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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-410**

Sarfo Nimoh,
Relator,

vs.

Allina Health System,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 12, 2011
Affirmed
Minge, Judge**

Department of Employment and Economic Development
File No. 26517562-3

Sarfo Nimoh, New Prague, Minnesota (pro se relator)

Allina Health System, Minneapolis, Minnesota (respondent employer)

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

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

UNPUBLISHED OPINION

MINGE, Judge

Relator challenges the findings of an unemployment law judge (ULJ) that he was discharged for employment misconduct and therefore not eligible for unemployment benefits. Relator argues that occasional failure to record the administration of narcotics is not employment misconduct and that he did not divert the narcotics for unauthorized use. Because there is substantial evidence to support the ULJ's misconduct determination and the ULJ did not err as a matter of law, we affirm.

FACTS

Relator Sarfo Nimoh was employed by Allina Health System from July 2007 to November 4, 2010 as a registered nurse (RN) at United Hospital. United has detailed policies for pain management and the administration of narcotics to patients. After assessing a patient and determining that they need pain medication, the RN checks what type of medication can be used and obtains the medication from Pyxis, a dispensing machine. To access Pyxis, the RN must use a fingerprint and enter the patient's information, and Pyxis records who removes medication and for which patient. The RN is required to double check the electronic medical record before administering the medication, record on the patient's medical record that the medication was given, and reassess the patient 60 minutes later and record the results of the reassessment.

In October 2010, a hospital audit of the administration of medication found four instances in the August-September timeframe when Nimoh withdrew narcotics from Pyxis but failed to record the administration of the medication to the patient. The audit

also found 24 instances where Nimoh administered pain medication to a patient but did not record the results of the required follow-up reassessment. Nimoh's supervisor questioned Nimoh about the incidents, and Nimoh was unable to recall what happened but believed that he simply forgot to record the incidents in question. Allina then discharged Nimoh for failing to document and account for the use of narcotics on the ground that this was a serious violation of nursing policies and procedures.

Nimoh established a benefit account with the Minnesota Department of Employment and Economic Development (DEED), and a DEED adjudicator determined that he was ineligible for benefits because he was discharged for employment misconduct. Nimoh appealed the determination and received a de novo hearing before a ULJ. The ULJ found that Nimoh failed to follow reasonable policies and rules and that this constituted employment misconduct. Nimoh requested reconsideration, and the ULJ affirmed his decision. This appeal follows.

D E C I S I O N

The only issue in this appeal is whether Nimoh's failure to follow hospital procedures in the administration of narcotics constitutes employment misconduct. This court may reverse, remand, or modify the decision of a ULJ if "the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision" are affected by an error of law or unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d)(4)–(5) (2010).

Whether the employee committed a certain act is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We review a ULJ's findings

of fact in the light most favorable to the decision and give deference 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). “[W]hether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo.” *Skarhus*, 721 N.W.2d at 344.

Employment misconduct is defined as “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” Minn. Stat. § 268.095, subd. 6(a) (2010). The failure to follow reasonable policies and procedures constitutes employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Nimoh argues that he “simply forgot[] to document due to work overload.” Employment misconduct includes negligent or indifferent conduct and does not have to be intentional. Minn. Stat. § 268.095, subd. 6(a). Nimoh does not contest that the policy of recording the administration of narcotics in a patient’s medical chart is reasonable and admitted that the failure to chart could negatively affect the health of the patient if another narcotic was administered. Nimoh’s failure to record administration of a narcotic, while aware of the potentially adverse consequences, was a serious violation of the hospital’s policy and of the standard of behavior Allina had a right to reasonably expect.

Nimoh raises an issue of whether he was deemed ineligible for unemployment benefits because of personal use or diversion of narcotics. Nimoh argues that he did not

divert the narcotics for unauthorized use, as implied by the hospital's termination document. However, during the evidentiary hearing, the ULJ challenged the hospital's contention that Nimoh could have diverted the narcotics and explicitly did not base denial of unemployment benefits on that ground.¹ Therefore, on this appeal, we assume that Nimoh was not using or distributing the narcotics but that he simply failed to record their administration to patients.

Because requiring a nurse to record when a narcotic is administered to a patient ensures patient safety and is a reasonable and important policy for the hospital, we conclude that Nimoh's failure to follow the procedure constitutes employment misconduct, disqualifying Nimoh for unemployment benefits.

Affirmed.

Dated:

¹ In his brief to this court, Nimoh states that he was never told that his documentation failure could result in termination and that, if he had been, he would have modified his workload to reduce the risk of repeating such mistakes. Nimoh does not argue that he could not be discharged or denied unemployment benefits unless he was given such a warning. However, we note that the hospital's clear documentation policy, the importance of strict accountability for narcotic painkillers, the problems of abuse and misuse of narcotics, and the risks arising from failure to document their administration to a vulnerable person (like hospital patients) indicate that a prior warning is not required.