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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1284**

Teisha Long,
Relator,

vs.

Gina M. Benassi Chiropractic Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 26, 2008
Affirmed
Kalitowski, Judge
Dissenting, Hudson, Judge**

Department of Employment and Economic Development
File No. 5278 07

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Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Relator Teisha Long challenges the unemployment-law judge's (ULJ) decision that she is disqualified from receiving unemployment benefits because she engaged in employment misconduct. Relator argues that (1) the ULJ's factual findings are not supported by substantial evidence; (2) the ULJ erred in failing to explain his credibility determinations; and (3) the ULJ abused his discretion by denying relator an additional evidentiary hearing. We affirm.

DECISION

When an employer discharges an employee for "employment misconduct," the employee is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). Employment misconduct is "any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment." *Id.*, subd. 6(a) (2006).

A challenge to the determination that an employee committed employment misconduct presents a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee's act itself constitutes employment misconduct is a question of law reviewed de novo, but whether the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). In reviewing the ULJ's decision, "[w]e

view the ULJ's factual findings in the light most favorable to the decision," and defer to the ULJ's credibility determinations. *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ULJ's factual findings will not be disturbed when substantially supported by the evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2006).

Substantial Evidence

Relator claims the ULJ's factual findings are not supported by substantial evidence. We disagree.

Relator was employed as a massage therapist and receptionist for Benassi Chiropractic. The ULJ concluded that she engaged in employment misconduct by (1) adding unauthorized and unperformed hours to her timecard by arriving at the clinic prior to the start of her scheduled shift and failing to complete any work during the extra time and (2) neglecting to perform her paperwork-filing duties while her supervisor, Gina Benassi, was on vacation.

Relator argues that the evidence does not support either finding. Although relator acknowledges that she was generally required to follow a fixed work schedule, she claims that Benassi asked her to arrive 15 minutes early when a patient's appointment coincided with the start of business hours to prepare the clinic for the patient's arrival. And she argues that, even if she did not complete the filing, there is no evidence that she did nothing when she arrived early.

We conclude that the ULJ's findings are supported by substantial evidence. Benassi denied that she asked relator to arrive early to prepare the clinic for patient appointments. Instead, Benassi testified that she reminded relator on numerous occasions

that she was not permitted to start more than five minutes early because the unauthorized time added “stress to the payroll,” and did not result in additional work being completed.

Benassi’s testimony is corroborated by documentary evidence submitted at the hearing. Relator’s timecards include a handwritten note from Benassi stating, “Please check in no more than 5 min[utes] early.” And Benassi indicated her disagreement with the additional hours recorded on relator’s timecards by writing “unauthorized overtime” next to relator’s start times.

The ULJ’s finding that relator did not perform her paperwork-filing duties while Benassi was on vacation is also supported by substantial evidence in the record. Although relator claims that she performed other work during this time period, Benassi testified that “all [relator] had to do the week I was gone was file and answer the phone. There were very few messages that needed to be done.” Despite having a limited amount of work to perform, Benassi noted that relator “didn’t even get the filing done.” This testimony supports the ULJ’s conclusion that relator did not perform her work.

Relator contends that her failure to complete the filing “was due exclusively to inadvertence” and that simple “inadvertence” does not constitute employment misconduct. Minn. Stat. § 268.095, subd. 6(a). But relator’s conduct does not fit within this exception. Benassi testified that she originally asked relator to file paperwork while she was out on vacation in March 2007. But upon returning from her four-day absence, Benassi discovered that “[n]one of the filing had been done,” even though relator had twice arrived early for work and had only a few other responsibilities to perform. Benassi asked relator again on two separate occasions to complete the filing, but relator

did not comply with Benassi's orders. After the final request, relator initially told Benassi that the filing had been completed, but later "produced an inch of filing from early March that she hadn't filed." Relator's continued failure to complete the filing amounts to more than just an inadvertent oversight. An employee's repeated failure to perform the work requested by an employer constitutes employment misconduct because it demonstrates a substantial lack of concern for the employment. *Schmidgall*, 644 N.W.2d at 804 (noting that failure to abide by an employer's reasonable requests amounts to employment misconduct).

Credibility Findings

Relator argues that the ULJ erred in failing to articulate reasons for discrediting relator's testimony. "Credibility determinations are the exclusive province of the ULJ." *Skarhus*, 721 N.W.2d at 345. But "[w]hen the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the [ULJ] must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2006). Relator contends that her credibility had a significant effect on the outcome because the ULJ had to determine whether relator's or Benassi's testimony regarding the additional hours was more credible. We disagree.

Relator claimed that Benassi authorized her to arrive 15 minutes early for work when a patient's appointment coincided with the start of business hours. But even if we accept this as true, Benassi's undisputed testimony demonstrates that after relator was warned not to start early, relator reported early for work on two occasions when there were not any appointments scheduled for the beginning of business hours. Relator

arrived 15 minutes early at 8:45 a.m. on March 12, 2007, despite having only afternoon appointments. And on March 15, 2007, relator reported for work 30 minutes early despite not having a patient appointment scheduled for the start of business hours. Moreover, relator did not challenge Benassi's testimony that relator failed to complete her filing despite repeated reminders. Thus, because the ULJ relied exclusively on Benassi's unrefuted testimony in reaching the determination that relator engaged in employment misconduct, we conclude that relator's credibility did not have a significant effect on the outcome of the case.

Denial of New Hearing

Relator claims that that the ULJ improperly denied her a new hearing. She argues that she submitted new evidence with her request for reconsideration that would have changed the outcome and demonstrated that Benassi's evidence was false. We disagree.

An additional evidentiary hearing is only required if new evidence

(1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

Id., subd. 2(c) (2006). We defer to the ULJ's decision as to whether to hold an additional evidentiary hearing, reversing only for an abuse of discretion. *Skarhus*, 721 N.W.2d at 345. In her request for reconsideration, relator submitted a chronological set of timecards, which included her hours for three dates that were approved by Benassi that had start times that were 15 minutes earlier than scheduled. She also submitted letters

from former clinic employees who alleged that they overheard Benassi instruct relator to arrive early for client appointments that were scheduled for the start of business hours.

This evidence tends to support relator's testimony that Benassi instructed her to report for work 15 minutes early when a patient's appointment was scheduled for the beginning of business hours. But in denying relator's request for reconsideration, the ULJ concluded that, even if relator was asked to report for work early on certain days, "[t]he offered documents shed no light on whether or not [relator] was actually performing scheduled work at the times claimed." Moreover, the new evidence does not address the days that relator started early when there were no patient appointments. Thus, the ULJ properly concluded that even when considered in a light most favorable to relator, the letters and timecards submitted by relator were unlikely to change the outcome or prove that Benassi's testimony was false.

Moreover, relator did not have good cause for failing to submit the evidence at the hearing. Relator blames the ULJ for her failure to present the evidence, arguing that the ULJ should have ensured that relator called witnesses to support her argument. But prior to the hearing, the ULJ asked relator if she planned to call a former clinic employee as a witness. Relator replied, "I don't believe it's necessary. I think there's enough documentation without [the testimony of the former employee]." The ULJ then informed relator that she would have the opportunity to call witnesses later in the hearing.

Relator acknowledges that she initially declined the opportunity to call witnesses, but contends that the ULJ had a duty to ask her later in the hearing if she had reconsidered her decision. Relator points out that the ULJ must "ensure that all relevant

facts are clearly and fully developed,” and must also assist pro se parties with the presentation of evidence. Minn. Stat. § 268.105, subd. 1(b) (2006) (requiring development of the record); Minn. R. 3310.2921 (2007) (requiring assistance of pro se parties).

The ULJ must “exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing.” Minn. R. 3310.2921. The record here indicates that relator received a fair hearing. She was offered the opportunity to call witnesses, and the ULJ asked her on two occasions during the hearing if she had anything else to discuss that she believed was important. Because relator was afforded ample opportunity to present her evidence and the ULJ appropriately deferred to relator’s decision to rely on documentary evidence, relator has not demonstrated good cause for failing to submit the evidence. Accordingly, we conclude that the ULJ’s denial of relator’s request for a new evidentiary hearing was within his discretion.

Affirmed.

HUDSON, Judge (dissenting)

Because the unemployment law judge (ULJ) failed to make the statutorily required findings regarding credibility issues central to its misconduct determination, I respectfully dissent.

Minn. Stat. § 268.105, subd. 1(c) (2006), provides that “[w]hen the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the [ULJ] must set out the reason for crediting or discrediting that testimony.”

Here, the central issue was whether Long committed employment misconduct by adding unauthorized hours to her timecards. The centrality of this issue is borne out by the fact that the sole reason identified by Dr. Benassi, in her March 19, 2007 letter terminating Long’s employment, was Long’s “unauthorized use of overtime.” Similarly, in Dr. Benassi’s written submissions to the Department of Employment and Economic Development, Dr. Benassi said she discharged Long because of “unauthorized overtime.” In one sentence, Dr. Benassi also mentioned that Long failed to complete some filing on one occasion. But the record reflects that the filing issue was only relevant because Dr. Benassi believed that Long should have completed it since she claimed an extra one-half hour of work. And while the ULJ found that Long did not complete the filing, that finding is inextricably tied to the unauthorized-overtime issue, the resolution of which required credibility findings by the ULJ. Moreover, it is not clear from the ULJ’s order that Long’s alleged failure to complete the filing was the reason for the discharge.

And finally, the hearing testimony likewise reveals that the principle issue was Long's alleged use of unauthorized overtime. Although a peripheral issue surfaced—whether Long improperly refused to call an attorney about an insurance claim—and the ULJ addressed that issue in his order, this case was about Dr. Benassi's contention that Long was deliberately violating Dr. Benassi's orders by clocking in early and charging Dr. Benassi for overtime, which Dr. Benassi could not afford to pay.

Yet despite the centrality of the overtime issue, and the parties' contradictory versions of whether Long was authorized to clock in at 8:45 a.m. on certain days, the ULJ made no findings setting forth his reasons for crediting Dr. Benassi's testimony over that of Long. The ULJ's failure to do so violates Minn. Stat. § 268.105, subd. 1(c) and this court's precedent. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (remanding for credibility findings where credibility was central to misconduct determination yet ULJ made no specific credibility findings).

The majority opinion concludes that Long's credibility did not have a significant effect on the outcome – and therefore no credibility findings were required – because after she was warned not to start early, Dr. Benassi's undisputed testimony demonstrates that Long reported early for work on March 12 and March 15, 2007, without having any appointments scheduled for the beginning of business hours.

But this conclusion proceeds from a false, or at least contested, premise. Dr. Benassi's testimony was not entirely undisputed. Long repeatedly testified that she only came in early when she was asked by Dr. Benassi to do so. Although Long did not directly address the March 12 and March 15 dates, the clear implication of her broader

testimony is that on these dates, there were in fact morning appointments scheduled and Dr. Benassi asked Long to come in early. That there is precedent for such a request by Dr. Benassi is demonstrated by other time cards in the record from February 2007 and March 2007, which show that on certain days Dr. Benassi *approved* Long's additional time. Thus, there is some record support for Long's contention here on appeal that Dr. Benassi's expectations regarding Long's start time was at best a moving target.

On this record, the ULJ's decision to credit Dr. Benassi's testimony over that of Long plainly had a significant effect on the ULJ's misconduct determination. Yet the ULJ simply stated that "[t]he evidence shows that there was a continuing issue with Long on days when she was scheduled to start at 9 a.m., but would frequently start her timecard at 8:45 a.m. . . . Her later failure to follow instructions after repeated reminders is considered a continuing disregard of the employer's stated interests, and this is employment misconduct." Significantly, there are no findings regarding either witness's demeanor, source of information, or interest in the outcome; nor are there findings regarding the reasonableness of the testimony offered by the witnesses in relationship to other testimony or documentary evidence available at the hearing. *See id.* (suggesting criteria for the required evaluation of credibility); *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532–33 (Minn. App. 2007) (suggesting credibility considerations). Thus, the ULJ did not "set out the reason for crediting or discrediting" the contested testimony as required by Minn. Stat. § 268.105, subd. 1(c).

Our caution in *Wichmann* bears repeating: "We recognize that this court usually can infer from findings which witnesses the ULJ found credible. But we cannot search

for substantial evidence to support these inferences in the absence of specific findings. To do so would negate the express requirement of section 268.105, subdivision 1(c).” 729 N.W.2d at 29.

Because the ULJ did not make findings addressing credibility and the ULJ’s finding of employment misconduct relies on a credibility assessment, I would remand for additional findings that satisfy the statute.

Dated: _____

Judge Natalie E. Hudson