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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1921**

Nancy Dorianna Kolstad,
f/k/a Nancy Parenteau,
Relator,

vs.

Regions Hospital,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 15, 2013
Affirmed
Ross, Judge**

Department of Employment and Economic Development
File No. 29852812-3

Nancy Dorianna Kolstad, Woodbury, Minnesota (pro se relator)

Regions Hospital, St. Paul, Minnesota (respondent employer)

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

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

A coworker reportedly witnessed pharmacist Nancy Kolstad drinking unprescribed prescription cough medicine containing codeine while on the job at Regions Hospital. Kolstad appeals from an unemployment law judge's determination that she is ineligible to receive unemployment benefits because she was discharged from her position for employment misconduct. Because the evidence substantially supports the unemployment law judge's findings of fact, we affirm.

FACTS

Nancy Kolstad was working as a pharmacist at Regions Hospital when another pharmacist witnessed her ingesting Cheratussin AC, a prescription cough syrup containing codeine. The pharmacists had been keeping the Cheratussin unsecured on a counter because they frequently used it to fill prescriptions. The next day the witnessing pharmacist reported what she saw to the pharmacy manager, who in turn reported it to the pharmacy director. The two supervisors then watched a videorecording of the counter, which was within view of a security camera. They saw Kolstad take the bottle of Cheratussin from the counter, pour the Cheratussin into her coffee cup, and ingest it.

That same day the Regions Hospital safety and security director interviewed Kolstad. She acknowledged that Cheratussin was on the counter, but she said she didn't know whether she put some of it into her coffee cup. She admitted that she took *something* off the counter and poured it into her cup, but she claimed that she thought it was coffee creamer. She added that she had felt ill when she got home that evening and

had thrown up. The hospital terminated her employment the next day for theft and consuming a controlled substance on duty.

Kolstad sought unemployment benefits and was initially deemed eligible after an employee at the department of employment and economic security concluded that she was not terminated for employment misconduct. Regions appealed this conclusion and an unemployment law judge (ULJ) conducted a hearing and found that Kolstad had been very tired on the day of the incident and that pharmacy management was to blame for her drug consumption because it had failed to accommodate Kolstad's mental-health-related requests for scheduling changes. The ULJ did find that Kolstad put the Cheratussin into her cup and drank it, concluding that she did so only on mistaking it for coffee creamer. The ULJ therefore held that Kolstad was not discharged for employment misconduct and that she was eligible to receive unemployment benefits.

Regions Hospital requested reconsideration. A different ULJ reviewed the case and reversed the first ULJ's decision, holding that the previous findings and decision were factually and legally erroneous. He found that Kolstad poured Cheratussin AC from the bottle into her coffee mug and drank it. He found that she had no prescription or permission to consume the medication and that she knew that the bottle contained Cheratussin.

The ULJ also made findings on the credibility of the witnesses. He found Kolstad's testimony incredible, deeming implausible the notion that she could not distinguish between cough syrup and coffee creamer. The ULJ further found that the pharmacy director and manager provided credible testimony about the surveillance

footage and the investigation, and that this supported the conclusion that she intentionally took the medication and was discharged for medication theft and prescription-medicine consumption. He also concluded that Kolstad's conduct constituted a serious violation of Regions Hospital's expectations and that she could "no longer be trusted to perform the duties of her job as a pharmacist." For these reasons, the ULJ held that Kolstad was discharged because of employment misconduct and is ineligible for unemployment benefits. Because of the earlier decisions favorable to Kolstad, the final decision on reconsideration resulted in a determination that Kolstad was overpaid \$5,373 in unemployment benefits.

Kolstad appeals by writ of certiorari.

D E C I S I O N

Kolstad challenges the ULJ's determination that she was discharged for employment misconduct, a determination that makes her ineligible for unemployment benefits. *See* Minn. Stat. § 268.095, subd. 4(1) (2010). We may modify, reverse, or remand a ULJ's determination on benefits if the relator's substantial rights were prejudiced by fact findings unsupported by substantial evidence or by a decision affected by an error of law, made upon unlawful procedure, or that is arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(3)–(6) (2010).

Kolstad contends that she did not engage in employment misconduct. Employment misconduct is "any intentional, negligent, or indifferent conduct, on the job . . . that displays clearly" either "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee" or "a substantial lack of concern for the

employment.” Minn. Stat. § 268.095, subd. 6. Whether an employee engaged in employment misconduct is a mixed question of law and fact. *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011). Whether an employee committed a specific act is an issue of fact, but whether the facts constitute employment misconduct is a question of law that we review de novo. *Id.* We review “factual findings in the light most favorable to the [ULJ’s] decision” and we will rely on those findings when substantial evidence supports them. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). “Substantial evidence” is the relevant evidence that “a reasonable mind might accept as adequate to support a conclusion.” *Moore Assocs. v. Comm’r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996) (quotation omitted).

Kolstad first challenges the ULJ’s factual finding that she intentionally poured Cheratussin into her coffee mug and drank it on the job. She argues that the finding is erroneous because the hospital offered no inventory records indicating a shortage of Cheratussin and because Regions did not subject her to a drug test to prove she had consumed it. Kolstad’s position is belied by her own admissions during the workplace investigation and by the other evidence. As to her contention on appeal that she did not actually ingest the drug, she admitted to the hospital security director that she poured *something* from the medicine counter into her cup and drank it, that she did not know whether it was medication, and that she felt sick that evening after she got home. Kolstad later added this concession: “I’m old enough at this point in my life to know that I’m not infallible especially when you get that busy.” Three pharmacy witnesses who would know what a bottle of Cheratussin looks like—one of them an eyewitness and the other

two supervisors—concluded that the substance that Kolstad poured into her cup was Cheratussin. The ULJ had sufficient evidence to conclude that the substance was, of course, Cheratussin.

As to Kolstad's contention that her Cheratussin consumption was not intentional, the ULJ was free to assess her credibility, and he did, finding it wanting. He reasoned that a pharmacist of Kolstad's significant experience would not, despite her claimed exhaustion, mistake cough syrup for coffee creamer. He considered the obvious differences in shape of the bottles and the taste of the substances. This reasoning is unassailable. Because we do not disturb the ULJ's credibility determinations, and the evidence in the record substantially supports the ULJ's finding, these factual challenges fail.

Kolstad also argues that the ULJ erroneously concluded that she was discharged for employment misconduct. She does not contend that stealing and intentionally ingesting Cheratussin are not misconduct; rather, she asserts that Regions Hospital really discharged her for something other than the theft and drug use. She maintains that she was actually discharged for her history of whistleblowing on pharmacy managers. For support, she emphasizes that the hospital discharged her within 28 hours of a claim that it had not substantiated, that she had no prior discipline, and that she had been the subject of no similar complaints. The argument fails on the facts. The ULJ found that the reason for the discharge was Kolstad's theft and her illegal, on-duty drug consumption. He did not find any retaliatory purpose behind the discharge. Kolstad did offer her own testimony and argument alleging the improper basis for the discharge, but the ULJ did

not credit that theory, finding instead that she was fired for her illegal conduct (drug theft and consumption), not for her alleged previous whistleblowing. Deferring to the ULJ's findings of fact and credibility determinations, as we must, we reject the argument that the hospital discharged Kolstad for some other, improper, reason.

We therefore affirm the ULJ's decision that Kolstad is disqualified from receiving unemployment benefits.

Affirmed.