STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0024

Healing Spirit Clinic, PLC,
Relator,

vs.

Arlo M. Christianson,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed November 25, 2008
Affirmed
Connolly, Judge

Department of Employment and Economic Development
File No. 9621 07

Paul Egtvedt, Egtvedt & Skees, L.L.P., 2915 Wayzata Boulevard, Minneapolis, MN 55405 (for relator)

Arlo M. Christianson, 190 South First Street, Foreston, MN 56330-9414 (pro se respondent)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101 (for respondent department)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Relator asserts that respondent Arlo M. Christianson was discharged for employment misconduct and is therefore disqualified from receiving unemployment benefits. Because Christianson's actions did not rise to the level of employment misconduct, we affirm.

FACTS

Respondent Arlo M. Christianson worked part time for relator Healing Spirit Clinic as a receptionist from October 1, 2006, through March 27, 2007. During the week of February 19, 2007, relator's owner, Dr. Helle Lukk, offered Christianson a full-time position at the clinic provided that he found other childcare arrangements for his three children.[1] Christianson told Lukk that he would have to think about the offer.

Shortly thereafter, Jeanne Roggow started working at the clinic as the business manager. On March 9, 2007, Roggow asked Christianson if he had been able to arrange alternative daycare for his children. Christianson stated that he was having trouble finding daycare that was not too expensive. On March 19, 2007, Christianson met with Lukk and Roggow and told them that he would not be accepting the full-time job offer. Christianson agreed to stay until someone was found to replace him and offered to train the new person.

[1] Lukk had previously been allowing respondent to take a break from work at about 2:45 p.m. each day to pick up his three children from school and then keep them in one of the unused clinic rooms until his shift ended at 5 p.m.

After March 19, 2007, Roggow asked Christianson to write down various procedures done at the front desk, "from charting the different documents to getting things together to attorneys' offices or to insurance companies." About one week later, Roggow asked Christianson if he had written anything down. Christianson stated that he was not going to write anything down because releasing medical records involved legal concepts beyond his knowledge. He testified that he did not think he could explain how to release medical records in writing because, even after seven months, he still referred to HIPAA documents to determine what information could be released. Roggow again asked him to write down the procedures, but they had no further conversations about the assignment before Christianson's last day of work on March 27, 2007.

Sometime between March 19 and March 27, Christianson bounced a rubber-band ball at his desk to entertain a child in the waiting room. Roggow asked Christianson to stop bouncing the ball, and he immediately complied. During that same week, Christianson read a book at his desk when he ran out of work to do. Lukk asked Christianson not to read books at his desk anymore. He again complied immediately.

The week before he was discharged, Christianson arrived at work to find that the computer system was not working. Christianson started disconnecting some of the computer hardware in an attempt to restore the system on his wife's computer.[2] Lukk asked Christianson to please not touch the system, but he continued to work on the computer. She again told Christianson not to touch the computers, and he returned to the front desk. Lukk then asked Christianson to call the Internet provider to ask if the

[2] Christianson's wife was also employed by Healing Spirit Clinic.

Internet connection was operable. The Internet provider inquired about what Lukk had tried so far, and Christianson informed the representative that Lukk did not really know how to work on the system. The representative then started to give Christianson instructions on how to fix the computers, but Christianson answered that Lukk did not want him touching the computers because she did not think he knew what he was doing. A patient in the waiting room overheard the conversation and reported it to Lukk. Lukk was offended, and she decided to discharge Christianson effective March 27, 2007.

Christianson established a benefit account with the Minnesota Department of Employment and Economic Development. A department adjudicator initially determined that Christianson was discharged for reasons other than employment misconduct and ruled that he was not disqualified from receiving benefits. Relator appealed that decision, and a de novo hearing was held before an unemployment-law judge (ULJ). The ULJ affirmed the determination. Relator filed a request for reconsideration with the ULJ, who affirmed the decision that Christianson was discharged for reasons other than employment misconduct. This certiorari appeal follows.

D E C I S I O N

When reviewing the decision of a ULJ, this court may affirm the decision, remand it for further proceedings, or reverse or modify it if the substantial rights of the petitioner 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) (2006).

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 the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court views 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). This court also gives deference to the credibility determinations made by the ULJ. *Id.* As a result, this court will not disturb the ULJ's factual findings when the evidence substantially sustains them. Minn. Stat. § 268.105, subd. 7(d). But whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo. *Scheunemann*, 562 N.W.2d at 34.

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006).

> Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.
>
> Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence

> because of illness or injury with proper notice to the employer, are not employment misconduct.

Id., subd. 6(a) (2006).

The ULJ found Christianson and his wife to be more credible witnesses than Lukk and Roggow. Based on this conclusion, the ULJ determined that Christianson was discharged from his job. Relator does not dispute this fact on appeal. Rather, relator argues that Christianson was properly discharged for employment misconduct such that he is disqualified from receiving unemployment benefits. The ULJ, however, found that Christianson's actions at work did not constitute employment misconduct. We agree.

Minn. Stat. § 268.095, subd. 6(a) clearly states that simple unsatisfactory conduct, good faith errors in judgment, and poor performance due to inability are not misconduct. Christianson's conduct falls into this category, rather than employment misconduct.

Relator argues that Christianson failed to comply with a direct order from his employer by failing to write out the procedures for releasing medical records, thereby committing misconduct. *See McGowan v. Executive Express Transp. Enters., Inc.*, 420 N.W.2d 592, 596 (Minn. 1988) ("One in charge of a business must be allowed to expect that reasonable orders will be followed."). The ULJ determined, however, that Christianson did not refuse to follow a direct order, but rather was unable to articulate the procedures because "he was not comfortable enough with the procedures" to write them down. This factual finding must be viewed in the light most favorable to the decision. *Skarhus*, 721 N.W.2d at 344. Because poor performance due to inability is not

employment misconduct under Minn. Stat. § 268.095, subd. 6(a), Christianson's failure to write down the procedures was not employment misconduct.

Relator next contends that Christianson failed to comply with another direct order when he continued to fix the computers even after being asked to stop. It is undisputed that after Lukk asked Christianson not to touch the computers, he continued to work on his wife's computer. But the second time he was asked to stop, Christianson immediately returned to his desk and called the Internet provider as directed. It was certainly unacceptable for Christianson to continue working on his wife's computer after Lukk asked him to stop. However, this was not a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee as required by the statute. Rather, it was simple unsatisfactory conduct, not employment misconduct. Furthermore, although Lukk took offense to what Christianson said on the phone when speaking with the Internet provider, these statements do not constitute misconduct. Christianson was merely telling the representative that Lukk did not know how to fix the computers, and she did not want him touching them because she did not think he knew how to fix computers either. Both of these statements were true, and in the context of the conversation, were not derogatory.

Relator further argues that although the incidents involving the unwritten procedures and the computer were each sufficient to constitute employment misconduct, when considered along with the ball bouncing and reading incidents, Christianson was properly discharged for employer misconduct under the "last straw" doctrine. "[S]everal instances of behavior unrelated in time or tenor may, as a whole, support a determination

of misconduct under the last straw doctrine." *Monyoro v. Marriott Corp.*, 403 N.W.2d 325, 328 (Minn. App. 1987) (quotations omitted). The doctrine does not apply here. The cases cited by relator in support of its last straw argument involved more egregious violations than those at issue here, as well as multiple warnings that the employee's behavior was unacceptable.[3]

Christianson bounced a ball at his desk in an effort to entertain a child in the waiting room. He stopped bouncing the ball as soon as he was asked to stop. Neither Lukk nor Roggow gave Christianson a warning regarding this incident, and there is no evidence in the record indicating that Christianson ever bounced the ball at his desk again. The reading incident was similar. Christianson was asked to stop reading at his desk, and he complied. Christianson's supervisor did not give him a warning and did not witness Christianson reading at his desk again. The four incidents at issue in this case, viewed individually or as a whole, do not demonstrate a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or a substantial lack of concern for the employment. The incidents amount to merely unsatisfactory conduct or poor performance due to inability. Therefore, the ULJ did not err by concluding that Christianson was not disqualified from receiving unemployment benefits because he was discharged for reasons other than employment misconduct.

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[3] *See Barstow v. Honeywell, Inc.*, 396 N.W.2d 714, 715 (Minn. App. 1986) (employee was verbally warned about absences from work and received several demerits for tardiness, failure to punch out, and failure to perform a weld check); *Campbell v. Minneapolis Star & Tribune Co.*, 345 N.W.2d 803, 804 (Minn. App. 1984) (employee received over 20 reprimands, as well as a final warning that additional indiscretions would result in termination); *Flahave v. Lang Meat Packing*, 343 N.W.2d 683, 685 (Minn. App. 1984) (employee received three written warnings for absenteeism).

Lastly, relator argues that Christianson gave conflicting statements in his application for benefits and at the hearing, and therefore the ULJ erred by finding Christianson credible. The ULJ had access to the filings and he conducted the hearing. He either was aware, or could have been made aware by the employer, of any conflicting statements, and yet he found Christianson to be more credible than Lukk or Roggow. We give deference to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344.

Affirmed.