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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-986**

Nicole Martin,  
Respondent,

vs.

Highland Manor, Inc.,  
Relator,

Department of Employment and Economic Development,  
Respondent.

**Filed March 19, 2012  
Affirmed; motion denied  
Larkin, Judge**

Department of Employment and Economic Development  
File No. 27025429-3

Nicole Martin, North Mankato, Minnesota (pro se respondent)

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(for relator)

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Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Larkin,  
Judge.

## UNPUBLISHED OPINION

**LARKIN**, Judge

Relator challenges an unemployment law judge's (ULJ) determination that relator's former employee, a respondent herein, is eligible to receive unemployment benefits, arguing that the ULJ erred by discrediting relator's reliable hearsay evidence. Because the ULJ's determination was based on an express credibility determination to which we defer, we affirm.

### DECISION

Relator Highland Manor, Inc. owns and operates Oak Hills Living Center, a skilled nursing facility. Respondent Nicole Martin was employed at Oak Hills as a registered nurse. Martin's job responsibilities included dispensing medication to residents. Highland discharged Martin based on a series of incidents that led Highland to conclude that Martin had diverted pain medication from patients. Martin established a benefit account with respondent Minnesota Department of Employment and Economic Development (DEED). A DEED adjudicator determined that Martin was eligible for benefits, and Highland appealed that determination. After a two-day evidentiary hearing in which both parties participated, a ULJ made detailed findings of fact and express credibility determinations and concluded that relator's evidence "was purely speculative and does not support a conclusion that Martin was stealing medications." The ULJ therefore determined that Martin was not discharged for employment misconduct and that she was eligible for benefits. Highland filed a request for reconsideration, and the ULJ affirmed her determination. Highland appeals.

## I.

We first address DEED’s pending motion to dismiss Highland’s appeal as moot. The doctrine of mootness requires appellate courts to “decide only actual controversies and avoid advisory opinions.” *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). If a court cannot grant effective relief, the matter is generally dismissed as moot. *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005).

DEED argues that this appeal is moot because Highland is required to reimburse the Minnesota unemployment insurance trust fund for benefits paid to Martin even if this court reverses the ULJ’s eligibility determination. Highland counters that it does not have to reimburse the trust fund if Martin was discharged for aggravated employment misconduct.

“Any nonprofit organization that has employees in covered employment must pay taxes on a quarterly basis . . . unless it elects to make reimbursements to the trust fund the amount of unemployment benefits charged to its reimbursable account . . . .” Minn. Stat. § 268.053, subd. 1(a) (2010). Highland has elected to be a reimbursing employer. Minnesota law further provides: “Unemployment benefits paid to an applicant . . . will be . . . charged to the reimbursable account of a base period nonprofit or government employer that has elected to be liable for reimbursements . . . .” Minn. Stat. § 268.047, subd. 1 (2010). But there are exceptions, including that, “[u]nemployment benefits paid will not be . . . charged to the reimbursable account of a base period nonprofit or government employer that has elected to be liable for reimbursements when . . . the

applicant was discharged from the employment because of aggravated employment misconduct . . . .” *Id.*, subd. 2 (2010).

Highland has consistently asserted that Martin’s alleged misappropriation of pain medication constitutes aggravated employment misconduct. If this court were to determine that the ULJ erred in concluding that Martin was not discharged for aggravated employment misconduct, Highland would not be required to reimburse the trust fund. Because the resolution of this appeal in Highland’s favor may eliminate Highland’s reimbursement obligation, the appeal is not moot. We therefore deny DEED’s motion to dismiss.

## II.

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2010). Minnesota courts have defined substantial evidence as: “(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).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4 (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). The misconduct definitions set out in the statute are exclusive and “no other definition applies.” *Id.*, subd. 6(e) (2010).

Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* This court reviews the ULJ’s factual findings “in the light most favorable to the decision” and defers to the ULJ’s credibility determinations. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

The ULJ concluded that because “[t]he evidence gathered by Highland Manor was purely speculative and does not support a conclusion that Martin was stealing medications” she was not discharged for employment misconduct. The ULJ further determined that “the testimony of Martin was more credible because it was more specific, more clear, more thorough, and the more plausible version of the events. The testimony of Highland Manor’s witnesses was less clear, more speculative, based almost entirely upon hearsay, and the less plausible version of the events.”

Highland argues that the ULJ's eligibility determination is not supported by substantial evidence and that the "ULJ erred as a matter of law by improperly discounting the reliable hearsay evidence presented by Highland." Highland asserts that in unemployment-benefits cases involving the care of vulnerable adults, evidence is likely to be in the form of hearsay: "As a practical matter, it would not be possible or appropriate for an employer in [Highland's] position to present the testimony by residents, about such residents' medical issues and medication, in order to challenge an unemployment eligibility determination by a former employee." Highland therefore argues that the ULJ inappropriately discounted its hearsay evidence and that the ULJ should have given the hearsay evidence the same weight as Martin's testimony.

Highland relies on *Holton v. Gnan Trucking, Inc.*, 379 N.W.2d 571 (Minn. App. 1985), for support. In *Holton*, a truck driver was discharged based on customer complaints of rudeness, threats, and foul and abusive language. 379 N.W.2d at 572-73. A referee and a Commissioner of Economic Security representative found that the truck driver had not engaged in willful misconduct. *Id.* at 572. They rejected the employer's evidence of misconduct because the employer "had merely 'presented [conclusive] statements made by customers who were not present at the hearing and not subject to inquiry as to the basis of their conclusions,' whereas [the truck driver] had been a direct participant in the events." *Id.* This court reversed, stating:

We do not accept this analysis of the weight of the evidence. The customers' statements were far more than [conclusive]. The letters detailed specific offensive behavior. They contained phrases, times, places, and other details making

fabrication unlikely. Each letter was based upon the customer's personal interaction with [the truck driver].

*Id.* at 574.

*Holton* is distinguishable. In *Holton*, the hearsay evidence consisted of specific written allegations from customers that directly established the terminated employee's misconduct. Unlike the direct evidence of misconduct in *Holton*, the hearsay statements in this case merely provide circumstantial evidence of the alleged misconduct. Although some residents alleged that Martin did not provide them with their medications on specific occasions—allegations that Martin denied at the evidentiary hearing—the ULJ noted that “[t]here is no evidence that anyone directly saw Martin taking medications.”

The ULJ conducted a lengthy hearing over the course of two days and provided Highland and Martin with ample opportunity to present evidence. In the end, the ULJ concluded that the evidence did not show that Martin diverted pain medication from patients. This finding was based on an express determination that Martin's testimony was more credible than Highland's circumstantial, hearsay evidence, and the ULJ explained the reasons for her credibility determination in detail. *See* Minn. Stat. § 268.105, subd. 1(c) (2010) (“When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony.”). And although the administrative rules allow a ULJ to consider hearsay evidence, the rules do not dictate how the ULJ must weigh such evidence. *See* Minn. R. 3310.2922 (2009) (“A judge may receive any evidence that possesses probative value,

including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.”). Moreover, this court does not reweigh the evidence or reassess witness credibility determinations on appeal. *See Skarhus*, 721 N.W.2d at 344.

Viewing the ULJ’s factual findings in the light most favorable to the decision and deferring to the ULJ’s credibility determinations, we conclude that the ULJ did not err in determining that Martin was not discharged for employment misconduct, aggravated or otherwise, and that she is eligible for unemployment benefits.

**Affirmed; motion denied.**