STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1243

Jeanine Slonim,
Relator,

vs.

Minnesota Department of Veterans Affairs,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 18, 2022
Affirmed
Reilly, Judge

Department of Employment and Economic Development
File No. 44810962-3

Peter B. Knapp, Mitchell Hamline Law Clinic, St. Paul, Minnesota (for relator)

Minnesota Department of Veterans Affairs, Minneapolis, Minnesota (respondent employer)

Keri Phillips, Anne B. Froelich, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Worke, Presiding Judge; Bjorkman, Judge; and Reilly, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that she was ineligible for unemployment benefits because she was discharged for employment misconduct. She argues that the ULJ improperly relied solely on hearsay evidence. We affirm.

FACTS

Relator Jeanine Slonim worked full-time as a human services technician for respondent Minnesota Department of Veterans Affairs (MDVA) for 12 years. Her job duties included providing care for patients at an MDVA facility and documenting that care. Slonim was a union employee, entitled to an investigation, union representation, and a *Loudermill* hearing[1] before MDVA could finalize certain disciplinary actions.

In September 2020, a report stated that Slonim failed to provide proper care for two residents. Following an investigation, MDVA suspended Slonim for five days without pay. Two weeks later, a second report stated that Slonim again failed to provide proper care for a resident and that she improperly washed her hands. Following another investigation, MDVA suspended Slonim for three days without pay. A month later in October 2020, a nurse on staff reported seeing Slonim with her face shield pulled down in

[1] A *Loudermill* hearing is provided to public employees before the employer imposes disciplinary action. The purpose of the *Loudermill* hearing is to provide the public employee a pretermination opportunity to respond to allegations against them before an impartial board or tribunal. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 50 (Minn. App. 1994), *rev. denied* (Minn. Mar. 23, 1994).

violation of MDVA's COVID-19 policies. MDVA investigated the incident by reviewing Slonim's care documentation and speaking to staff and clients. Following the investigation, MDVA determined that Slonim would be discharged from employment based on her "poor work performance" and for failing to follow MDVA policies. MDVA also provided Slonim a letter explaining the cause for her discharge. Before discharging her, MDVA conducted a *Loudermill* hearing to discuss the violation with Slonim.

Following her discharge, Slonim applied for unemployment benefits through respondent Department of Employment and Economic Development (DEED). DEED determined Slonim was ineligible for unemployment benefits because she was discharged for employment misconduct. Slonim appealed. In April 2021, a ULJ held a hearing to determine whether Slonim was eligible for unemployment benefits. The Human Resources Consultant (HR Consultant) for MDVA testified on its behalf. The HR Consultant testified that MDVA discharged Slonim for "multiple reasons" including the five-day suspension, the three-day suspension, and the failure to wear personal protective equipment (PPE) properly. The HR Consultant testified that she could not answer questions about the three-day suspension because she did not have the investigation report. But the HR Consultant did testify about the other two suspensions stating that MDVA determined that suspending Slonim was appropriate following a "review of the documentation and . . . reports from the residents as well as other employees." The HR Consultant also testified that a nurse observed Slonim not wearing a face shield or goggles around a resident while under strict COVID-19 precautions. The ULJ asked if she could take the testimony of the nurse who reported the incident, but the nurse did not answer the phone when contacted.

Slonim also testified. She testified that MDVA informed her that she would be suspended for providing improper care to residents and for failing to wear PPE. Slonim testified that she did provide proper cares[2] to residents, but she may have forgotten to document it. Slonim testified that she admitted in the *Loudermill* hearing that she "did not provide cares" for two residents, but that she "probably said the wrong word." Slonim also testified about the third incident leading to her suspension. She testified that she had been wearing a face shield, but that she was working in a new area within the care facility, and a resident had pulled the face shield down from her face. She testified that the nurse walked in and observed the face shield down when she was trying to defog it. The ULJ asked the HR Consultant if Slonim provided MDVA with the reasons for why she was not wearing a mask. The HR Consultant testified that Slonim told MDVA that she took the mask off to defog it in the *Loudermill* hearing but did not say that a resident pulled it down.

Following the hearing, the ULJ issued her determination finding that Slonim was not eligible for unemployment benefits because she was discharged for employment misconduct. The ULJ based the findings of fact mainly "on the testimony of [the HR Consultant]." The ULJ found that the HR Consultant provided detailed testimony explaining the reasons Slonim was discharged. Because the HR Consultant identified details that Slonim could not provide, the ULJ found her testimony credible. The ULJ also

[2] MDVA required employees to provide multiple forms of care for clients including, but not limited to, assistance with toileting, grooming, hygiene, and transfer assistance. The term "cares" is often used when an employee assisted with more than one client care need.

found that Slonim's pre-hearing responses differed from her testimony. Slonim requested reconsideration, and the ULJ affirmed her decision. This appeal follows.

DECISION

I. The ULJ did not err in considering hearsay testimony.

Slonim argues that the ULJ improperly relied solely on hearsay evidence to find that she committed misconduct resulting in her termination, a finding that precluded her from receiving unemployment benefits. This court reviews "the ULJ's findings of fact in the light most favorable to the decision and will not disturb those findings as long as there is evidence in the record that reasonably tends to sustain them." *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016) (quotation omitted). When reviewing the decision of a ULJ, this court may affirm the decision, remand the case, or reverse or modify the decision if the decision is unsupported by substantial evidence or is arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(5)-(6) (2020).

Slonim objects to the testimony of the HR Consultant, arguing that her testimony was hearsay. She contends that the ULJ could not rely solely on hearsay evidence but needed some direct evidence to find that Slonim violated MDVA policies. Under Minn. R. Evid. 802, out-of-court statements offered for their truth are excluded from evidence unless they fall within an exemption or exception. But a ULJ is not bound by the rules of evidence and is specifically permitted to receive hearsay "if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2021).

In *Skarhus v. Davanni's Inc.*, an employee was discharged after a fellow employee reported her for food theft. 721 N.W.2d 340, 342-43 (Minn. App. 2006). The employee applied for unemployment benefits and DEED determined that she was ineligible because she was discharged for employment misconduct. *Id.* at 342. At a hearing before a ULJ, the employer's general manager testified on behalf of the employer, although he had not been present when the incident occurred. *Id.* at 345. This court determined that "[a] witness at an evidentiary hearing is not required to have firsthand knowledge because a ULJ 'may receive any evidence which possesses probative value, including hearsay.'" *Id.* (quoting Minn. R. 3310.2922). This court determined that the testimony was "relevant and properly considered by the ULJ" and affirmed the decision. *Id.* at 345-46.

The matter here is similar. Both Slonim and the HR Consultant testified about the incidents leading to Slonim's discharge. While the HR Consultant was not working alongside Slonim during these incidents, the HR Consultant was present during the *Loudermill* hearings. And as the HR Consultant for the employer, she received investigative reports and complaints from employees and patients at MDVA. The ULJ balanced Slonim's testimony against the HR Consultant's testimony. The ULJ found the HR Consultant's testimony more credible, and we must defer to the credibility determinations made by the ULJ. *Id.* at 344.

Slonim cites *In re Expulsion of E.J.W. from Indep. Sch. Dist. No. 500* to support her assertion that an agency cannot *solely* rely on hearsay evidence. 632 N.W.2d 775, 782 (Minn. App. 2001). In *In re Expulsion of E.J.W.*, three boys were accused of being involved in a bomb threat at a school. *Id.* at 777. At the expulsion hearing, the three boys'

statements were admitted as hearsay through the police officers who took their statements. *Id.* This court determined that there was no direct evidence to support the hearing officer's findings and that the students must be afforded a new hearing with the right to confront witnesses. *Id.* at 782-83.

But *In re Expulsion of E.J.W.* is not persuasive in the unemployment hearing context because it applied the exclusion and expulsion administrative procedures under Minn. Stat. § 121A.47 (2020). *Id.* at 781-82. Without a special statute, "an administrative agency cannot, at least over objection, rest its findings of fact solely upon hearsay evidence which is inadmissible in a judicial proceeding." *State ex rel. Indep. Sch. Dist. No. 276 v. Dep't of Educ.*, 256 N.W.2d 619, 627 (Minn. 1977) (quotation omitted). In the context of exclusion and expulsion proceedings, there are no special statutes that allow the administrative agency to rely on hearsay evidence in its findings of fact. In contrast, a statute exists for unemployment hearings allowing the ULJ to rest its findings of fact upon hearsay evidence. *See* Minn. Stat. § 268.105, subd. 1(b) (2020) (stating that the department may adopt rules and procedures for hearings and that the rules "need not conform to common law or statutory rules of evidence and other technical rules of procedure"); *see also* Minn. R. 3310.2922 (stating that a ULJ "may receive any evidence that possesses probative value, including hearsay"). And, in this case, the ULJ relied on both hearsay and non-hearsay from the testimony of the HR Consultant and Slonim.

In sum, the ULJ determined that the HR Consultant provided detailed and credible testimony to show that MDVA decided to discharge Slonim after progressive discipline. The ULJ recognized that the HR Consultant was present at the *Loudermill* hearings when

Slonim testified and credited the testimony of the HR Consultant. The ULJ did not find Slonim to be as credible, in part because her testimony was inconsistent. Viewing the factual findings in the light most favorable to the decision, we conclude that the hearsay evidence was the type of evidence "on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922.

II. The record supports a determination of misconduct.

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2020). Employment misconduct is "any intentional, negligent, or indifferent conduct, on the job or off the job, that is a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." Minn. Stat. § 268.095, subd. 6(a) (2020). It is not "simple unsatisfactory conduct" or "good faith errors in judgment if judgment was required." *Id.*, subd. 6(b)(3), (6) (2020). Whether an act constitutes employment misconduct is a question of law, which this court reviews de novo. *Marn v. Fairview Pharmacy Servs.*, 756 N.W.2d 117, 121 (Minn. App. 2008), *rev. denied* (Minn. Dec. 16, 2008).

Slonim argues that MDVA discharged her for "negligent behavior," but that there was no evidence that Slonim acted in a negligent way. This argument is not persuasive. While Slonim testified before the ULJ that she did not violate MDVA policies, Slonim admitted she told her employer that she did not provide cares. The ULJ found Slonim's prior statement to be more credible than the contradictory statements that she made at the unemployment hearing. Further, when asked whether she provided cares to a resident

without a face shield or googles, Slonim responded, "yes." While she tried to justify why she was not wearing the facemask or goggles, the ULJ again found the HR Consultant's testimony to be more credible than Slonim's as to this incident. And we must defer to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344.

"As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). When an employee knowingly violates an employer's instructions and directives, such action amounts to employment misconduct because it is a willful disregard of the employer's interests. *Id.* at 806. A single violation of a reasonable policy constitutes misconduct, but such a finding is even more persuasive "when there are multiple violations of the same rule involving warnings or progressive discipline." *Id.*

Here, the ULJ found that "Slonim's conduct in failing to provide cares and complying with PPE requirements seriously violated the standards of behavior [MDVA] had the right to reasonably expect." The ULJ also found that Slonim knew of MDVA's policies to wear a mask and face shield under COVID-19 policies, but that in October 2020, Slonim did not do so. The ULJ found that Slonim had a fair opportunity to share her side of the story in the investigative interviews and *Loudermill* hearings, at which she was represented, before her termination. The record supports these findings. Thus, we conclude that by violating MDVA's reasonable policies, Slonim committed employment misconduct.

Affirmed.