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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2013**

Marcia Kimble,
Relator,

vs.

Zumbro House, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 5, 2011
Affirmed
Shumaker, Judge**

Department of Employment and Economic Development
File No. 25460613-3

Marcia Kimble, Kissimmee, Florida (pro se relator)

Zumbro House, Inc., Woodbury, Minnesota (respondent employer)

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

Considered and decided by Shumaker, Presiding Judge; Johnson, Chief Judge; and
Worke, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Relator challenges an unemployment-law judge's (ULJ) finding that she is ineligible for unemployment-compensation benefits because she was discharged for employment misconduct. Relator contends she did not commit misconduct. We affirm.

FACTS

Relator Marcia Kimble was employed as a residential counselor at Zumbro Homes, a residential-care facility operating several group homes for people with a history of "challenging" behavior. Kimble worked for Zumbro from June 2009 until she was discharged from employment on May 10, 2010. Her duties as a residential counselor included supervising Zumbro residents.

Because of the behavioral histories of the residents, some of them require significant supervision, as outlined in resident-specific risk-management plans. Zumbro employees are required to review each resident's risk-management plan prior to interacting with the resident. Employees receive training on how to properly supervise residents and on the importance of reviewing residents' plans. Kimble testified that she was aware of the importance of reviewing residents' risk-management plans.

On May 8, 2010, a residential counselor asked Kimble to transport a resident from another Zumbro group home to a dance to which all Zumbro residents were invited. Kimble agreed to bring the resident to the dance, but she failed to review the resident's risk-management plan beforehand. This particular resident had a criminal-sex-offender history and needed constant supervision when outside the group home.

Kimble testified that she arrived at the dance around 7:00 p.m. and was to supervise the resident in question, along with residents from her group home. When one of her residents asked for her assistance crossing the room to get a snack, Kimble accompanied him. She informed the other residential counselors that she was leaving, but she did not ask any of them to supervise the resident from the other group home. She testified that she left that resident in the presence of other staff members and that he was in the same place when she returned approximately ten minutes later. Zumbro's witness at the hearing, Leah Randall, testified that Kimble told her the resident was out of her sight for about 30 minutes. Kimble disputes this.

The resident in question later told a Zumbro employee that he had sexual contact with another resident at the dance while Kimble was away. Although this claim had not been corroborated, Randall contacted Kimble about the incident because, as Randall testified, "any failure to provide supervision as is required in a client's [] management plan can be considered neglect," and Zumbro must then start the "process for reporting violations of the Vulnerable Adults Act." Zumbro discharged Kimble because of this incident.

Kimble contends that other Zumbro counselors have failed to adhere to risk-management plans without being discharged. She testified she had never been reprimanded for such an infraction and did not understand that she could be discharged for it. Randall testified that "because of the nature of our clients and the risk to not only the clients but the surrounding community . . . , we . . . terminate employees when we have this type of supervision infraction." Randall testified that Kimble acknowledged in

June 2009 and again in August 2009 that consistent adherence to security protocols and supervision of clients were of paramount importance and that Kimble was specifically trained as to the importance of supervising residents with histories of sex offenses.

Zumbro discharged Kimble on May 10, 2010, and she filed for unemployment-compensation benefits with the Minnesota Department of Employment and Economic Development (DEED). A DEED adjudicator found Kimble ineligible for benefits because she was discharged for employment misconduct. She appealed and requested an evidentiary hearing before a ULJ. The ULJ found Kimble ineligible for benefits because she committed employment misconduct. The ULJ affirmed this finding on reconsideration. Kimble then brought this certiorari appeal.

D E C I S I O N

Standard of Review

This court may affirm, or remand, reverse, or modify the ULJ's decision if the relator's substantial rights 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) (2010).

Employment Misconduct

Kimble contends her conduct was not employment misconduct. The ULJ disagreed, concluding that

Zumbro had a reasonable expectation that Kimble would properly supervise the resident. Kimble had read and was familiar with Zumbro Security Policy, which required Resident Counselors to follow residentsrisk [sic] management plans. Zumbro also trained Kimble on recidivism amongst sex offenders. Hence, Zumbro had repeatedly instructed and trained Kimble about the risk posed by its residents, and the importance of following their risk management plans. It was therefore reasonable for Zumbro to expect Kimble to supervise the resident according to his risk management plan. Kimble seriously violated Zumbro[’s] reasonable expectation when she failed to keep the resident in her sight at all times.

“Whether an employee has engaged in conduct that disqualifies him from unemployment benefits is a mixed question of fact and law.” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). “Whether the employee committed an act alleged to be employment misconduct is a fact question, but the interpretation of whether that act is employment misconduct is an issue of law.” *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19-20 (Minn. App. 2003).

The ULJ found that Kimble left the resident in question at the dance for between 10 and 30 minutes. We review a ULJ’s findings of fact in the light most favorable to the decision and defer to the ULJ’s credibility determinations. *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). We “will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Id.*; *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Kimble

admitted that she left the resident unsupervised against Zumbro security policy, so the ULJ's finding is correct. The next question is whether Kimble's act constituted misconduct.

Unemployment-compensation benefits extend only to people unemployed through no fault of their own. *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981). An employee who is discharged for employment misconduct is therefore ineligible to receive unemployment benefits. Minn. Stat. §268.095, subd. 4(1) (2010). Employment misconduct means "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) (2010). But employment misconduct does not include the applicant's "inefficiency or inadvertence; . . . simple unsatisfactory conduct; . . . conduct an average reasonable employee would have engaged in under the circumstances; . . . [or] good faith errors in judgment if judgment was required." *Id.*, subd. 6(b)(2)-(6) (2010).

Zumbro contends that Kimble's failure to supervise the resident was employment misconduct. "If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct." *Id.*, subd. 6(d) (2010). However, "the language of the statute does not require that [even a single] incident lead to an *actual resulting* harm . . . in order to have a significant adverse effect on the employer." *Peterson*, 753 N.W.2d at 776 (emphasis added).

The resident whom Kimble left unsupervised claimed that he had sexual contact with another resident, a vulnerable adult, while he was unsupervised. This allegation, although unsubstantiated, required Zumbro to notify the statewide Common Entry Point, “which is the process for reporting all violations of the Vulnerable Adults Act” in a report that is then “forwarded to the Department of Human Services,” which then determines “if further action is necessary.” Kimble’s conduct caused harm to Zumbro in that it potentially subjected Zumbro to an investigation by the department of human services, the avoidance of which is a legitimate interest. Kimble’s conduct also put a vulnerable adult in harm’s way, because according to the resident Kimble should have been supervising, he was able to have sexual contact with a vulnerable adult.

Further, “[a]n employer has the right to expect its employees not to engage in conduct that seriously endangers people’s safety.” *Shell v. Host Int’l Corp.*, 513 N.W.2d 15, 18 (Minn. App. 1994). Randall testified that some of Zumbro’s residents pose a high risk to the public as well as to the other vulnerable adults in the group-home community. She testified that the security policy Kimble received upon hire, and which Kimble acknowledged by signing, requires counselors to review residents’ risk-management plans to determine the risk they pose and to ascertain the level of supervision required by the counselors. Randall testified that the policy states that “severe infractions [of the policy] will result in immediate termination of employment,” and that the “[s]everity of infraction will be determined by the program coordinator and based on the perceived level of risk.” Randall further testified that other residential counselors who have committed “supervision infractions” similar to Kimble’s have been discharged.

Kimble testified that she knew the importance of reviewing residents' risk-management plans before interacting with them. She testified that she failed to review this particular resident's plan prior to working with him. She also admitted leaving him unsupervised while she accompanied another resident across the room for at least ten minutes. Randall testified Kimble told her she was gone for closer to 30 minutes.

Regardless of how long Kimble was gone, her absence was in direct contravention of Zumbro's express requirement that its employees follow the guidelines contained in each resident's risk-management plan. We liken the field in which Zumbro operates to the medical field, where "strict compliance with protocol and militarylike discipline is required," because even brief and seemingly insignificant infractions can have drastic repercussions in the form of harm to vulnerable people. *See Ress v. Abbott Northwestern Hosp., Inc.*, 448 N.W.2d 519, 525 (Minn. 1989). Because Zumbro clearly requires residential counselors to adhere to its risk-management plans and has a reasonable expectation that counselors will do so, Kimble's failure to comply with this requirement is a serious violation of Zumbro's reasonable expectations of her. Even though the resident's allegations of sexual contact with another resident remain uncorroborated, Kimble's negligence allowed the resident an opportunity to commit harm and constitutes employment misconduct. *See Peterson*, 753 N.W.2d at 776.

Fair Evidentiary Hearing

In her request for reconsideration, Kimble contends she did not receive a fair evidentiary hearing because she "was not able to explain [her] side." A fair hearing is one in which the ULJ fully develops the record, assists an unrepresented relator in

presenting a case, and explains the procedure of and the terms used throughout the hearing. Minn. Stat. § 268.105, subd. 1(b) (2010). The ULJ significantly assisted Kimble with her testimony at the hearing. He led her through her testimony and asked her numerous questions to fully develop the record. He helped her provide comprehensive evidence of her experience and of her arguments in favor of her claim of eligibility for benefits. Kimble did not state at any time on the record that she was dissatisfied with the hearing.

Kimble also contends she did not receive a fair hearing because the ULJ did not contact her witnesses. She had listed three witnesses to be contacted to testify, none of whom were present at the time of the misconduct. The ULJ “may exclude any evidence that is irrelevant, immaterial, unreliable, or unduly repetitious.” Minn. R. 3310.2922 (2009). Because none of these witnesses would have been able to testify to relevant facts about Kimble’s misconduct, the ULJ properly excluded their testimony.

A hearing is generally considered fair if both parties are afforded the opportunity to give statements, cross-examine witnesses, and offer and object to witnesses. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529-30 (Minn. App. 2007). The ULJ afforded the parties all such opportunities. Kimble received a fair hearing.

Affirmed.