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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-483**

Barbara Hulett, n/k/a Barbara Hulett-Anderson,
Relator,

vs.

Minnesota Department of Corrections,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 23, 2012
Reversed and remanded; motion granted
Hudson, Judge**

Department of Employment and
Economic Development
File No. 26593548-3

Barbara Hulett, n/k/a Barbara Hulett-Anderson, Shakopee, Minnesota (pro se relator)

Minnesota Department of Corrections, St. Paul, Minnesota (respondent)

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

Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and
Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HUDSON, Judge

Relator challenges the determination by an unemployment-law judge (ULJ) that she is ineligible for unemployment-compensation benefits because she was discharged for aggravated employment misconduct. She also moves to supplement the record with evidence that a previous criminal charge based on the alleged misconduct has been dismissed. Because the dismissal of criminal charges may be relevant to determining relator's eligibility for benefits based on aggravated employment misconduct, we grant the motion and reverse and remand for the ULJ to consider that issue, as well as whether relator should be deemed ineligible for benefits based on employment misconduct.

FACTS

Relator Barbara Hulett-Anderson began work as a licensed practical nurse for the Minnesota Department of Corrections (DOC) in 2000. In 2010, a DOC investigator concluded that Hulett-Anderson had been supplying unauthorized prescription medication to a co-worker at the Minnesota Correctional Facility-Shakopee. As a result of the investigation, Hulett-Anderson was discharged. She was also charged with a fifth-degree controlled-substance crime, which is a felony. *See* Minn. Stat. § 152.025 (2010).

Hulett-Anderson established an unemployment-compensation benefits account with the Minnesota Department of Employment and Economic Development (DEED), a department adjudicator denied benefits, and she appealed. At a hearing before a ULJ, the investigator testified that she received an incident report that alleged that a DOC security officer had been receiving prescription pills from Hulett-Anderson to treat a hangover.

The investigator interviewed three employees, including the security officer, who corroborated that report. The security officer told the investigator that he had received 20 to 30 pills of different shapes and sizes from Hulett-Anderson. The investigator also interviewed Hulett-Anderson, who stated that she had provided only aspirin to the security officer.

Hulett-Anderson testified that she gave the security officer only aspirin on a sporadic basis, that access to all controlled substances was restricted, and that she was pleading not guilty to the criminal charge. A co-worker and a staff physician testified that access to prescription medication was strictly controlled and that the unauthorized distribution of such medication was highly unlikely. A registered-nurse supervisor testified that a narcotics count was performed twice a day and that, within the last year, the count had been off on one or two occasions without explanation.

The ULJ found that Hulett-Anderson provided unauthorized prescription medication to a co-worker and was facing pending charges of fifth-degree controlled-substance sale. The ULJ did not determine that her alleged conduct of providing unauthorized prescription drugs amounted to employment misconduct, but determined that she was ineligible for unemployment benefits because she had been discharged for aggravated employment misconduct. Hulett-Anderson requested reconsideration, and the ULJ affirmed, determining that the preponderance of the evidence showed that Hulett-Anderson had provided the security officer with unauthorized prescription medication and that her conduct amounted to a felony.

This certiorari appeal follows. On appeal, Hulett-Anderson has moved to supplement the record with new evidence that the controlled-substance charge arising out of the alleged unauthorized distribution of medication has been dismissed.

D E C I S I O N

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) (2010). This court views "the ULJ's factual findings in the light most favorable to the decision and should not disturb those findings as long as there is evidence in the record that reasonably tends to sustain them." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Id.* (quotation omitted). "Whether the employee committed a particular act is a question of fact." *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 822 (Minn. App. 2010) (citation omitted), *review denied* (Minn. Sept. 29, 2010). "Determining whether a particular act constitutes disqualifying misconduct is a question of law that we review de novo." *Stagg*, 796 N.W.2d at 315.

An employee who is discharged for aggravated employment misconduct is ineligible to receive unemployment benefits and is subject to cancellation of the wage credits that she would have earned from that employment. Minn. Stat. § 268.095, subds. 4(2), 10(c) (2010). Aggravated employment misconduct is defined as "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 effect on the employment.” Minn. Stat. § 268.095, subd. 6a(a)(1) (2010). “If an applicant is convicted of a gross misdemeanor or felony for the same act for which the applicant was discharged, it is aggravated employment misconduct if the act substantially interfered with the employment or had a significant adverse effect on the employment.” *Id.*, subd. 6a(b). The ULJ determined that Hulett-Anderson had been discharged for aggravated employment misconduct, based on her conduct of providing controlled substances to a co-worker, and found that she faced a pending felony charge of fifth-degree controlled substance crime. *See* Minn. Stat. § 152.025 (2010) (stating elements of fifth-degree controlled substance crime).

Hulett-Anderson challenges the ULJ’s decision that she committed aggravated employment misconduct, arguing that she has not been convicted of the criminal charge against her. She argues that the day before the ULJ issued the decision on reconsideration, she received notification that the state had dismissed the criminal charge pursuant to Minn. R. Crim. P. 30.01. *See* Minn. R. Crim. P. 30.01 (permitting state to voluntarily dismiss criminal complaint). She maintains that she attempted to submit the notification of dismissal to the ULJ, but her request was denied as untimely, and she now moves to supplement the record with evidence of that dismissal. DEED contests the motion.

We may take judicial notice of public records and retain inherent power to look beyond the record when the orderly administration of justice commends it. *Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn.*, 787 N.W.2d 523, 530 (Minn. 2010). The rule-30.01

dismissal of the criminal charge is a public record and is therefore subject to judicial notice. *Id.* DEED argues that the dismissal of criminal charges has little relevance to the ULJ's determination because the standard of proof in unemployment-insurance proceedings differs from that in criminal proceedings. *See* Minn. Stat. § 268.031, subd. 1 (2010) (reciting preponderance-of-the-evidence standard in proceedings conducted under unemployment-insurance law). But the ULJ's decision of ineligibility specifically cites the pending criminal charge, and the state's later dismissal of that charge may provide evidence relevant to determining whether Hulett-Anderson committed aggravated employment misconduct. *See* Minn. Stat. § 268.095, subd. 6a(a)(1) (stating that the commission of an act "that would amount to a gross misdemeanor or felony" amounts to aggravated employment misconduct if that act had a significant adverse effect on employment or substantially interfered with employment). We conclude that, under these circumstances, the interest of justice favors allowing consideration of the additional evidence to assess whether a remand to the ULJ would be appropriate, and we grant the motion to supplement the record.

A ULJ must conduct an additional evidentiary hearing if a party shows that evidence that was not submitted at a previous hearing would likely change the outcome of the decision and good cause exists for not having previously submitted the evidence. Minn. Stat. § 268.105, subd. 2(c) (2010). Because the dismissal of the criminal charge would likely change the outcome of the ULJ's decision on the issue of aggravated employment misconduct, and because Hulett-Anderson attempted to submit that evidence before the ruling on reconsideration, we reverse and remand for the ULJ to conduct an

additional evidentiary hearing and consider the circumstances surrounding the dismissal of the charges. *See* Minn. R. 3310.2923 (2011) (stating that ULJ may officially note facts subject to judicial notice in Minnesota courts).

Hulett-Anderson also argues on appeal that her conduct did not amount to employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(a) (2010) (defining employment misconduct as “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”). The ULJ determined only that she was ineligible for benefits based on aggravated employment misconduct. Because the ULJ did not determine whether Hulett-Anderson committed employment misconduct based on her alleged conduct of providing unauthorized prescription medication, we decline to consider that issue. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate court will not review matters not considered below). But on remand, if the ULJ finds that her conduct does not constitute aggravated employment misconduct, the ULJ may additionally consider whether she is ineligible for unemployment benefits based on conduct that meets the statutory definition of employment misconduct.

Reversed and remanded; motion granted.