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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2196**

Mary Skottegaard,
Relator,

vs.

Comcast Cablevision Corporation,
Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed August 22, 2011
Reversed and remanded; motion to strike dismissed as moot
Stauber, Judge**

Department of Employment and Economic Development
File No. 25933399-3

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Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and
Ross, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

In this certiorari unemployment appeal, relator argues that (1) the unemployment law judge (ULJ) abused his discretion by failing to order an additional evidentiary hearing when relator offered new evidence of her mental illness and provided good cause for not submitting the evidence at the hearing; (2) the ULJ failed to fully develop the hearing record in order to determine whether the mental-illness exception to misconduct applied to relator; and (3) the ULJ's finding that relator was discharged for employment misconduct is not supported by substantial evidence. Because we conclude that the ULJ abused his discretion by refusing to order an additional evidentiary hearing to receive the new evidence, we reverse and remand.

FACTS

Relator Mary Skottegaard worked full-time for respondent Comcast Cablevision Corporation (Comcast) as a customer service/payment center representative from 2004 until August 9, 2010. Relator had received warnings for her attendance prior to June 21, 2010. On June 21, she received another warning when she arrived to work late. On July 7, she again arrived late to work and received a warning. On July 28 or 29, relator had a "cash shortage" of \$3 and received another warning.

Relator was a "no call/no show" for her shift on July 31. Relator testified at the hearing: "I got up late and I already assumed my job was in jeopardy because I was on a final occurrence, not only with the \$3 cash [shortage], but with my attendance." She stated, "I hurried up and got dressed and while I was getting dressed, I realized that they

were going to send me home because I was on my final occurrence. . . . And when they send you home, it's quite embarrassing. And, I didn't want to go through that if I thought I was going to be fired." On August 2, relator spoke by telephone with her immediate supervisor. The supervisor told relator that she was worried about her. Relator explained that she did not come to work because she thought she was going to be fired. The supervisor told relator that she had not yet lost her job and asked relator to report to work the next day.

Relator worked from August 3 until August 5. At the end of her shift on August 5, she was told that she was being placed on a paid leave of absence. Her employer called her on August 9 and informed her that her employment was being terminated.

Relator applied for benefits with the Minnesota Department of Employment and Economic Development (DEED). In response to a request for information relating to the claim, Comcast submitted a letter stating that relator had been discharged due to a violation of the company's attendance policy.

DEED determined that she was ineligible for benefits because she was terminated for employment misconduct. Relator appealed, and a ULJ held a de novo hearing at which relator appeared pro se. Comcast did not participate in the hearing.

Following the hearing, the ULJ issued his decision finding that relator was discharged for employment misconduct. The ULJ found that relator failed to report for her shift or call her supervisor on July 31 because she feared that she would be discharged. He found that relator was discharged for this final no-call/no-show.

Relator obtained counsel and requested reconsideration of the ULJ's decision. In her written request to the ULJ, relator asked the ULJ to "schedule a new hearing to explore the mental-health exception to misconduct in this case." Relator argued that she suffered from anxiety, insomnia, and post-traumatic stress disorder (PTSD), and that "her absenteeism did not constitute misconduct because of her mental health impairments." Relator attached a letter from a psychiatrist who treated her for depression and anxiety. The psychiatrist explained that relator suffers from PTSD, stemming from an event where relator was robbed at gunpoint while working for Comcast. When she returned to work at Comcast following the robbery, relator had difficulty with lingering anxiety and the psychiatrist prescribed her Xanax and Restoril. The psychiatrist explained that relator would sometimes take Restoril in the middle of the night when she could not fall back to sleep, and as a consequence "was excessively sedated in the morning and could not wake up sufficiently to get into work." The psychiatrist also stated that relator would sometimes need to take Xanax on the job in order to control her anxiety and function adequately. The psychiatrist wrote that "[relator's] anxiety has never been under very good control since this robbery at work and she has continued to have posttraumatic stress symptoms in spite of treatment and medication."

Relator's counsel explained in the request for reconsideration that relator did not submit the psychiatrist's letter prior to the hearing "because [relator] was representing herself pro se and did not know that she needed to submit this type of information." Relator also argued that the ULJ failed to adequately address the mental-health issue

despite having a duty to develop the record and assist pro se parties in the presentation of evidence.

The ULJ denied relator's request for reconsideration and affirmed his initial decision. He concluded that even if relator overslept because of medication she is taking for a mental illness, relator's decision not to report to work or contact Comcast was based on her expectation that she would be discharged, not as a consequence of any mental illness or impairment. The ULJ therefore concluded that relator's new evidence would not likely change the outcome of the decision. This certiorari appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, this court may affirm the decision, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced. Minn. Stat. § 268.105, subd. 7(d) (2010). An employee who is discharged for employment misconduct is ineligible for 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). The mental-illness exception to the statute provides that "conduct that was a consequence of the applicant's mental illness or impairment" is not employment misconduct. *Id.*, subd. 6(b)(1) (2010).

In deciding a request for reconsideration, the ULJ cannot consider evidence not submitted at the prior hearing but must hold an additional evidentiary hearing to receive

new evidence if it “would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence.” Minn. Stat. § 268.105, subd. 2(c) (2010). This court defers to the ULJ’s decision not to hold an additional evidentiary hearing and will not disturb it absent an abuse of discretion. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). But the ULJ’s discretion to deny an additional hearing is not absolute, and it must be exercised consistent with the statutory requirements. *Vasseei v. Schmitt & Sons School Buses Inc.*, 793 N.W.2d 747, 750 (Minn. App. 2010). Specifically, under Minn. Stat. § 268.105, subd. 2(c), the ULJ “must order an additional evidentiary hearing” if the conditions for considering new evidence are met.

The first question we must answer is whether the new evidence is likely to change the outcome of the decision. The ULJ concluded that the new evidence was not likely to change the outcome because relator was fired for failing to call or report to work on July 31 after oversleeping. He concluded that even if it were true that relator overslept because of her medication, her failure to call or report to work for fear of being discharged was not a consequence of any mental illness or impairment.

Relator contends that “[a] meaningful inquiry into how relator’s PTSD affected her functioning at work, her ability to get to work on time, and even her conduct in avoiding her workplace after oversleeping on July 31, 2010, would likely have changed the outcome of her hearing.” Relator further argues that “[relator’s] fear of showing up at her work site (where she previously had been traumatized), when she had a reasonable belief she would be escorted out in a humiliating manner, could have been exacerbated

by her PTSD.” We agree that the new evidence of relator’s mental illness is likely to change the outcome of the case.

The letter from relator’s psychiatrist indicates that relator has a serious mental illness that affects her day-to-day ability to function. As the ULJ recognized, the evidence shows that relator may have overslept due to the medications that she takes for her mental illness. But this is not the sole consequence of her mental illness. The letter also indicates that relator suffers from depression and anxiety. The letter states that without medication, relator “did not have adequate control of anxiety to even be able to sit at her desk and be in the workplace.” Even with medication, “[relator’s] anxiety has never been under very good control since this robbery at work and she has continued to have posttraumatic stress symptoms.” Therefore, contrary to the ULJ’s conclusion that relator’s oversleeping was the only consequence of her mental illness, the letter indicates that relator’s failure to call or report to work for fear of being escorted out in front of her coworkers was also likely a consequence of her mental illness.

Because relator was unrepresented at the hearing and presented no evidence relating to the mental-illness exception, it is likely that medical documentation of her mental illness would change the outcome of the decision. The mental-illness exception provides that “conduct that was *a consequence* of the applicant’s mental illness or impairment” is not employment misconduct. Minn. Stat. § 268.095, subd. 6(b)(1) (emphasis added). Given this broad statutory language, we conclude that the new evidence of relator’s mental illness is likely to have an effect on the outcome of her case.

In addition to showing that the new evidence will likely change the outcome, relator must also show that she had good cause for not previously submitting the evidence. Minn. Stat. § 268.105, subd. 2(c). The record reflects that relator had good cause.

Relator participated in the hearing without the aid of counsel and was the only witness. She also participated by telephone from a treatment facility where she had just been admitted the previous day. It is also clear from the record that relator lacks sophistication. Although relator was asked in a prehearing questionnaire whether she had “a serious or chronic illness or a serious injury,” the questionnaire did not mention mental illness and relator did not realize that her mental illness fell under this category. Further, although relator did not realize the relevance of her treatment for PTSD, she did attempt to explain the robbery at work and its effect on her. Relator told the ULJ that she takes medication that causes her to oversleep, following an incident where she was robbed at work. She also told the ULJ that she had exhausted her FMLA leave. The ULJ failed to inquire further and relator did not have an opportunity to specifically address the mental-illness exception. Thus, we conclude that relator had good cause for failing to submit the psychiatrist’s letter at the initial hearing.

The record establishes that the new medical evidence would likely affect the outcome of the case and that relator had good cause for failing to submit it at the initial hearing. We therefore reverse the ULJ’s order affirming on reconsideration and remand for an additional evidentiary hearing to consider whether the mental-illness exception

applies. Because we conclude that the ULJ's decision warrants reversal, we do not reach relator's additional arguments.

Reversed and remanded; motion to strike dismissed as moot.