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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-1309**

Hawah Barry,  
Relator,

vs.

Augustana Home Health Care Services (Corp),  
Respondent,

Department of Employment  
and Economic Development,  
Respondent.

**Filed March 29, 2011  
Affirmed  
Crippen, Judge\***

Department of Employment and Economic Development  
File No. 24224055-3

Hawah Barry, Brooklyn Center, Minnesota (pro se relator)

Augustana Home Health Services, Minneapolis, Minnesota (respondent)

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

Considered and decided by Minge, Presiding Judge; Larkin, Judge; and Crippen,  
Judge.

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**CRIPPEN**, Judge

Relator Hawah Barry challenges the decision of an unemployment law judge that relator's dismissal from employment was because of her misconduct, claiming that there was not substantial evidence in the record to support a finding that she was sleeping on the job. We affirm because the record includes substantial evidence to support the unemployment law judge's findings.

### FACTS

Relator was employed by respondent Augustana Home Health Care Services (Augustana) from August 2008 through December 29, 2009, when she was terminated from her employment for sleeping while at work. Relator worked as a home health aide during the evening shift, from 10:00 p.m. to 6:00 a.m., and she was assigned tasks by her employer that included providing personal care and emergency response care to elderly residents. She was the only employee on duty at night, and in accordance with the employee handbook and licensing requirements of Augustana, she was not to sleep during work hours. It was also her employer's policy that when she was not assisting patients, she was expected to remain in the office.

On August 13, 2009, an Augustana resident reported discovering relator asleep at work. Although her supervisor could not verify by videotape whether relator was sleeping, relator received a written warning for the event, informing her that if she was found sleeping at work she would be discharged. Relator denied that she was asleep at work on that date and claimed that she was given a warning for another reason.

On December 24, 2009, relator went to a hospital emergency room in the morning because she was not feeling well. The doctor who examined her noted that her blood-sugar levels were elevated but told her she would be able to report to work. Relator reported to work and did not tell any Augustana representative about her hospital visit. Thereafter, at about 12:25 a.m., a resident discovered relator asleep on a couch in a communal area. The resident attempted to awaken relator verbally, and when she was non-responsive, the resident called police, who awakened relator at 12:55 a.m. Relator's supervisor, Katie Stadher, the housing director at Augustana, testified at relator's unemployment compensation hearing that she reviewed a videotape of the evening and "saw [relator] laying down on the couch with a blanket, take her shoes off, and then sleep for approximately an hour."

Relator claimed that she was feeling dizzy at about midnight and sat on the couch but did not sleep or lie down. She testified that she did not know why the police came. Relator also testified that she had called an Augustana nurse and Stadher earlier in the evening, before the police came, to report that she was not feeling well. Although allegedly given the option to go home by the nurse, relator decided stay at work because she did not want to leave the residents alone. According to Stadher, relator did not contact the Augustana nurse until 2:00 a.m., after relator was discovered sleeping.

Relator was initially suspended pending an investigation of the incident. Following the investigation, which included review of the videotape, relator was fired for sleeping at work and for lying. After a hearing at which relator and Stadher testified, the ULJ ruled that relator was discharged for employment misconduct and therefore not

entitled to receive employment benefits. Relator asked for reconsideration of the decision, which the ULJ denied.

## DECISION

In reviewing a decision of a ULJ, this court may affirm, reverse, remand, or modify if, among other reasons, the decision is “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d) (2008). Whether an employee engaged in employment misconduct is a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ULJ’s findings are reviewed in the light most favorable to the decision and will not be altered if there is evidence that reasonably tends to support them. *Schmidgall*, 644 N.W.2d at 804. Credibility determinations are exclusively the province of the ULJ, and this court defers to those determinations. *Skarhus*, 721 N.W.2d at 344.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct is defined as “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) (Supp. 2009).

A single instance of sleeping on the job can constitute employment misconduct. *Auge v. Gillette Co.*, 303 N.W.2d 255, 257-58 (Minn. 1981). “Because the nature of an

employer's interest will vary depending upon the job, what constitutes disregard of that interest, and therefore misconduct, will also vary." *Id.* at 257.

Here, the evidentiary record shows that Augustana had a legal duty not to permit employees who cared for residents to sleep on the job, and relator does not challenge this condition of her employment. This duty was recited in Augustana's handbook, which prohibits employees from sleeping on the job and which makes sleeping at work a basis for termination. *See* Minn. Stat. § 268.095, subd. 6a(2) (2008) (providing that a licensed health-care facility employee commits aggravated employment misconduct by committing an act that constitutes "serious neglect" of patients).

Rather, relator's sole argument is that the evidentiary record lacks substantial evidence to show that she was sleeping while at work on the early morning of December 25, 2009. Resolution of this factual issue depended on the ULJ's credibility determinations made upon the conflicting testimony of relator and Stadher. Relator claimed that she did not sleep at work, but Stadher testified that relator did sleep at work, as shown by a videotape of relator sleeping and by a patient who reported it. The ULJ specifically found certain aspects of relator's testimony "unlikely and not credible," and its conclusions, such as that "[a] breach of trust occurred when [relator] fell asleep and later lied about her actions" demonstrate that the ULJ did not find relator's testimony credible. The ULJ also found that "[t]he employer's testimony and contemporaneous documentation was consistent and outlined a more probable sequence of events than [relator's] testimony." *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 530-31 (Minn. App. 2007) (affirming ULJ's credibility determinations if they are

supported by substantial evidence). As noted during the hearing before the ULJ, a video recording captured relator taking off her shoes, covering herself with a blanket, and lying down on a couch in an area where she was not supposed to be unless assisting a patient. This evidence showed that relator intentionally chose to sleep while at work. Because there was substantial evidence to support the ULJ's finding that relator slept while at work, which constituted employment misconduct, we affirm the ULJ's decision that relator was not entitled to receive unemployment benefits.

**Affirmed.**