This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0418

Charlene Tschida,
Relator,

vs.

Unity Family Healthcare,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 24, 2012
Reversed
Kirk, Judge

Department of Employment and Economic Development
File No. 28825358-3

John J. Neal, Willenbring, Dahl, Wocken & Zimmermann, PLLC, Cold Spring, Minnesota (for relator)

Eric M. Trelz (pro hac vice), Marc D. Goldstein (pro hac vice), Polsinelli Shughart PC, Saint Louis, Missouri; and Jessica M. Marsh, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis, Minnesota (for respondent Unity Family Healthcare)

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

Considered and decided by Ross, Presiding Judge; Kirk, Judge; and Klaphake, Judge.[*]

---

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KIRK, Judge

Relator challenges the ULJ's determination that she is ineligible for unemployment benefits because she was discharged for misconduct, arguing that: (1) the ULJ misapplied the last-straw doctrine; (2) there is insufficient evidence to support the ULJ's determination; and (3) the ULJ should have granted her request for an additional hearing. Because we conclude that the ULJ's finding that relator engaged in employment misconduct is not supported by substantial evidence, we reverse.

FACTS

Relator Charlene Tschida was employed full-time as a licensed practical nurse at respondent Unity Family Healthcare from January 2005 until November 10, 2011. For most of her employment Tschida was assigned to work with one doctor. After that doctor left Unity, Tschida transferred to a float-nurse position on October 1, 2011. Prior to beginning this new position on October 1, Tschida was required to work eight hours per day but she did not have set hours. As a float nurse, Unity claims Tschida was required to work from 8:00 a.m. until 5:00 p.m., and that she was not allowed to leave at the end of the day until all of the work was finished. Tschida disputes Unity's claim that she was orally informed of these hours when she began the float-nurse position, but she acknowledges that she received written notice of the hours at the end of October.

On November 4, Tschida faxed patient medical records to another clinic in response to a request from the clinic and the signed consent forms of three patients.[1] As a result of this incident, Tschida was immediately suspended without pay while Unity conducted an investigation. On November 10, Sandra Day, Unity's chief nursing officer, discharged Tschida. Interestingly, the incident of faxing records which led to Tschida's immediate suspension on November 4 was not given as a reason for her discharge at the hearing before the unemployment law judge (ULJ). Day testified in regard to the faxing of these records that she "didn't discharge her because of that particular incident." The evidence presented at the hearing established that: there was nothing improper about faxing patient records where a release had been signed; nurses regularly did this; and, while Unity had an internal policy requiring that these records should only be sent out by Health Information Management employees, this policy had never been given to or discussed with Tschida and was not part of her employee handbook.

Day testified that Tschida was discharged because of several attendance and patient-care issues and specifically identified six incidents that occurred between October 1 and October 28. Despite Unity's policy of progressive discipline, which would require first verbal and then written warnings before discharge, Tschida did not receive warnings for any of these incidents and was not notified about them until she was discharged.

After her discharge, Tschida applied for unemployment benefits. The Minnesota Department of Employment and Economic Development (DEED) determined that she

[1] The transmittal of patient records that led Unity to immediately and wrongfully suspend Tschida without pay were records belonging to patients of the doctor with whom Tschida had recently worked at Unity and who now works at the clinic receiving the records.

was ineligible for benefits; Tschida appealed. The ULJ determined that Tschida was ineligible for unemployment benefits because she was discharged for employment misconduct. After Tschida requested reconsideration, the ULJ affirmed her decision.

This certiorari appeal follows.

D E C I S I O N

When reviewing a ULJ's eligibility decision, this court may affirm, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2010). Substantial evidence is "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

An employee who was discharged is eligible for employment benefits unless the discharge was for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2010). "Employment misconduct" is defined as "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). "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 the employee committed the act is a fact question, which this court views in the light most favorable to the decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether the employee's act constitutes employment misconduct is a question of law, which is reviewed de novo. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). This court defers to a ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 345.

A. The ULJ did not base her opinion on the last-straw doctrine.

Tschida argues that the ULJ misapplied the last-straw doctrine. Under that doctrine, "behavior unrelated in time or tenor may, as a whole, support a determination of misconduct under the last straw doctrine." *Barstow v. Honeywell, Inc.*, 396 N.W.2d 714, 716 (Minn. App. 1986). The final incident that results in the employee's discharge must be "of such a nature that it demonstrates conclusively the employee's utter disregard for the employer's interests." *Id.* (quotation omitted). We disagree with Tschida that the ULJ based her decision on this doctrine. Instead, the ULJ specifically found that Unity discharged Tschida based on a combination of attendance and performance issues. Therefore, the ULJ was not required to find that the final incident that resulted in Tschida's discharge demonstrated utter disregard for Unity's interests.

B. Substantial evidence does not support the ULJ's finding that Tschida engaged in employment misconduct.

Tschida contends that there is not substantial evidence in the record to support the ULJ's finding that Tschida engaged in employment misconduct. The ULJ found that Tschida was discharged for a combination of attendance and performance issues,

including the final incident, her "ongoing failure to work her scheduled hours," and "multiple errors in handling patient orders." We address each incident separately to determine whether substantial evidence supports the ULJ's determination that Tschida committed employment misconduct.

1. Medical records faxed to another clinic.

Tschida argues that the November 4 incident when she faxed patient medical records to another clinic was the final incident that led to her discharge and that it did not constitute misconduct. As previously discussed, we disagree with Tschida's underlying argument that the ULJ based her decision on the last-straw doctrine. But we agree with Tschida that the November 4 incident was the final incident that led to her discharge because the record establishes that Tschida was suspended without pay immediately after the November 4 incident and Unity presented Tschida with a list of the additional issues only after conducting a subsequent investigation.

We further agree with Tschida that her conduct during this final incident was not employment misconduct, and we note that the ULJ also acknowledged that this incident likely did not amount to misconduct. In general, refusing to comply with an employer's reasonable policy is misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). "An employer has a right to expect that its employees will abide by reasonable instructions and directions." *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004). As Unity later acknowledged, Tschida's conduct of faxing patient records to another medical facility did not violate the Health Insurance Portability and Accountability Act (HIPAA). Tschida's

conduct did violate Unity's internal policy allowing only certain employees to respond to records requests, but she was not notified of the policy, it was the common practice of nurses at Unity to fax records to other clinics, and Unity acknowledged that she did not knowingly violate the policy. Tschida's conduct during this incident was not a serious violation of the standards of behavior that Unity had a right to reasonably expect and, therefore, was not employment misconduct.

2. Attendance issues.

The ULJ found that, in the month before her discharge, Tschida was late to work approximately eight days and left work early more than once. "An employer has the right to establish and enforce reasonable rules governing absences from work." *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). Whether an employee's absences or timeliness are a serious violation of the standards of behavior the employer has the right to expect varies based on the circumstances. *Stagg*, 796 N.W.2d at 316.

Tschida does not dispute that she arrived at work after 8:00 a.m. on approximately eight days in October and left work before 5:00 p.m. on one occasion. However, she argues that she was not notified that she was required to work from 8:00 a.m. until 5:00 p.m. when she transitioned to the float-nurse position. Prior to beginning her new position, Tschida was required to work eight hours per day but did not have specific hours. Day testified that, as a float nurse, Tschida's hours were from 8:00 a.m. until 5:00 p.m. and that she could not leave until all of the work had been completed. The parties agree that Tschida received written notification of these attendance requirements at the

end of October, but Day claims that Tschida was also orally notified of this policy by the triage nurse at the beginning of October. There is no evidence indicating that Tschida did not work eight hours on any of these eight days.

Here, Day's testimony is the only evidence in the record to support the ULJ's finding that Unity notified Tschida about the change in her hours on October 1. During her testimony, Day stated that a triage nurse orally notified Tschida that she was required to be at work between 8:00 a.m. and 5:00 p.m. But Day was unable to provide any details regarding when or how this information was communicated to Tschida, or any business record documenting that it had occurred. In addition, the triage nurse did not testify at the evidentiary hearing. While a ULJ "may receive any evidence that possesses probative value, including hearsay," the evidence must be the type "on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922. We conclude that the hearsay evidence from one employee that another employee verbally notified Tschida about the change in her hours, without corroboration, is not the type of evidence upon which a reasonable, prudent person would rely.

The parties agree that Tschida received written notice of these hours at the end of October, but the record establishes that a majority, if not all, of the attendance issues that Unity alleged occurred before she received notice. The written notice was sent to all nurses, not just Tschida, suggesting that confusion about the 8:00 a.m. to 5:00 p.m. requirement was widespread. Accordingly, the occasions when Tschida arrived after 8:00 a.m. and left before 5:00 p.m. are not serious violations of the standards of behavior Unity had the right to expect. Therefore, the ULJ's finding that Tschida was notified

about her hours when she began the float-nurse position is not supported by substantial evidence.

3. Patient-care issues.

Finally, the ULJ found that Tschida's multiple errors in communicating with patients constituted employment misconduct. It is generally misconduct for an employee to fail to perform assigned duties and, in the health care field in particular, "strict compliance with protocol and militarylike discipline is required." *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 525 (Minn. 1989).

Here, the ULJ found that there were several issues with Tschida's job performance. Specifically, Tschida failed to: notify a patient of her test results; report a baby's weight to a physician; return a patient's phone call; and notify a patient about a prescription that was called in to the pharmacy. In making these findings, the ULJ relied on Day's testimony. But the record does not contain any evidence that corroborates Day's testimony, Day had no firsthand knowledge of the incidents, and her testimony was unclear about many details of the incidents. We address each incident separately.

The ULJ found that on October 14 Tschida left work at approximately 4:38 p.m. without returning a patient's phone call. As discussed previously, the record establishes that Tschida was notified at the end of October that she was required to remain at work until 5:00 p.m. Prior to that time, Tschida did not believe she was required to be at work during specific hours and believed she could leave work as soon as she had worked eight hours. The record establishes that on October 14, Tschida had worked eight hours by the time she left shortly after 4:30 p.m. Thus, because we have previously concluded that the

ULJ's finding that Tschida was notified that she had to stay at work until 5:00 p.m. is not supported by substantial evidence, we conclude that the ULJ's finding that Tschida left work early on October 14 is also not supported by substantial evidence.

The ULJ found that Tschida failed to inform a patient of her positive test results for rheumatoid arthritis, and the patient "ended up hospitalized for medical problems aggravated by the untreated rheumatoid arthritis." The record establishes that Tschida's notes stated that she notified the patient about the test results, and that the patient ended up in the hospital at some later date. But the record does not establish that the patient's later hospitalization was the result of Tschida's alleged failure to notify the patient about the test results. Day testified that she was unsure about the patient's reason for being hospitalized, but she thought the patient had been hospitalized for a heart-related incident and that heart issues can sometimes result from improper care of rheumatoid arthritis. Based on this vague, uncorroborated testimony, we conclude that the ULJ's finding is not supported by substantial evidence.

The ULJ found that Tschida failed to tell a patient that a prescription had been called in for that patient. This finding is based on Day's testimony that a nurse told Tschida to notify the patient about the prescription. But Day's testimony was not corroborated by any other evidence and the nurse who allegedly told Tschida about the prescription did not testify at the evidentiary hearing. We conclude that this finding is not supported by substantial evidence.

Finally, the ULJ found that Tschida failed to notify a doctor about the weight of a baby who had been diagnosed with failure to thrive "according to procedure." This

finding is based on Day’s testimony that standard nursing care requires nurses to report the weight of a failure-to-thrive baby to the baby’s doctor when the baby comes into the hospital for a weight-check appointment. Day testified that Tschida violated this policy by not reporting the baby’s weight. Tschida testified that she was not aware that the baby had been diagnosed with failure to thrive and that she did not report the baby’s weight to the baby’s doctor because the baby was thriving and had gained weight. Because Day’s testimony was not corroborated by documentation of the nursing-care policy or a specific medical record that would have alerted Tschida of the need to notify the baby’s doctor of the baby’s weight, we conclude that this finding is not supported by substantial evidence.

Because the ULJ’s findings relied on vague hearsay testimony unsupported by medical or business records, we conclude that substantial evidence does not support the ULJ’s finding that Tschida engaged in employment misconduct. Therefore, we do not address Tschida’s argument that the ULJ abused its discretion by declining to order an additional evidentiary hearing because one of her witnesses was not allowed to testify.

Reversed.