STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0617

In re the Matter of the Maltreatment Appeal of Watta Yanor Kamara.

Filed February 19, 2019
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CV-17-8807

A. L. Brown, Marcus Almon, Capitol City Law Group, LLC, St. Paul, Minnesota (for appellant Watta Yanor Kamara)

Keith Ellison, Attorney General, Megan J. McKenzie, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Department of Health)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

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

LARKIN, Judge

Appellant-nursing-assistant challenges respondent-department's determination that she maltreated a vulnerable adult, arguing that she did not engage in conduct that constitutes abuse within the meaning of Minn. Stat. § 626.5572, subd. 2(b) (2018). We affirm.

FACTS

Respondent Minnesota Department of Health (MDH) issued a notice of findings of maltreatment based on an investigative report concluding that appellant Watta Yanor Kamara had abused a vulnerable adult (VA). After reviewing Kamara's request for reconsideration, MDH upheld the finding of maltreatment. Kamara timely requested a fair hearing, and MDH notified the Minnesota Department of Human Services (DHS) that a hearing was necessary.

A human-services judge (HSJ) presided over an evidentiary hearing and recommended that the commissioner of health reverse the finding of maltreatment. In May 2017, the commissioner issued a final order rejecting the HSJ's recommendation and affirming MDH's maltreatment finding. The commissioner's factual findings in support of the maltreatment determination are largely undisputed and not challenged on appeal.

The VA was a resident of St. Therese Home, a nursing-home facility licensed by MDH, where Kamara worked as a nursing assistant. At the time of the alleged maltreatment, the VA was 83 years old, diagnosed with dementia and Parkinson's disease, and had a history of falls. The VA was combative at times and easily scared. In June 2015, the VA's daughter put a hidden camera in the VA's room after suspecting inadequate care.

The surveillance videotape from this camera is the key evidence in this case. On one occasion, the camera recorded the VA on her bed unclothed while Kamara stood next to her.[1] The VA was agitated and possibly trying to cover herself with an incontinence

[1] The videotape did not record any audio.

product that Kamara was trying to put on her. Kamara shook her finger at the VA and threw a towel over the VA's face. When the VA threw the towel back at Kamara, Kamara threw the towel in the VA's face a second time, but more forcefully. The maltreatment determination was based on this incident.

Kamara appealed the commissioner's final order to the district court, arguing that her conduct was not serious or egregious enough to constitute maltreatment, that the commissioner's decision was arbitrary and capricious, and that the commissioner applied the wrong legal standard. The district court affirmed the commissioner's final order and maltreatment determination. Kamara appeals.

D E C I S I O N

"After review by the district court, we review the commissioner's decision independently, giving no deference to the district court's decision and being governed by the standards prescribed in the Minnesota Administrative Procedure Act (APA)." *In re Appeal of Staley*, 730 N.W.2d 289, 293 (Minn. App. 2007). "[D]ecisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *Reserve Mining Co. v. Herbst,* 256 N.W.2d 808, 824 (Minn. 1977). "Upon review, a court must exercise judicial restraint, lest it substitute its judgment for that of the agency." *Staley,* 730 N.W.2d at 293. We may reverse the agency's decision if it is unsupported by substantial evidence or arbitrary or capricious. *See* Minn. Stat. § 14.69(e), (f) (2018).

Kamara claims our standard of review is de novo, relying on *Staley*. Although this court used de novo review in determining whether the conduct in *Staley* constituted maltreatment, the court did so only because it had to interpret the statute that defined maltreatment to make its determination. *See Staley*, 730 N.W.2d at 297-300 ("When an agency bases its decision on statutory interpretation, we are presented with a question of law, which we review de novo."). Here, we need not engage in statutory interpretation to determine whether Kamara's conduct constitutes maltreatment under the relevant statutory definition, because *Staley* established the applicable standard. *See id*. at 299 (stating that "health-care workers are not subject to disqualification unless they have engaged in *serious and egregious* conduct") (emphasis added). We therefore apply the traditional deferential standard of review.

Under the Minnesota Vulnerable Adult Act (the Act), Minn. Stat. §§ 626.557-.5573 (2018), maltreatment means abuse, neglect, or financial exploitation. Minn. Stat. § 626.5572, subd. 15. The act defines "abuse" as:

> Conduct which is not an accident or therapeutic conduct . . . which produces or could reasonably be expected to produce physical pain or injury or emotional distress including, but not limited to, the following:
>
> (1) hitting, slapping, kicking, pinching, biting, or corporal punishment of a vulnerable adult;
>
> (2) use of repeated or malicious oral, written, or gestured language toward a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening.

Minn. Stat. § 626.5572, subd. 2(b).

In *Staley*, this court interpreted the act and stated, "The entire statute clearly reflects a purpose to protect vulnerable adults, but while also ensuring that health-care workers are not subject to disqualification unless they have engaged in *serious and egregious* conduct." 730 N.W.2d at 299 (emphasis added). In *Staley*, a nursing assistant made a statement to a vulnerable adult while helping the vulnerable adult use the bathroom. *Id.* at 292. The nursing assistant said, "I forgot to put my [f-cking] gloves on and it's your fault, now you're going to [sh-t] all over my hands, you dumb [f-cker]." *Id.* (alterations in original) (quotation marks omitted). This court held that "[a]n isolated and non-malicious statement does not, of itself, constitute conduct which could reasonably be expected to produce emotional distress, within the meaning of Minn. Stat. § 626.5572, subd. 2(b) (2006), defining 'abuse' of vulnerable adults." *Id.* at 291.

Kamara argues that the commissioner erred by determining that the undisputed facts constitute abuse as defined in the Act and *Staley*. We review the commissioner's findings and reasoning to determine whether they reflect application of the standards set forth in the Act and *Staley*, as well as whether they are supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 180 N.W.2d 175, 178 (Minn. 1970) (quotation omitted). "[T]he burden is upon the appellant to establish that the findings of the agency are not supported by the evidence in the record, considered in its entirety." *Reserve Mining Co.*, 256 N.W.2d at 825 (quotation omitted).

In determining that Kamara engaged in maltreatment based on abuse, the commissioner relied on Minn. Stat. § 626.5572, subd. 2(b)(1) and (2). Regarding subdivision 2(b)(2), the commissioner reasoned:

> [A] reasonable person would consider throwing a towel in a vulnerable adult's face twice to be egregious conduct that is disparaging, derogatory, humiliating, harassing, or threatening and thus cause emotional distress. Based upon the video evidence, no reasonable person could say that the VA benefitted in any way from this treatment. It is clear that [Kamara] intentionally committed this act with bad intention. Any act the VA might have committed against [Kamara] does not absolve [Kamara] for the treatment she committed against the VA. Therefore, I determine that [Kamara's] treatment of the VA [was] egregious and also meets the definition of abuse by a preponderance of the evidence under Minn. Stat. § 626.5572, subd. 2(b)(2).

As to that subdivision, the commissioner noted that, in addition to throwing the towel at the VA two times, the video shows that Kamara "forces care on the VA while she grasps [the] VA's hand tightly," "twice puts her face close to the" VA's, and "repeatedly shakes her finger at [the] VA; once in a scolding gesture and twice with an angry jabbing motion towards the VA's face." The commissioner considered all of Kamara's conduct and body language, as well as the "environment," in which the VA was unclothed. The commissioner concluded that "a reasonable person would consider throwing a towel in a vulnerable adult's face twice to be *egregious* conduct." (Emphasis added.)

The commissioner's maltreatment determination was based, in part, on her assessment of Kamara's credibility. Kamara testified that the VA was unclothed because the VA kept throwing the covers off. She also testified that she tossed the hand towel over the VA's mouth and covered her entire face to keep the VA from spitting at her. The

commissioner found that the video contradicted Kamara's testimony "and makes the veracity of her testimony questionable." A reviewing court defers to the commissioner's credibility determinations if there is record evidence that reasonably sustains those determinations. *Tuff v. Knitcraft Corp.*, 526 N.W.2d 50, 51 (Minn. 1995); *see In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (stating that appellate courts defer to commissioner's conclusions regarding conflicts in testimony, weight of testimony, and inferences to be drawn from testimony). We defer to the commissioner's credibility determination, which is supported by the video evidence.

Again, conduct constitutes abuse if it "produces or could reasonably be expected to produce . . . emotional distress" and it consists of "treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening." Minn. Stat. § 626.5572, subd. 2(b)(2). "Treatment" is not defined in the statute. When an undefined term is nontechnical, courts apply the common meaning of the term and may rely on dictionary definitions in doing so. *See Suleski v. Rupe*, 855 N.W.2d 330, 335 (Minn. App. 2014) (applying the dictionary definition and common meaning of the term "primary residence" in a family-law dispute where the term was not defined in statute). "Treatment" is defined as "[t]he act, manner, or method of handling or dealing with someone or something." *The American Heritage College Dictionary* 1464 (4th ed. 2007). The commissioner's reliance on the entire course of Kamara's conduct, as shown on the videotape, is consistent with that dictionary definition of treatment. The entirety of Kamara's actions constitute the manner in which she dealt with the VA.

Kamara's challenge to the commissioner's maltreatment determination is primarily based on the argument that her behavior was not "serious and egregious" enough to constitute abuse under *Staley*. Noting that there is a "dearth" of caselaw regarding what constitutes abuse under section 626.5572, Kamara relies on unpublished cases from this court. This court's unpublished cases are not precedential. Minn. Stat. § 480A.08, subd. 3(c) (2018). They can, however, be persuasive. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993) ("Unpublished opinions of the Court of Appeals are not precedential. . . . [but] can be of persuasive value.").

Kamara relies on *Keys v. Bethesda Health & Housing*, an unemployment-benefits case in which a nursing-home employee was denied benefits after a senior-unemployment-review judge (SURJ) concluded that her conduct towards two patients, which had led to her termination, constituted abuse. No. A04-2029, 2005 WL 1950143, at *1-2 (Minn. App. Aug. 16, 2005). One coworker testified that the employee had "grabbed the patient by her arm and yanked her arm up in the air," and another coworker testified that she had "pushed another patient's foot with her own foot, instead of using her hand." *Id.* at *1 (quotation marks omitted). Although noting reservations about the employee's conduct, this court deferred to the SURJ's finding and concluded that the conduct met the definition of abuse under Minn. Stat. § 626.5572, subd. 2(b). *Id.* at *2.

Kamara also relies on *Borg v. Regina Medical Center*, another unemployment benefits case in which a nursing assistant's employment was terminated for forcing a tightly knotted gown onto a vulnerable adult. No. A11-1796, 2012 WL 3023398, at *1 (Minn. App. July 23, 2012). An unemployment-law judge denied benefits to the nursing

assistant, concluding that her conduct towards the patient constituted abuse under Minn. Stat. § 626.5572, subd. 2(b). *Id.* at *1-2. Given that context, this court applied de novo review when determining whether abuse occurred because in an unemployment-benefits case, "whether a particular act constitutes disqualifying misconduct presents a question of law, which we review de novo." *Id.* at *2 (citing *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011)). This court determined that the nursing assistant's conduct did not meet the definition of abuse under Minn. Stat. § 626.5572, subd. 2(b). *Id.*

Because the standard of review applicable to an abuse determination made by an unemployment-law judge in an unemployment-benefits case is different than the deferential standard applicable to a determination made by the MDH, reliance on this court's de novo abuse determinations in such cases is questionable. Moreover, in *Borg*, this court concluded that there had been no abuse because the conduct at issue did not place the patient "at risk of serious injury," which is not the statutory definition of abuse in this case. *Id.* For those reasons, we do not rely on *Borg* in our analysis.

Lastly, Kamara relies on *Balenger v. State, Dept. of Health*, in which this court affirmed MDH's maltreatment determination based on abuse where the relator publicly sprayed a vulnerable adult with a garden hose and rubbed shampoo on her face, hair, and clothing after the vulnerable adult refused to shower that morning. No. A15-0226, 2015 WL 7357192, at *1-2 (Minn. App. Nov. 23, 2015), *review denied* (Minn. Feb. 16, 2016). Kamara argues that because her conduct was not as egregious as the conduct in *Balenger*, it does not constitute abuse.

Kamara argues that these cases show a continuum of conduct by which her treatment of the VA should be judged. Although we agree that Kamara's conduct was not as serious and egregious as the public humiliation in *Balenger*, and we recognize that Kamara's physical contact with the VA in this case is not as rough as the abusive contact in *Keys*, we are satisfied that it clears the bar set in *Staley*. Unlike *Staley*, the abusive conduct in this case is not a single, nonmalicious oral statement. *See Staley*, 730 N.W.2d at 298 (stating that "it [was] undisputed that there [were] no *repeated* statements at issue; neither was the sole statement *malicious*," that is, "carried out with evil intent"). The commissioner's determination that Kamara's conduct constitutes abuse under Minn. Stat. § 626.5572, subd. 2(b)(2), is consistent with the definition set forth in that statute, consistent with the standard set forth in *Staley*, and supported by substantial evidence.

Regarding Minn. Stat. § 626.5572, subdivision 2(b)(1), the commissioner reasoned: "[Kamara] twice threw a towel, hitting the VA in the face both times, acts that clearly fall under Minn. Stat. § 626.5572, subd. 2(b)(1)." The parties disagree regarding whether throwing the towel constituted "hitting" under subdivision 2(b)(1). In addition, Kamara argues that if the towel tossing does not constitute "hitting" under subdivision 2(b)(1), it cannot be considered cumulatively with Kamara's other conduct as part of Kamara's "treatment" of the VA under subdivision 2(b)(2).

Kamara does not persuade us that an act cannot be considered "treatment" under subdivision 2(b)(2) unless it also constitutes physical contact, that is, "hitting, slapping, kicking, pinching, biting, or corporal punishment of a vulnerable adult," under subdivision 2(b)(1). The commissioner articulated two distinct reasons why Kamara's conduct satisfies

the definition of abuse under section 626.5572. One is based on the towel-tossing conduct alone under subdivision 2(b)(1), and the other considers the towel tossing in the context of Kamara's entire course of conduct—Kamara's treatment of the VA—under subdivision 2(b)(2). Kamara's suggested "one or the other" approach is not consistent with the plain language of the statute, which sets forth a broad, nonexclusive list of examples of conduct that may constitute abuse under the statutory definition. Even if a particular act does not fall within the physical-contact examples set forth in subdivision 2(b)(1), that does not mean it cannot satisfy the treatment example in subdivision 2(b)(2). Again, the commissioner independently relied on each subpart of subdivision 2, and we base our review on that approach.

Because substantial evidence supports the commissioner's determination that Kamara's treatment of the VA satisfies the statutory definition of abuse under Minn. Stat. § 626.5572, subd. 2(b), as interpreted in *Staley*, we do not decide whether the conduct constituted "hitting" under subdivision 2(b)(1).

Having concluded that the commissioner's decision is supported by substantial evidence, we next consider whether it is arbitrary and capricious. *See* Minn. Stat. § 14.69(e), (f). An agency decision is arbitrary and capricious if

> the agency relied on factors which the legislature had not intended it to consider, if it entirely failed to consider an important aspect of the problem, if it offered an explanation for the decision that runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Staley, 730 N.W.2d at 295 (quotation omitted). A decision is arbitrary and capricious "if there is no rational connection between the facts and the agency's decision," *Sweet v. Comm'r of Human Servs.*, 702 N.W.2d 314, 318 (Minn. App. 2005), *review denied* (Minn. Nov. 15, 2005).

As explained above, the record shows that the commissioner's decision is based on the applicable statutory standard, as interpreted in *Staley*, and that there is a rational connection between the facts and the commissioner's decision. Thus, the commissioner's decision is not arbitrary and capricious.

This court "must exercise judicial restraint, lest it substitute its judgment for that of the agency." *Staley*, 730 N.W.2d at 293. Kamara complains that deferring to the commissioner's determination that her conduct satisfies the statutory definition of abuse, as interpreted in *Staley*, makes the commissioner the sole arbitrator of abuse determinations. Our deferential standard does not go that far. As shown in *Staley*, this court is willing to reverse an abuse determination if it is satisfied that the underlying conduct does not rise to the level of abuse contemplated by the legislature. We do not have that concern in this case. And our decision is not based on unrestrained deference to the commissioner's decision. Instead, we have reviewed the commissioner's reasoning and conclusion through a deferential lens, to ensure that it is consistent with the relevant statutory definition of abuse, as interpreted by this court in *Staley*. Based on our review, we conclude that it is, and we therefore affirm.

Affirmed.