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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1364

Cathy A. Kelly,
Relator,

vs.

Mayo Foundation for Medical
Education & Research,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed May 6, 2013
Affirmed
Stauber, Judge

Department of Employment and Economic Development
File No. 29396457-3

Brandon V. Lawhead, Austin, Minnesota (relator)

Joanne L. Martin, Rochester, Minnesota (for respondent Mayo Foundation for Medical Education & Research)

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

Considered and decided by Stauber, Presiding Judge; Bjorkman, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

Relator challenges the decision by the unemployment law judge (ULJ) that she is ineligible for unemployment benefits because she was terminated for employment misconduct when she changed a patient's care plan without approval from her supervisor. We affirm.

FACTS

Relator Cathy A. Kelly was employed as a licensed practical nurse (LPN) by respondent Mayo Foundation for Medical Education & Research (MFMER) beginning in January 2008. Sometime in 2010, relator asked her supervising physician if he would see her friend as a patient. Her supervising physician agreed, and relator went to the initial appointment, and received authorization to access the friend's medical records. The friend had a controlled-substance agreement that provided he would be prescribed a narcotic drug at a specified dosage. He regularly requested that relator pick up his prescription and personally deliver it to his home, which she did.

On January 24, 2012, the friend requested a prescription refill. Although the prescription normally indicated that it was to be delivered by relator, the prescription that was printed off stated that it was to be mailed to the patient. The prescription was issued by a substitute physician because relator's supervising physician was on vacation. When relator noticed that the prescription issued by the substitute physician indicated it was to be mailed to the patient, relator changed the delivery instruction to provide that she

would deliver the prescription. Relator did not ask permission from a physician prior to making this change, and when confronted she initially denied making the change.

On February 17, 2012, relator was terminated from her employment with MFMER. Relator applied for unemployment benefits, and was initially deemed eligible. MFMER appealed relator's eligibility determination, arguing that she was terminated for employment misconduct. Following a hearing before a ULJ on April 24, 2012, the ULJ reversed relator's eligibility determination, concluding that relator committed employment misconduct when she changed her friend's prescription delivery method without first consulting her supervising physician. The ULJ also concluded that relator knew what she did was wrong because she initially denied making the change when confronted.

On May 16, 2012, relator filed a request for reconsideration, arguing that the ULJ failed to develop her claim that she was terminated in retaliation for taking light-duty work following the onset of a disability. The ULJ affirmed the determination of ineligibility, concluding that any claim that relator's discharge was retaliatory was "spurious" in light of the seriousness of the misconduct in changing a patient's prescription delivery method without permission. This certiorari appeal followed.

D E C I S I O N

An applicant for unemployment benefits who was discharged is ineligible for benefits if the applicant was discharged for employment misconduct. Minn. Stat. § 268.095, subd. 4 (2012). "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) (2012). "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) (2012).

"Whether an employee committed employment misconduct is a mixed question of fact and law." *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether an act was committed is a question of fact; but, whether the act constitutes employment misconduct is a question of law, which we review de novo. *Id.* We review the ULJ's fact findings in the light most favorable to the decision, giving deference to the ULJ's credibility determinations. *Id.* "[T]his court will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Id.*

On appeal, we "may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusions, or decision are . . . unsupported by substantial evidence in view of the entire record as submitted; or arbitrary and capricious." Minn. Stat. § 268.105, subd. 7(d)(5) (2012).

Relator argues that her conduct was not a "serious violation" of her employer's policies because she had permission to participate in her friend's care and to review his files, and because she believed she was following her employer's policies. However, the ULJ determined that her conduct was a serious violation because she modified a patient's prescription for a controlled medication without her supervising physician's permission, and initially lied about doing so. We agree with the ULJ that relator's behavior was a

serious violation. "Serious violation" is not clearly defined by caselaw or statute; however, a single instance of seemingly innocuous behavior can, given the surrounding circumstances, constitute a serious violation of an employer's standards. *See Potter v. Northern Empire Pizza, Inc.*, 805 N.W.2d 872, 876-77 (Minn. App. 2011) (concluding that a single instance of "poking" was a serious violation because it was physical contact purposefully intended to harm a coworker), *review denied* (Minn. Nov. 15, 2011). Moreover, the supreme court has stated that, "if there is one unique area of employment law where strict compliance with protocol and militarylike discipline is required, it is in the medical field." *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 525 (Minn. 1989). We conclude that under these circumstances, even though it involved a single incident, relator's conduct was a serious violation because she altered a patient's prescription when she should have known it was necessary to first obtain permission from her supervising physician. The fact that relator initially denied changing the prescription is substantial evidence that relator knew her conduct was contrary to her employer's policies.

Relator also argues that she did not receive a fair hearing because the ULJ failed to develop testimony regarding relator's claim that she was terminated in retaliation for accepting light-duty work due to a disability. As a pro se party, relator is entitled to have the ULJ assist her "in the presentation of evidence, and to control the hearing in order to protect the parties' right to a fair hearing, and ensure that relevant facts are clearly and fully developed." *Ntamere v. Decisionone Corp.*, 673 N.W.2d 179, 180 (Minn. App. 2003) (citing Minn. R. 3310.2921). During the hearing, relator stated that her friend "said that I needed to be careful because being on light duty he was fearful for my job."

Following this statement, the ULJ did not inquire further into the possibility that relator was attempting to raise a retaliation defense. However, upon reconsideration, the ULJ concluded that relator's retaliation claim was specious given the seriousness of relator's misconduct. We agree. The record contains substantial evidence that relator's conduct endangered her employer's patient by violating the protocols designed to ensure patient welfare. Moreover, relator's dishonesty about violating her employer's protocols also constituted employment misconduct. *See Baron v. Lens Crafters, Inc.*, 514 N.W.2d 305, 307-08 (Minn. App. 1994) (concluding that the failure to perform job responsibilities, coupled with dishonesty about that failure, constituted employment misconduct). Because we conclude there is substantial evidence in support of the ULJ's determination that relator was discharged for employment misconduct, we affirm.

Affirmed.