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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1251**

Jennifer Perry,
Relator,

vs.

Daniel W. Sletten, D.D.S., M.S., LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 1, 2013
Affirmed
Bjorkman, Judge**

Department of Employment and Economic Development
File No. 29506439-3

Jennifer Perry, Lindstrom, Minnesota (pro se relator)

Daniel W. Sletten, D.D.S., M.S., LLC, Stillwater, Minnesota (respondent)

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

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

UNPUBLISHED OPINION

BJORKMAN, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that she is ineligible for unemployment benefits, arguing (1) the evidence does not substantially support the ULJ's finding that she was discharged for not having a dental-assistant license and (2) the failure to maintain her licensure does not constitute employment misconduct. We affirm.

FACTS

Relator Jennifer Perry began working as a licensed dental assistant for Daniel W. Sletten, D.D.S., in 2002. In addition to performing dental-assistant duties, Perry worked the front desk, answered phones, checked-in and counseled patients, scheduled appointments, and ordered supplies. She also worked approximately twice a month at Dr. Sletten's Wisconsin office where she did not need to be licensed.

In 2010, the Minnesota Board of Dentistry (the board) audited Perry's dental-assistant license and requested several documents from her. Perry sent the documents to the board, but they were not received. The board followed up with two additional letters, which Perry contends she did not receive. In September 2011, Dr. Sletten told his dental assistants that he wanted to display their licenses at the office. At that time, Perry contacted the board and learned that her license had expired.

Perry informed Dr. Sletten of the situation and the steps that she must take to renew her license, including taking two classes and three exams. Dr. Sletten allowed her to continue performing dental-assistant duties while she completed the renewal process.

Perry took the first exam in November 2011 but had difficulty scheduling the two classes, which she needed to complete before taking the final two exams. In early February 2012, Dr. Sletten met with Perry, advising her to get her license up to date. At that time, Perry had not made any further progress toward renewing her license. On February 26, Dr. Sletten discharged Perry for not having a license.

Perry applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development (DEED) determined that Perry is ineligible to receive benefits because she was terminated for employment misconduct. Perry appealed the ineligibility determination. The ULJ conducted an evidentiary hearing.¹ The ULJ determined that Perry is eligible to receive benefits because she was discharged for reasons other than employment misconduct. Dr. Sletten requested reconsideration. On reconsideration, the ULJ reversed her decision, concluding that Perry is ineligible to receive benefits because Dr. Sletten discharged her for not having a dental-assistant license, which constitutes employment misconduct. This certiorari appeal follows.

D E C I S I O N

We review a ULJ's decision to determine whether it is "(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) (2012).

¹ Dr. Sletten did not participate in the evidentiary hearing.

An employee who is discharged for “employment misconduct” is not eligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). 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) (2012). Whether an employee committed a particular act is a fact question, which we review for substantial evidence, giving deference to the ULJ’s credibility determinations. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether an act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

I. Substantial evidence supports the ULJ’s finding that Perry was terminated for not having a dental-assistant license.

Perry argues that she was discharged because she was unhappy with certain office conduct. This argument is unavailing. First, because Perry did not present this argument to the ULJ, it is waived. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (“An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.”). Second, it is undisputed that Dr. Sletten requires his dental assistants to be licensed. Shortly before discharging Perry, Dr. Sletten told her to get her license up to date. And when Dr. Sletten terminated Perry, he told her that she needed a current license. Although Dr. Sletten allowed Perry to work as a dental assistant for several months without a license and she

did not need a license to perform all her duties, the evidence substantially supports the ULJ's finding that Perry was terminated for not having a dental-assistant license.

II. Perry's failure to maintain her dental-assistant license constitutes employment misconduct.

The ULJ concluded that Perry committed a serious violation of the standards of behavior Dr. Sletten had a right to reasonably expect. We agree. Merely losing a professional license is not necessarily employment misconduct; but intentional, negligent, or indifferent conduct that causes the loss of a license required to perform one's work-related duties is employment misconduct. *See Markel v. City of Circle Pines*, 479 N.W.2d 382, 385 (Minn. 1992). The record demonstrates that Perry's negligent and indifferent conduct resulted in the loss of her license. Perry knew she needed a dental-assistant license to perform her job duties. She knew that she was subject to an audit but did nothing to follow up after sending paperwork to the board in 2010. She did not contact the board until Dr. Sletten wanted to display her license in September 2011. And five months after learning her license had expired, Perry had not taken substantial action to regain her license.

Moreover, the lack of a professional license is particularly serious in the context of Perry's employment. Minnesota law prohibits an unlicensed dental assistant from performing the duties of a licensed dental assistant. *See* Minn. Stat. § 150A.10, subd. 2 (2012); *see also* Minn. R. 3100.8400, .8500 (2011). Dentists are subject to significant penalties for allowing an unlicensed person to perform a licensed dental assistant's duties. *See* Minn. Stat. §§ 150A.10, subd. 2, .12 (2012). The supreme court has

recognized the significance of behavior standards for medical professionals, stating “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., Inc.*, 448 N.W.2d 519, 525 (Minn. 1989).

Perry argues that she did not commit employment misconduct because she did not know that she could be terminated for failing to have a license, Dr. Sletten permitted her to work for several months while aware that she did not have a license, and she performed work that did not require a license. We are not persuaded. First, the ULJ expressly found that Perry’s testimony that she did not know she could be fired for losing her license was not credible, and we defer to the ULJ’s credibility determinations. *Lamah v. Doherty Emp’t Grp., Inc.*, 737 N.W.2d 595, 598 (Minn. App. 2007). Second, Dr. Sletten’s knowledge of her license expiration does not excuse or condone her inadequate response to the board’s audit and failure to timely complete the steps necessary for reinstating her license. Third, although Perry could perform some employment tasks without a dental-assistant license, she could not perform all of her duties. Ultimately, not having a license significantly limited Perry’s ability to work for Dr. Sletten. On this record, we conclude that Perry committed employment misconduct and is ineligible to receive unemployment benefits.

Affirmed.