing that Dr. Ziemer's letter indicated that relator's mental illnesses affected her sleep,

judgment, and day-to-day functioning, this court concluded that the new evidence was “likely to have an effect on the outcome of [relator’s] case.” *Id.* at *4.

At the hearing following the remand, relator submitted medical records and a second letter from Dr. Ziemer, dated September 2011. The ULJ found that relator suffered from PTSD, depression, and anxiety, and that her mental illnesses affect her judgment, sleep, and concentration. He found that relator was discharged after several attendance warnings, certain of which were due to relator’s oversleeping, a cash-shortage error in late July 2010, and a final failure to report to work or call in on July 31, 2010. The ULJ found that the occasions on which relator overslept and the cash-shortage error were caused by her PTSD and medications. As to her July 31 conduct, the ULJ found that relator overslept due to her medications, but determined that her failure to report to work was not a consequence of mental illness. He again concluded that relator was discharged for employment misconduct.

Relator argues that the ULJ’s finding that her conduct on July 31 was not a consequence of her mental illness is unsupported by substantial evidence in the record. We agree.

As the ULJ found, relator suffers from anxiety and depression as well as PTSD. Relator testified that her primary motivation for choosing not to report to work or call in after oversleeping was her fear of confrontation and humiliation, as well as her clouded judgment, which stemmed from her mental illnesses and medications. In 2010, Dr. Ziemer opined that “[relator’s] anxiety has never been under very good control since this robbery at work and she has continued to have posttraumatic stress symptoms in spite of

treatment and medication.” Dr. Ziemer explained that medications he prescribed relator were necessary to control her anxiety in the workplace, but “had an effect on how well she could function at work.” And relator’s medical records indicate that a symptom of her mental illnesses included “put[ting] the worst spin on things” and that anxiety caused her to enter “panic mode.”

In September 2011, Dr. Ziemer opined:

[Relator] has a longstanding history of avoidance of unpleasant life events with a tendency to seek out behaviors (often addictive) that aid that avoidance. This is frankly more a temperament issue than a consequence of mental illness from posttraumatic stress, although posttraumatic stress can certainly heighten anxiety levels enough that some people can engage in additional avoidant behaviors to deal with unpleasant life events, especially as relates to the initial traumatic event. I do not think that posttraumatic stress per se is sufficient to cause failure to call in after oversleeping, and rather, the failure to call in is a manifestation of her lifelong trait of avoiding things that cause anxiety or other unpleasant emotions. Her overall anxiety level was higher as a result of the unfortunate robberies in the workplace that she was a part of. It is common enough that people with depression feel such apathy, low energy and lack of motivation that they frequently have problems with absenteeism as a result. Her posttraumatic stress played into the depression by making the work environment so unpleasant that she didn’t want to confront it. However, for her an essential part of treatment will be to underscore the need to confront life difficulties that inevitably will arise in her life rather than feeling that she has *carte blanche* to continue the destructive avoidant pattern.

Relying on the 2011 letter, the ULJ found that relator’s conduct on July 31 was a manifestation of “avoidance behaviors,” and therefore distinguishable from her mental illnesses. But although Dr. Ziemer opined that one of relator’s illnesses—PTSD—was not the “per se” cause of her July 31 conduct, Dr. Ziemer explained that relator avoided

circumstances that caused anxiety and that her anxiety level was elevated by the 2009 robbery. Thus, Dr. Ziemer's 2011 letter indicates that relator's avoidance behaviors are a reaction to anxiety, a mental impairment for which she was treated, and that her anxiety was exasperated by her PTSD. Dr. Ziemer also stated that relator's PTSD "played into [her] depression by making the work environment so unpleasant that she didn't want to confront it." Thus, when read as a whole, the record indicates that relator's avoidance behavior is related to or is a symptom of her various mental illnesses. On this record, we conclude that the ULJ's finding that relator's conduct on July 31 was not a consequence of her mental illness is unsupported by substantial evidence.

Respondent Minnesota Department of Employment and Economic Development argues that Dr. Ziemer's September 2011 letter demonstrates that relator's "avoidance behavior" on July 31 was conduct for which she should be held responsible. But Dr. Ziemer's recommendation that relator take responsibility for her conduct in order to progress in treatment does not establish that her avoidance behavior is not a consequence of mental illness.

The ULJ also reasoned that relator's assumption that she would be discharged if she reported to work on July 31 was "lucid [and] rational" and "not the result of a defective mind." But whether an employee's conduct is rational is not determinative of whether the conduct is a consequence of mental illness. *See Cunningham v. Wal-Mart Assocs.*, 809 N.W.2d 231, 236 (Minn. App. 2011) (explaining that employee reasonably believed that if he had not completed a written action plan he should not report to work,

and because his inability to complete the plan was related to his mental impairment, concluding that employee's absenteeism was a consequence of his mental impairment).

The ULJ stated that relator's "almost impeccable" work performance prior to the 2009 robbery demonstrated that the conduct for which she was discharged was not a consequence of mental illness. We disagree. Relator's testimony that her work performance was "almost impeccable" prior to the robbery suggests that her underlying depression and anxiety did not affect her work performance prior to the robbery, but says nothing about whether the illnesses affected her conduct in 2010. Instead, the record establishes that the 2009 robbery caused her PTSD, which exasperated her preexisting symptoms of depression and anxiety.

Finally, the ULJ found that relator lacked credibility due to her "monetary incentive" in the unemployment-benefits proceeding and "sudden attribution of her conduct to her mental health issues in the second hearing." But because all employees and employers have a financial interest in whether an applicant is deemed eligible for unemployment benefits, this reason does not sustain a finding that relator is not credible.

Nor is the ULJ's negative credibility finding sustained by relator's failure to clearly discuss her mental illnesses and their connection to her conduct at the first hearing. As this court previously held, relator had good cause for failing to provide evidence of her mental illness at the first hearing because she was unrepresented, unsophisticated, suffering from mental illness, and residing at a mental-health facility. *Skottegaard*, 2011 WL 3654446, at *4. Relator's subsequent acknowledgement of her mental illness on the advice of counsel demonstrates advocacy, but does not indicate that

relator's testimony about her mental-illness symptoms is not credible. Thus, although we generally defer to a ULJ's credibility determinations, we need not do so here because the ULJ's reasons do not support the finding. *See* Minn. Stat. § 268.105, subd. 1(c) (2010) (requiring the ULJ to set out reasons for crediting or discrediting testimony); *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (stating that the ULJ's credibility determinations must be supported by substantial evidence).

Applying the broad statutory language of Minn. Stat. § 268.095, subd. 6(b)(1), we conclude that relator's conduct on July 31 "was a consequence of [her] mental illness or impairment."

Relator also argues that the ULJ's findings as to her course of conduct support the conclusion that the conduct for which she was discharged was a consequence of mental illness. We agree.

In employment-misconduct cases generally, and in cases involving progressive discipline particularly, the employee's conduct as a whole is relevant. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806-07 (Minn. 2002) (stating that "multiple violations of the same rule involving warnings or progressive discipline" will often constitute misconduct); *Drellack v. Inter-Cnty. Cmty. Council, Inc.*, 366 N.W.2d 671, 674 (Minn. App. 1985) (stating that an employee's "behavior may be considered as a whole in determining the propriety of [the employee's] . . . qualification for unemployment benefits"). In *Cunningham*, this court considered prior warnings, as well as the relator's final failure to report to work which led to his discharge, when determining whether the relator's conduct was a consequence of mental illness. 809 N.W.2d at 233-34, 236.

Here, the ULJ found that relator was discharged under a progressive-discipline policy and that several of relator's attendance violations and her cash-shortage error were consequences of mental illness. Therefore, because relator's course of conduct is relevant, the ULJ's findings as to relator's warnings under the progressive-discipline policy support the conclusion that relator was discharged because of conduct that was a consequence of mental illness.

Because relator's conduct on July 31 was a consequence of mental illness, and because the ULJ found that relator was disciplined for a course of conduct that was a consequence of mental illness, the ULJ erred as a matter of law in concluding that the mental-illness exception was inapplicable. We conclude that because relator was not discharged for employment misconduct she is eligible for unemployment benefits.

Reversed.