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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-377**

Mary DeValk,
Relator,

vs.

Health Partners, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed October 24, 2011
Affirmed
Connolly, Judge**

Department of Employment and Economic Development
File No. 26467762-3

Jonathan Geffen, Arneson & Geffen, PLLC, Minneapolis, Minnesota (for relator)

Health Partners, Inc., Minneapolis, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator challenges the decision by the unemployment law judge (ULJ) that she was ineligible for unemployment benefits because she had been discharged for misconduct. Because there is substantial evidence in the record to support the ULJ's determination, we affirm.

FACTS

Relator Mary DeValk, a licensed practical nurse, worked at Health Partners, Inc. in the ankle and surgery department at its specialty center clinic from June 28, 2004 to November 8, 2010, when relator was terminated. The termination letter stated: "This letter constitutes discharge for performance issues including inability to write professional notes/letters for patients, inability to place a dressing in a safe manner and working outside your scope of practice by advising a patient what medication to take." The termination letter also covered relator's previous behavior issues, warnings, and meetings with her employer to discuss job performance.

Relator began having discipline issues in April 2009. On April 16, 2009, relator received a verbal warning for disrespectful behavior toward a supervisor. On November 9, 2009, relator received a written warning for breach of confidentiality after a violation of the Health Insurance Portability and Accountability Act (HIPAA). On May 27, 2010, relator received a three-day suspension for breach of privacy.

On August 20, 2010, relator met with her supervisor regarding interrupting a conversation between a physician and patient during an examination and making a

suggestion about footwear. Relator was aware that interrupting a physician was inappropriate. At the August 20 meeting, the employer also discussed relator's anxiety, disruptive behavior, and inability to write patient letters in a professional manner.

On September 13, relator prepared a letter for a patient regarding a fracture of the right foot, but relator wrote the letter referring to the left foot. When the patient pointed out the error, relator wrote the letter incorrectly a second time, before finally correcting the error in the third draft. The employer found that "[t]his delayed the patient's exit from the clinic and did not provide an excellent patient experience."

On September 14, relator incorrectly dressed a patient's leg wound. Relator used a non-expandable tape and wrapped the entire circumference of the leg, which could have unsafely constricted the patient's blood flow. Relator testified that she knew the tape was incorrect and used it only temporarily because the other tape that she had was not sticking. The employer testified that relator knew better than to use the wrong tape, even temporarily, due to her training and prior experience and should never have used the improper tape to dress the wound because it was unsafe.

On September 20, relator met with her supervisor to discuss relator's overall job performance and her inability to perform job functions in a timely manner. She was told at this time that any further performance or behavior issues could result in further discipline up to, and including, discharge.

On October 15, relator wrote a letter to a patient twice in an unprofessional manner. On November 2, relator was asked by a physician to write a letter for a patient, which relator then asked another nurse to write because she was unable to spell several

words and did not know how to turn the information into a letter format. The employer stated that relator “lacked the ability” to write the letter. Relator, however, only stated that it would have taken longer for her to write the letter herself and that she did not want to take the time to look words up in the dictionary.

Also on November 2, relator interrupted a physician’s conversation with a patient to suggest a specific brand of anti-inflammatory medication for the patient. Relator acknowledged that making such recommendations was outside the scope of her practice. Finally, on November 8, relator was discharged for performance issues.

On December 15, an evidentiary hearing was conducted by telephone pursuant to Minn. Stat. § 268.105, subd. 1(a) (2010). The employer requested the hearing after an initial determination found that relator was eligible for benefits. On December 16, the ULJ issued his decision, concluding that relator was ineligible for benefits because she had engaged in employment misconduct. On December 20, 2010, relator filed a timely request for reconsideration. The ULJ affirmed on January 26, 2011. This certiorari appeal follows.

D E C I S I O N

This court reviews the ULJ’s factual findings “in the light most favorable to the decision.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). In doing so, this court “will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Id.* When reviewing the decision of a ULJ, the court 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) (2010).

Relator presents four arguments as to why the ULJ's decision should be reversed. First, she argues that the ULJ erred in considering incidents to which the employer testified, but did not cite as grounds for discharge in relator's termination letter. Relator argues that the employer's specifically articulated bases for terminating relator were actions that occurred after September 13, 2010, and that the ULJ incorrectly considered events preceding September 13, 2010 in his decision. The events occurring prior to September 13, 2010 were, however, noted in the termination letter and the employer testified that, while they were not specifically identified as grounds for discharge, they were incidents of progressive discipline leading to relator's termination.

A discharged employee's "behavior may be considered as a whole in determining the propriety of [relator's] discharge and [relator's] qualification for unemployment benefits." *Drellack v. Inter-Cnty. Cmty. Council, Inc.*, 366 N.W.2d 671, 674 (Minn. App. 1985). Therefore, the ULJ properly considered events prior to September 13, 2010, including incidents of breaches of patient privacy and confidentiality, in determining relator's misconduct.

Second, relator argues that the ULJ erred in finding that relator committed employment misconduct. An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). "Employment misconduct means 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). Not all unsatisfactory conduct amounts to employment misconduct. Examples of behavior that do not rise to the level of misconduct include instances where the employee’s conduct was: (1) a consequence of the applicant’s inefficiency or inadvertence; (2) simply unsatisfactory; (3) a consequence of the applicant’s inability or incapacity; or (4) a good faith error in judgment, if judgment was required. *Id.*, subd. 6(b) (2010).

Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact. *Skarhus*, 721 N.W.2d at 344. Determining whether a particular act constitutes employment misconduct is a question of law that this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

Relator argues that she did not engage in benefit disqualifying employment misconduct because: (1) relator’s struggle with writing professional letters was based on her inability; (2) relator’s decision to temporarily use the wrong tape to bind a patient’s leg was a good faith error in judgment; and (3) relator’s conduct in interrupting a physician to recommend a brand of anti-inflammatory medication was a simple mistake.

We focus here on relator’s conduct in interrupting a physician, however, clearly amounted to employment misconduct. Relator argues that her conduct in interrupting a physician to recommend a brand of anti-inflammatory medication was a simple mistake, not rising to the level of disqualifying misconduct. However, relator knew it was

improper to interrupt a physician who was consulting with a patient. The standard of behavior an employer has the right to expect of its employees varies with the nature of the job, and therefore what actions constitute misconduct will vary from job to job. *See Auger v. Gillette Co.*, 303 N.W.2d 255, 256 (Minn. 1981). Sometimes, very exacting standards can be expected, and the Minnesota Supreme Court has recognized that, “if there is one unique area of employment law where strict compliance with protocol and militarylike discipline is required, it is in the medical field.” *Ress v. Abbott Nw. Hosp.*, 448 N.W.2d 519, 525 (Minn. 1989). Her employer had the right to expect that relator, a nursing professional, would strictly comply with its protocol during physician-patient visits.

Moreover, relator had been previously warned that she was not to interrupt a physician or make recommendations to patients while the patient was consulting with the physician. When an employee knowingly violates a reasonable employer policy, that employee commits employment misconduct. *Schmidgall*, 644 N.W.2d at 806. Multiple violations of the same rule demonstrate an employee’s substantial lack of concern for the employment. *See Gilkeson v. Indus. Parts & Serv., Inc.*, 383 N.W.2d 448, 452 (Minn. App. 1986) (noting that an employee’s pattern of rule violations constituted misconduct). Relator’s employer had the right to expect that she would comply with reasonable work policies and instructions, and her failure to do so amounted to employment misconduct. By violating the same rule within a few months of a similar warning, relator demonstrated a substantial lack of concern for employment. In light of this holding, we find it unnecessary to even consider the incidents involving relator’s difficulty in writing

letters and temporary use of the wrong tape, and whether those incidents qualify as exceptions to employment misconduct.

Relator next argues that the ULJ's findings of fact were not supported by substantial evidence in the record. Specifically, relator takes issue with the ULJ's findings regarding the incident where relator recommended a brand of anti-inflammatory medication to a patient. The ULJ found that: (1) "[relator] had been counseled about this specific type of conduct only a few months earlier"; and (2) "[relator] indicated that she regularly made recommendations of this nature to patients."

This court reviews a ULJ's decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence in view of the record as a whole or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d). Substantial evidence is "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

The ULJ found that relator interrupted a physician to interject a medication recommendation and that she had been counseled on this type of conduct only a few months earlier. Relator argues that there is no evidence on the record that relator recommended specific types of over-the-counter medication in the past or had been reprimanded for such activity. Relator argues that her warning not to interrupt a physician to recommend a specific type of shoe to patients was "clearly" different from

recommending medication. Both incidents, however, involved relator interrupting a conversation between a physician and patient to interject her own recommendation. The record clearly shows that relator had been warned about doing so, even if the specific type of interruption differed.

The ULJ also noted that relator “indicated that she regularly made recommendations of this nature to patients.” Substantial evidence in the record reflects that relator regularly made recommendations to patients in her role of coaching post-operation patients and supports the ULJ’s finding.

Finally, relator argued that the ULJ erred in failing to develop the record regarding relator’s anxiety. Relator argues for the first time on appeal that her anxiety amounts to a mental illness or impairment, an exception to the definition of misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(1). Further, the only mention of relator’s anxiety in the record is found in the termination notice, where the employer noted that relator’s supervisor had met with her regarding her “anxiety and disruptive behavior.” Relator herself never mentioned anxiety during the evidentiary hearing. This court will not consider matters not argued and considered below. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

The ULJ properly considered relator’s employment record as a whole when considering whether relator had engaged in employment misconduct and there is substantial evidence in the record to support his finding of employment misconduct. Specifically, the ULJ did not err in determining that relator engaged in employment misconduct by failing to follow her employer’s reasonable work policy and instructions that she not interrupt physicians during patient consultations. The ULJ’s decision was

supported by the substantial evidence in the record, and no substantial rights of the relator have been prejudiced.

Affirmed.