

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-135**

Ejiroghene Egi,
Relator,

vs.

Senior Care Woodbury, LLC,
Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed November 23, 2010
Reversed
Stoneburner, Judge**

Department of Employment and Economic Development
File No. 234689443

Peter B. Knapp, Heather Monnens, Certified Student Attorney, William Mitchell Law
Clinic, St. Paul, Minnesota (for relator)

Senior Care Woodbury, LLC, Woodbury, Minnesota (respondent employer)

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

Considered and decided by Stauber, Presiding Judge; Halbrooks, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Relator challenges the unemployment-law judge's (ULJ's) determination that she was discharged for employment misconduct and therefore is ineligible to receive unemployment benefits. Because the record does not support the ULJ's finding that relator committed the alleged conduct for which her employment was terminated, we reverse.

FACTS

For more than nine years, relator Ejiroghene Egi worked as a licensed practical nurse at Senior Care Woodbury LLC, (Senior Care), a long-term care facility. Her duties included providing care for patients as directed by staff physicians. She was discharged from employment in September 2009.

The record reflects that Egi received two "Counseling Reports" in November 2008 for "incomplete documentation," as a result of which she was given education on documentation. In February 2009, Egi received two additional "Counseling Reports," one for "incomplete documentation" on February 6, and one for "unsatisfactory work performance" on February 25. The February 25 report states that Egi failed to complete two "neuro checks," and further states "[n]o charting in nurses notes." Although Egi signed this report, she contends that she performed the required checks but failed to chart them before she completed her shift. Egi was suspended for this incident.

The circumstances that resulted in Egi's discharge arose in September 2009. Senior Care asserts that Egi falsely documented that she had performed a required

dressing change at a patient's catheter site on September 15, 16 and 17. It is undisputed that on September 15, 16, and 17, 2009, a patient at Senior Care had a catheter in place that required care during every shift. Senior Care asserts that the September 15–17 medical orders and treatment record for this patient specifically required a dressing change at the catheter site and application of antibiotic ointment during every shift. Egi asserts that the specific instruction to perform a dressing change was not added to the medical orders until September 18, and that before that date, the care required left changing the dressing to the nurse's judgment. Egi testified that in caring for this patient she had frequently changed the dressing, but that after examining the dressing on September 15, 16, and 17, she concluded on each occasion that a dressing change was not necessary because the dressing was dry and clean. Egi denies that she indicated to anyone that she had changed the dressing on those dates.

When a nurse changes a dressing, in addition to charting that required care was given, the nurse writes the date and the nurse's initials on the dressing. On September 18, when a nurse changed the dressing at the patient's catheter site, the nurse discovered that the dressing had last been changed on September 15, 2009. On September 18, the patient's skin surrounding the opening for the catheter was reddened, there was drainage, and antibiotic ointment was ordered.

The patient required round-the-clock care, which was provided in three shifts per day, therefore, it is not disputed that at least three nurses, including Egi, cared for this patient during each 24-hour time period between September 15 and September 17. Each nurse who cared for the patient during this period initialed the treatment record,

indicating that the nurse had provided the care required on the patient's treatment record. It is undisputed that no one changed the dressing during this time.

Senior Care alleges that Egi intentionally ignored the physician's orders for this patient as recorded on the patient's treatment record when she failed to change the dressing. This conduct resulted in termination of her employment. Because of Egi's prior warnings, one of Senior Care's witnesses stated that Egi was discharged due to a "pattern" of unsatisfactory work.

Egi denies that the treatment record required dressing changes on every shift at the time she provided care. Egi asserts that the dressing-change requirement and the instructions regarding the application of antibiotic ointment were added after the dressing was changed on September 18.

The record contains forms titled "Physician's Orders" for August and September 2009. Each of these documents contains a typed order for "catheter care every shift" but neither document orders a dressing change during every shift. The record also contains a form titled "Physician's Orders" with handwritten entries beginning August 24, 2009. An entry on this document dated September 18, 2009, states "[p]lease change dressing around suprapubic catheter site [every]¹ shift & apply bacitracin."

Two pages of charting forms relevant to this matter are in the record. These forms list treatment requirements in the first column, date of entry of treatment required in the second column, followed by a grid with a square for each shift for each day of the month of September. Nurses initial the applicable square to indicate that the corresponding

¹ The orders use the notation "q" to mean "every."

treatments have been performed during a shift. All of the required treatments are typewritten except the last two, which are handwritten references to catheter-site care. The first handwritten entry is crossed out, and there are no initials in the grid that follows this crossed-out entry. The second undated handwritten entry reads “superpubic site care [every] shift [change]² drsg³ & apply bacitracin S/P catheter [change]”⁴ There are initials in each box for every shift of every day from September 1 through September 30, indicating that the required care was provided by each nurse during every shift.

Egi argues that these documents support her assertion that after the dressing was changed on September 18, 2009, the physician’s orders were updated to require dressing changes and application of antibiotic ointment during every shift and that the instruction to “[change] drsg & apply bacitracin” was only added to the treatment-charting record at that time and was not on the treatment-charting record when she provided care on September 15, 16, and 17. Egi argues that the words requiring a dressing change and application of bacitracin appear to be in a different handwriting from the instruction for “superpubic site care” and appear to be “squeezed in” to the space.

Senior Care asserts that the instructions requiring every-shift dressing changes and antibiotic-ointment application were in the treatment-charting record before September

² The records use the Greek delta character to mean “change.”

³ This abbreviation of “dressing” is underlined three times.

⁴ This instruction was written in beneath a crossed-out handwritten instruction that reads “[s]uperpubic site cares [infinity symbol] shift.” There are no initials next to this crossed-out instruction, indicating that it was crossed out before charting began in September 2009 and is not relevant to this appeal.

18 and that Egi intentionally and falsely initialed the chart to make it appear as though she had provided care that she had not.

Egi's application for unemployment benefits was denied, and she appealed. The ULJ conducted an evidentiary hearing and kept the record open to receive the relevant physician's orders and treatment-charting records that were not provided at the initial hearing. The ULJ concluded that Egi committed employment misconduct by initialing the treatment record, indicating that she had changed the dressing when she had not. Egi requested reconsideration and a new hearing. The ULJ declined to provide another hearing and affirmed the determination that Egi committed employment misconduct. The ULJ rejected Egi's claim that the dressing-change instruction was not on the treatment record prior to September 18, finding that Egi's assertion was unsupported by anything other than her mere assertion. Egi appeals by writ of certiorari.

D E C I S I O N

I. Evidentiary Support for ULJ Rulings

When reviewing a ULJ's decision, this court may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the findings, inferences, conclusion, or decision are "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5) (2008). This court views a ULJ's factual findings in the light most favorable to the decision, defers to the ULJ's credibility determinations, and will not disturb the findings if the evidence substantially sustains them. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002); *Skarhus v. Davanni's*, 721 N.W.2d 340, 344 (Minn. App. 2006). 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 individual discharged from employment is ineligible for unemployment benefits if the applicant was discharged because of employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2008). “Whether an employee has engaged in conduct that disqualifies [her] from unemployment benefits is a mixed question of fact and law.” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). Whether an employee committed a particular act is a question of fact, but the interpretation of whether that act constitutes employment misconduct is a question of law. *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19–20 (Minn. App. 2003).

In this case, if the ULJ’s finding that the treatment record on September 15–17 required a dressing change during every shift is supported by substantial evidence, Egi’s charting indicating that she performed a dressing change when she did not would constitute employment misconduct. But we conclude that the record does not support the ULJ’s finding. The record lacks substantial evidence to support a finding that the treatment records required a dressing change on September 15, 16 and 17. And, absent a specific instruction that the dressing be changed on every shift, there is no evidence in the record that Egi falsely charted her care of this patient.

The ULJ noted that the dressing-change instruction was “written in” but stated that “[o]ther than Egi’s allegation, there is no evidence to support the conclusion that the

record was altered after the fact.” We disagree. The ULJ failed to address (1) whether the dressing-change instruction is written in different handwriting from the words preceding it; (2) how the instruction could have been on the treatment record before it appeared on the physician’s orders; (3) that Senior Care conceded that the order for bacitracin was not made until after the dressing was changed on September 18; and (4) that three nurses initialed the chart to indicate that on each shift between September 15 and September 17, required care was provided, but none of these nurses changed the dressing.

The ULJ appears to have misunderstood Egi’s argument about the treatment record and erroneously related her argument to the crossed-out instruction rather than to an addition to the instruction next to which each nurse’s initials appear. The ULJ stated that Egi had an obligation to seek clarification of any inconsistency between the physician’s order and the treatment-charting record. But Egi did not argue that the treatment-charting record and physician’s orders were inconsistent on the days she provided treatment; she argued that the dressing-change requirement was not a part of either record at the time she provided care. The physician’s orders provide substantial support for Egi’s assertion that the instruction for daily dressing change and application of bacitracin was added to the treatment-charting record after the physician ordered this treatment on September 18.

The credibility of Senior Care’s testimony that the dressing change requirement was on the treatment-charting record at the time Egi provided care is undermined by evidence that every nurse who cared for this patient between September 15–17 signed off

as having provided the required catheter-site care without changing the dressing. At oral argument on appeal, respondent Department of Employment and Economic Development (DEED) suggested that all of the nurses falsified the record by indicating that they had provided the required care for this patient when they had not. This is only speculation. It is more likely that all of the nurses read the treatment record as Egi did; believing that the determination of whether to change the dressing during each shift had been left to the judgment of each nurse.

The Senior Care representative who testified at the hearing stated that it was *after* the patient exhibited signs of infection on September 18, that the patient was “put on some antibiotic ointment.” The physician’s orders reflect that antibiotic ointment was first ordered on September 18, and the instructions on the treatment record to apply antibiotic ointment appear as part of the requirement to change the dressing on every shift. This evidence substantially supports Egi’s assertion that the requirement for dressing change on every shift was not on the treatment record when she provided care prior to September 18.

“When 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) (Supp. 2009). Egi testified regarding the alteration of the records, and the ULJ noted Egi’s argument in the order. But the ULJ erroneously found that Egi’s testimony was not supported by anything in the record and did not provide any other reason to discredit Egi’s testimony. Based on this record, we conclude that the ULJ’s findings, including the

credibility findings, are not supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Minn. Ctr. for Envtl. Advocacy*, 644 N.W.2d at 466 (explaining the level of evidence required to substantially support a finding of fact). The record does not support the finding that the dressing-change requirement was in the treatment record when Egi provided care, and without this finding, there is no basis for concluding that Egi failed to properly provide or chart the required care; no basis for finding employment misconduct as alleged by Senior Care.⁵

II. Pattern and Reason for Termination

Senior Care argues on appeal that Egi was discharged because of a pattern of previous errors rising to the level of employment misconduct. The ULJ’s order notes that on “more than one occasion,” Egi initialed documents to indicate that she had provided treatments, when she had not provided the required care. But Senior Care’s representative, in response to a question from the ULJ, indicated that the September 2009 incident was the incident that led to Egi’s discharge. And Senior Care’s written description of the discharge states that there was a specific incident that caused Egi’s discharge, specifically, the “catheter care scheduled to be done on every shift.”

⁵ At oral argument on appeal, DEED argued that even if Egi was not required by the treatment record to change the dressing, she committed employment misconduct by failing to remove the dressing when she checked it. Senior Care made no such allegation and the ULJ made no such finding. The only support for DEED’s assertion is a four-line, undated and unsigned, typed notation on plain paper asserting that “[b]asic nursing care” for the catheter site “cannot be done without removing the dressing.” Because the record does not support any assertion that Egi was discharged for failing to remove the dressing even if she was not required to change it, we decline to address this argument.

The ULJ's initial decision and reconsideration decision both note Egi's prior issues with documenting care, but both decisions limited the misconduct determination to the September 2009 incident. The ULJ noted in the initial determination that, after the February 2009 suspension, Egi had been warned that "if she continued to make the same errors she could be terminated." The ULJ stated that Egi's "failure to bring her conduct into line with the employer's reasonable expectations displayed clearly a substantial lack of concern for the employment and may properly be characterized as employment misconduct."

The proper focus in determining eligibility for benefits is the actual cause for termination of employment. *See Hansen v. C.W. Mears, Inc.*, 486 N.W.2d 776, 780 (Minn. App. 1992) (noting that actions "not the cause of the termination . . . may not be relied upon as the basis for termination of benefits"), *review denied* (Minn. July 16, 1992). And "misconduct is irrelevant to a determination of unemployment compensation benefits if that conduct was not in fact the reason for the employee's discharge." *Harringer v. AA Portable Truck & Trailer Repair, Inc.*, 379 N.W.2d 222, 224 (Minn. App. 1985) (finding support in other jurisdictions for the irrelevancy of an employee's conduct not related to stated reason for discharge). The record shows that the September 2009 dressing-change allegation was the reason for Egi's discharge. There is no basis for a conclusion that Egi would have been discharged based on incidents that occurred many

months before her discharge. Because we find that Egi's conduct relating to the dressing-change incident in September 2009 was not employment misconduct, we conclude that the ULJ erred in determining that Egi is not eligible for unemployment benefits.

Reversed.