STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0288

Nancy Sager,
Relator,

vs.

Fraser,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed November 24, 2014
Affirmed
Hooten, Judge

Department of Employment and Economic Development
File No. 31682922-3

Jonathan E. Fruchtman, Minneapolis, Minnesota (for relator)

Fraser, Minneapolis, Minnesota (respondent employer)

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

Considered and decided by Hooten, 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

HOOTEN, Judge

Relator Nancy Sager challenges the determination by an unemployment law judge (ULJ) that Sager is disqualified from receiving unemployment benefits because she committed employment misconduct by failing to provide medical documentation to support her continued leave of absence. Sager argues that (1) the ULJ's factual findings are not supported by substantial evidence in the record; (2) the ULJ erred by attributing to her the failure of her medical provider to complete and provide the medical forms; and (3) her failure in submitting the medical forms was not misconduct but was instead caused by inadvertence, her reasonable belief that it was not necessary, or a good faith error in judgment. We affirm.

FACTS

Respondent Fraser is a non-profit organization that helps children and adults with special needs. Sager began working for Fraser in early 2013 as a program assistant, working an overnight shift three days a week. Sager also began working full-time at Wells Fargo as a phone bank operator in April 2013. About a month later, Sager tripped in a stairwell while at work for Wells Fargo and injured her back. On May 18, 2013, Sager informed Fraser that she would need to take leave due to her injury. Fraser put Sager on a medical leave of absence through August 10, 2013, but warned Sager in a letter that she would need to provide "adequate documentation" regarding her work restrictions to support her leave and "stay in regular contact with Fraser . . . , especially regarding any changes in [her] workability." The letter also stated that if Fraser failed to

"receive timely communication and an updated workability report" by August 10, Sager's leave would end and she would be terminated.

Sager sought treatment from a chiropractor who provided Sager with chiropractic care certificates and other documentation that Sager would then fax to Fraser. While Fraser provided Sager and the chiropractor with Fraser's own workability form, the chiropractor did not use the Fraser form in reporting Sager's fitness for work and instead used the clinic's chiropractic care certificates or other documents indicating Sager's work restrictions. Sager sent a total of ten updates to Fraser. The last update that Fraser received was from the visit on July 22, which provided that she was still subject to a lifting restriction and would be seen again on August 5.

Sager was seen by the chiropractor on August 5, at which time her chiropractor indicated that she was able to return to work at Wells Fargo.[1] On or about August 12, Sager returned to work with Wells Fargo after submitting a statement from her chiropractor releasing her to work with a lifting restriction. Sager continued to see the chiropractor throughout the months of August and September, but Fraser did not receive copies of any of the chiropractic care certificates from any of these visits. After a number of requests for an update of her medical condition, Fraser extended Sager's medical leave and warned her that if she did not provide medical documentation by September 25, she would be terminated. Ultimately, despite substantial communications between the

[1] At the eligibility hearing, Sager did not provide a copy of the August 5 chiropractic care certificate that allowed her to return to work at Wells Fargo.

parties, no medical updates were provided to Fraser by September 25 and Fraser terminated Sager's employment on September 30, 2013.[2]

Sager applied for unemployment benefits after her termination, and respondent Minnesota Department of Employment and Economic Development (DEED) determined that Sager was ineligible for benefits because she was discharged for employment misconduct. Sager appealed this determination, and the ULJ held a telephonic hearing at which Sager and two Fraser employees, Kimbra Boitnott and Amanda Prince, testified. At the hearing, Sager claimed that she was unable to provide medical documentation to Fraser after July 22 because Fraser had informed her that it would accept only its own workability form from the chiropractor, and the chiropractor had failed to submit the Fraser form despite Sager's repeated requests. Sager also testified that her chiropractor was unable to send the form to Fraser because Fraser had failed to send a release to the chiropractor. The Fraser employees both testified that Fraser had never required Sager to submit its own workability form, and that Fraser had never told Sager that the chiropractic care certificates were insufficient.

The ULJ determined that Sager had committed employment misconduct by failing to make a "reasonable effort to obtain a statement from the chiropractor to provide to the employer regarding her ability to work," failing to show a "good faith effort to comply with Fraser's reasonable request," and "clearly" displaying "a serious disregard of Fraser's interest and standards of behavior." The ULJ found Sager's testimony to be "wholly not credible," and held that the evidence failed to prove her allegations regarding

[2] Fraser's termination was made retroactive to September 13, 2013.

the Fraser workability forms and lack of release. On reconsideration, the ULJ affirmed her decision, holding that Sager had failed to provide sufficient new evidence or prove that the evidence against her at the hearing was false and that this false evidence "had an effect on the outcome of the decision." The matter comes before this court on a writ of certiorari.

D E C I S I O N

The purpose of chapter 268 is to assist those who are unemployed through no fault of their own. Minn. Stat. § 268.03, subd. 1 (2012). The chapter is remedial in nature and must be applied in favor of awarding benefits, and any provision precluding receipt of benefits must be narrowly construed. Minn. Stat. § 268.031, subd. 2 (2012).

In reviewing a ULJ's determination of ineligibility for unemployment benefits, this court may affirm the decision, remand it for further proceedings, or reverse or modify the decision if the relator's substantial rights have been prejudiced because the findings, inferences, conclusions, or decision is affected by other error of law, unsupported by substantial evidence in view of the entire record as submitted, or is arbitrary and capricious. 2014 Minn. Laws, ch. 271, art. 1, § 1, at 1028–29 (to be codified at Minn. Stat. § 268.105, subd. 7(d) (2014)).[3]

Determining whether an employee committed misconduct is a mixed question of fact and law. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (citing

[3] The 2014 amendment affected only subdivision 7(b), and subdivision 7(d) was unchanged. Because the amendment did not make any substantive changes to subdivision 7(d), the amended statute applies to pending litigation. *Braylock v. Jesson*, 819 N.W.2d 585, 588 (Minn. 2012).

Schmidgall v. FilmTec Corp, 644 N.W.2d 801, 804 (Minn. 2002)). Sager argues that she did not commit employment misconduct, challenging both the ULJ's factual findings and legal conclusions.

I.

In her findings of fact and decision, the ULJ found "no evidence that the employer refused to accept the forms as filled out by the [c]hiropractor." The ULJ further found that evidence failed to show that Sager made a "reasonable effort to obtain a statement from the chiropractor" or "that the chiropractor refused to provide the employer" with a medical update. The ULJ also determined that Sager's testimony lacked credibility and was not corroborated by evidence in the record. Sager argues that these findings are unsupported by the evidence.

The ULJ's factual findings are examined "in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ." *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 822 (Minn. App. 2010) (citing *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006)), *review denied* (Minn. Sept. 29, 2010). The court is not to disturb these findings as long as there is evidence in the record that "substantially sustains them." *Skarhus*, 721 N.W.2d at 344. "A decision is supported by substantial evidence when it is supported by (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 Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002).

Sager asserts that her testimony at the hearing contradicted the Fraser witnesses' testimony, established that the Fraser form was required, and proved that she repeatedly attempted to obtain the report from her chiropractor. She claims the ULJ's determination that she lacked credibility was based on "misplaced conjecture" regarding the August 5 Wells Fargo workability form that was not in the record. Sager also argues that other evidence in the case—the differences between the workability forms, the course of events, Fraser's failure to specifically allow a workability form in a different format—refutes the ULJ's findings and supports her testimony.

The only evidence asserted by Sager that directly rebuts the challenged factual findings is her own testimony, which was discredited by the ULJ. "[W]e give deference to the ULJ's credibility determinations." *Van de Werken v. Bell & Howell, LLC*, 834 N.W.2d 220, 221 (Minn. App. 2013). However, the credibility determination must be supported by substantial evidence, and the ULJ must set forth a valid reason for crediting or discrediting testimony that may significantly affect the ultimate decision of the ULJ. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533; *see also* 2014 Minn. Laws ch. 251, art. 2, §§ 15, 24(b), at 862, 870 (to be codified at Minn. Stat. § 268.105, subd. 1a(a) (2014))[4] (providing that the ULJ "must set out the reason for crediting or discrediting that testimony" when the witness's credibility "has a significant effect on the outcome of the decision"). The ULJ discredited Sager's hearing testimony by weighing its plausibility in light of the other evidence presented, finding no evidence to support

[4] The 2014 legislation recodified subdivision 1a(a) and merely clarified its language, and therefore applies to pending litigation. *See Braylock*, 819 N.W.2d at 588.

several of her contentions. In doing so, the ULJ provided a valid reason as required by statute. *See Ywswf*, 726 N.W.2d at 533 (providing that a comparison of testimony to other evidence is a permissible factor in evaluating credibility). Because the ULJ gave a reason for her credibility determination and that decision was supported by substantial evidence, we defer to the ULJ's decision to discredit Sager's testimony and credit the testimony of Fraser's witnesses.

Sager also provides alternative inferences that the ULJ could have drawn from the evidence, but fails to show that the findings themselves lacked substantial evidence. It was undisputed that the chiropractor had issued, and Fraser had accepted, ten workability updates by July 22. Both of the Fraser employees that were questioned at the hearing said that Fraser accepted those certificates and did not require its own form. The ULJ, finding their testimony to be credible, based this credibility determination on the corroboration and consistency of their testimony with other evidence in the record. In the two-month period between her last update to Fraser on July 22 and her termination on September 30, Sager visited the chiropractor several times and was able to obtain a care certificate from the chiropractor for her other job at Wells Fargo on August 5. This evidence supports the ULJ's findings that there was no evidence the chiropractor would have refused to issue a similar certificate for Fraser and that Sager failed to make an effort to obtain a medical update.

"When witness credibility and conflicting evidence are at issue, we defer to the decision-maker's ability to weigh the evidence and make those determinations." *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006). In light of the

entire record and this court's deference to the ULJ in making determinations based on conflicting evidence, we hold that the ULJ's factual findings were based on substantial evidence.

II.

Sager next argues that the ULJ erred by attributing misconduct to Sager based on the actions of the chiropractor in failing to provide the updates required on Fraser's medical forms and forwarding the forms to Fraser, and that the ULJ erred by failing to find that her conduct fell within one of the misconduct exceptions in the unemployment benefits statute.

A.

Whether an employee's action constitutes disqualifying misconduct is a question of law that this court reviews de novo. *Stagg*, 796 N.W.2d at 315. An employee who is discharged by an employer due to misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). "Misconduct" is defined as "any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly" either "(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." 2014 Minn. Laws, ch. 239, art. 2, § 5, at 772 (to be codified at Minn. Stat. § 268.095, subd. 6(a) (2014)).[5] The statute further provides a list of employee conduct

[5] The 2014 amendment affected only subdivision 6(b)(10), and subdivision 6(a) was unchanged. Because the amendment did not make any substantive changes to subdivision 6(a), the amended statute applies to pending litigation. *Braylock*, 819 N.W.2d at 588.

that is not considered misconduct, which includes conduct due to inadvertence, the conduct of an average reasonable employee under the circumstances, and good faith errors in judgment if judgment was required. 2014 Minn. Laws, ch. 239, art. 2, § 5, at 772–73 (to be codified at Minn. Stat. § 268.095, subd. 6(b)(2), (4), (6)).[6]

Sager contends that the ULJ made an error of law, and acted arbitrarily and capriciously, in basing her misconduct finding on the failure of the chiropractor to comply with Sager's repeated requests to send updates to Fraser. Sager argues she made "repeated and diligent efforts" to obtain a workability report on the Fraser form, the chiropractor failed to provide such after her requests, and that therefore the chiropractor's conduct led to her termination. DEED claims that Sager is misrepresenting the true reason why she failed to obtain updated workability documentation: her return to work at Wells Fargo on August 13. DEED argues that the other reasons given by Sager for failing to obtain a workability update from the chiropractor are false, and therefore her conduct constitutes a substantial lack of concern for her employment and a serious violation of Fraser's expectations.

Generally, an employee's refusal to abide by an employer's reasonable policies and requests is disqualifying misconduct. *Schmidgall*, 644 N.W.2d at 804. In certain situations, events beyond the control of the employee will not constitute misconduct. *Hanson v. Crestliner Inc.*, 772 N.W.2d 539, 543–44 (Minn. App. 2009). Sager

[6] These provisions were similarly unaffected by the 2014 amendment. The amendment modifies subdivision 6(b)(10), which is not at issue in the instant case. Because the amendment does not make any substantive changes to subdivision 6(b)(2), (4) or (6), the amended statute applies. *Braylock*, 819 N.W.2d at 588.

mistakenly relies on *Ashur v. Electrolux Home Prods., Inc.* as establishing that an employee does not commit misconduct when a medical provider fails to update an employer as required by a policy. No. A10-1238, 2011 WL 1236266 (Minn. App. Apr. 5, 2011). Unpublished opinions of this court are not precedential, Minn. Stat. § 480A.08, subd. 3(c) (2012). Even if we were to consider *Ashur*, we can distinguish it from this case on the basis that, unlike Ashur, who followed company policy in requesting and sending medical documentation, Sager did not.

The key determination under the statute is whether the employee committed intentional, negligent, or indifferent conduct that seriously violated the reasonable expectations of the employer or showed a substantial lack of concern for the employment. *See* 2014 Minn. Laws, ch. 239, art. 2, § 5, at 772 (to be codified at Minn. Stat. § 268.095, subd. 6(a)). Here, Fraser's reasonable expectations were that Sager would provide "timely communication and an updated workability report" to Fraser or risk termination. Fraser gave Sager an extended deadline to do so, eventually giving her over two months to submit documentation. Sager had demonstrated the ability to get such updates from her chiropractor; she was able to provide medical updates to Fraser numerous times before July 22. Sager had ample opportunity after July 22 to get such an update, as she saw the chiropractor numerous times after that date and the chiropractor gave her a medical update for her other job on August 5. While she claims to have made repeated requests for an updated medical form, she failed to show any reason why the chiropractor would have failed to comply with such request. Regardless of whether her failure to obtain an update was motivated by her return to work at Wells Fargo, her circumstances

were such that obtaining the report was not beyond her control. Sager's actions were intentional, negligent, or indifferent to her employer's needs, and substantially violated Fraser's reasonable request for updated medical documentation.

B.

Sager also argues that because she made a diligent effort to obtain an update and believed that the update had to be on Fraser's workability form, her conduct constituted inadvertence, the conduct of a reasonable employee, or a good faith error of judgment, and therefore was not misconduct under the statute.

"Inadvertence" is not considered misconduct under the unemployment benefits statute. 2014 Minn. Laws, ch. 239, art. 2, § 5, at 772 (to be codified at Minn. Stat. § 268.095, subd. 6(b)(2)). "Inadvertence" is an "oversight or a slip," and is "[m]arked by unintentional lack of care" or a failure to be "duly attentive." *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 540 (Minn. App. 2011) (quotation omitted). Here, Sager had over two months to obtain an update from her chiropractor, saw the chiropractor several times over that period, and was continually reminded by Fraser that she needed to get the update. Her failure to obtain the report was not mere inadvertence.

"[C]onduct an average reasonable employee would have engaged in under the circumstances" is also not considered misconduct under the statute. 2014 Minn. Laws, ch. 239, art. 2, § 5, at 772 (to be codified at Minn. Stat. § 268.095, subd. 6(b)(4)). Sager's conduct does not fit this exception. It is highly unlikely that the average, reasonable employee, given two-months' time, would have completely failed to obtain a report from a chiropractor that she had seen on six occasions in that time frame. Sager

contends that she tried to obtain a report and the chiropractor refused to issue one, but the ULJ did not credit her testimony on this point. Further, Sager gave no explanation as to why she failed to provide Fraser with a copy of the chiropractor's statement releasing her to work that was submitted to Wells Fargo.

Finally, there is a statutory exception for "good faith errors in judgment" by the employee. 2014 Minn. Laws, ch. 239, art. 2, § 5, at 773 (to be codified at Minn. Stat. § 268.095, subd. 6(b)(6)). However, good faith errors in judgment are excused only in situations where judgment is required. *Marn v. Fairview Pharmacy Servs. LLC*, 756 N.W.2d 117, 122 (Minn. App. 2008). Fraser's requirement that Sager provide the company with a medical update did not require her judgment; rather, at the inception of her medical leave, she was instructed that she had to provide Fraser with documentation of her medical condition in order to support her continued leave or she would be terminated. Even if Sager was operating under the mistaken belief that she had to obtain an update on Fraser's workability form, she still had an obligation to obtain the update from the chiropractor or provide a satisfactory reason explaining why the chiropractor refused to fill out Fraser's form. She failed to do so.

Affirmed.