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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-155**

Leah Walters,
Relator,

vs.

Mapleton Community Home,
Respondent,

Department of Employment and
Economic Development,
Respondent.

**Filed November 23, 2010
Affirmed
Hudson, Judge**

Department of Employment and
Economic Development
File No. 23230495-4

Leah Walters, Mapleton, Minnesota (pro se relator)

Mapleton Community Home, Mapleton, Minnesota (respondent)

Lee B. Nelson, Britt K. Lindsay-Waterman, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent Department)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Hudson,
Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Relator, a nurse, challenges the ULJ's decision that she is ineligible for unemployment benefits for aggravated employment misconduct, based on the finding that she fraudulently obtained prescription narcotics by posing as another nurse, which constitutes a felony. Because substantial evidence supports the finding of aggravated misconduct and the chemical-dependency exception does not apply, we affirm.

FACTS

Relator Leah Walters worked part-time as a charge nurse for Mapleton Community Home (MCH) from December 15, 2008 to August 3, 2009. Each month, Walters worked between one and one-and-a-half shifts or approximately ten hours. As a charge nurse, Walters oversaw a wing, supervised about eight staff members, and distributed medication, including narcotics, to patients.

Walters was arrested on August 8, 2009, after she pretended to be another nurse, called in narcotics prescriptions for herself, and tried to pick them up at a local pharmacy.¹ On August 10, she was charged with five counts of felony possession of a controlled substance and one count of felony attempted possession of a controlled substance. At the time of Walters' unemployment hearing, these charges were still pending.

¹ Based upon the criminal complaint, it appears that the ULJ's finding that the arrest occurred on July 8, 2009 was a typographical error. Neither party disputes the actual date of arrest.

Sometime between August 8 and August 10, MCH learned of Walters' arrest. MCH suspended Walters pending the outcome of the criminal proceeding, but no one from MCH notified Walters of the suspension because Walters' supervisors believed that she would notify MCH that she was unable to work. As MCH predicted, Walters called into work on August 10, stating that she was not available to work because she was dealing with family problems and depression. The parties dispute whether Walters intended to be absent for one shift or an indefinite period of time. Regardless, neither MCH nor Walters contacted the other about scheduling Walters for another shift following this conversation.

Prior to her arrest, Walters had a longstanding diagnosis of depression, but after her arrest, Walters was also diagnosed with opiate dependence. Walters self-reported her chemical dependency to the Board of Nursing and enrolled in the Health Professionals Services Program, a program for health-care professionals to address chemical-dependency issues while retaining their licenses. Walters received emergency treatment at a crisis center and enrolled in an ongoing outpatient-treatment program.

For most of her time at MCH, Walters also worked full-time as a nurse at a hospice, but she apparently lost that position sometime during the summer of 2009. The reason for her separation from the hospice is unknown. Walters subsequently applied for unemployment benefits arising out of her termination from the hospice. She was still employed by MCH. The Minnesota Department of Employment and Economic Development (DEED) notified MCH of Walters' application for benefits on July 30, and

MCH notified DEED about Walters' suspension sometime between August 8 and August 10.

On September 1, a DEED adjudicator found Walters ineligible for unemployment benefits because she had been suspended from her position at MCH for employment misconduct. Walters appealed the decision. The unemployment-law judge (ULJ) convened an evidentiary hearing where Walters, MCH's director of nursing, and MCH's director of operations testified. The ULJ issued an initial decision on September 25 and an amended decision on October 5. The ULJ found that MCH had discharged Walters for conduct that constituted a felony, which was aggravated employment misconduct; that she was ineligible for all unemployment benefits; and that her wage credits from MCH were cancelled.

Walters filed a request for reconsideration, contending that (1) she had no notice that aggravated employment misconduct would be an issue at the hearing; (2) the relevant statute does not provide for suspension for aggravated employment misconduct; (3) the ULJ failed to make findings addressing a connection between Walters' conduct and her chemical dependency; and (4) substantial evidence does not support the finding that Walters' conduct had a significant adverse effect on MCH within the meaning of the aggravated-misconduct provision. MCH submitted a letter in which MCH stated that Walters had agreed to "cease and desist" from the practice of nursing during the Board of Nursing investigation into the charges against her and indicated that Walters was therefore not able and available to work.

On reconsideration, the ULJ affirmed the original decision, finding that (1) Walters was given adequate notice that aggravated employment misconduct would be an issue at the hearing; (2) although the unemployment-insurance statute does not provide for suspension for aggravated employment misconduct, Walters' suspension had lasted more than 30 days and had become a discharge by the time of the hearing; (3) there is no chemical-dependency exception to aggravated employment misconduct; (4) substantial evidence supported the finding that Walters' conduct had a significant adverse effect on MCH; and (5) even though Walters had agreed not to practice nursing, she was still able and available to work because she could seek and accept employment outside of nursing. This petition for certiorari review follows.

D E C I S I O N

This court may remand, reverse, or modify the decision of the ULJ if the substantial rights of the petitioner may have been prejudiced because the findings, conclusions, or decisions are affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008).

“Whether an employee has engaged in conduct that disqualifies him 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 the employee committed a particular act is a question of fact.” *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). This court will reverse or modify the ULJ's findings of fact only when they are “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(5).

“But whether the act committed by the employee constitutes employment misconduct is a question of law.” *Peterson*, 753 N.W.2d at 774. This court therefore reviews de novo the ULJ’s determination of misconduct. *Id.*

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). “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) (Supp. 2009). Aggravated employment misconduct is “the commission of any act, on the job or off the job, that would amount to a gross misdemeanor or felony if the act substantially interfered with the employment or had a significant adverse effect on the employment.” Minn. Stat. § 268.095, subd. 6a(a)(1) (2008).

Initially, Walters argues that the ULJ improperly relied on hearsay in finding that she fraudulently obtained prescription medications, which constitutes a felony. The evidentiary standard in an unemployment hearing need not conform to the rules of evidence. Minn. Stat. § 268.105, subd. 1(b) (Supp. 2009). The ULJ may consider hearsay “if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.” Minn. R. 3310.2922 (2009). The ULJ relied on the criminal complaint submitted by MCH to find that Walters fraudulently obtained prescription narcotics. The complaint was drafted by a law-enforcement official; it is based on interviews with a number of first-hand witnesses; and

it provides detailed factual allegations. A reasonable person would have relied on the complaint to find that there was probable cause to believe that Walters committed the crimes with which she was charged. *See* Minn. R. Crim. Proc. 2.01, subd. 4 (requiring judge to determine “whether probable cause exists and to believe an offense has been committed and the defendant committed it” to support issuance of complaint); *State v. Hart*, 723 N.W.2d 254, 259 (Minn. 2006) (same).

Moreover, Walters did not provide any testimony or exhibits that contradicted the allegations contained in the complaint. Regardless of the reason for Walters’ silence on this issue, a reasonable person faced with the complaint on one hand and silence on the other would have likely relied on the complaint to infer that Walters fraudulently obtained prescription medications. Such inferences are permissible in this context. *See* Minn. R. 3310.2922 (permitting the ULJ to “draw adverse inferences from the refusal of a party or witness to testify on the basis of any privilege”); *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 1558 (1976) (noting that “the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them”); *Parker v. Hennepin Cty. Dist. Court*, 285 N.W.2d 81, 83–84 (Minn. 1979) (concluding that petitioners had right to invoke Fifth Amendment in civil proceeding but could not avoid answer being deemed admitted as a consequence).

Walters next contends that even if she committed acts that constitute felonies, the ULJ erred in ruling that she was discharged for aggravated employment misconduct. Specifically, Walters contends that the record does not contain substantial evidence that

her acts substantially interfered with or had a significant adverse effect on her employment.

We disagree. In the context of applying the single-incident exception to employment misconduct, this court has interpreted whether an employee's conduct had a "significant adverse impact" on the employer. *See* Minn. Stat. § 268.095, subd. 6(a) (2008) (excluding "a single incident that does not have a significant adverse impact on the employer" from definition of misconduct). A single incident is no longer an exception to misconduct and is instead a factor to be considered in determining whether misconduct has occurred. *Compare* Minn. Stat. § 268.095, subd. 6(d) (Supp. 2009) *with* Minn. Stat. § 268.095, subd. 6(a) (2008). But prior case law interpreting the single-incident exception remains instructive. This court has consistently concluded that an act that undermines the employer's ability to entrust an employee with key employment functions constitutes a "significant adverse impact" on the employment. *See Peterson*, 753 N.W.2d at 776 (pilot consuming alcohol while on flight-reserve status); *Frank v. Heartland Auto. Servs., Inc.*, 743 N.W.2d 626, 630 (Minn. App. 2008) (employee automobile-service manager fraudulently charging customer).

MCH's director of nursing testified that, upon learning of Walters' arrest, she suspended Walters because Walters' position required her to distribute the same types of narcotics that she was charged with fraudulently obtaining. Walters argues that there is no evidence that she ever took narcotics from patients and that MCH has a strict protocol for counting narcotics that would prevent her from doing so. But MCH's director of operations testified that, despite MCH's protocol for counting narcotics, "[MCH] really

[has] to have a pretty good trust with [its] nurse because even though she shows that she took that pill and gave it to the resident, she can easily slip it into her pocket and [MCH] would never know.” Thus, substantial evidence supports the ULJ’s finding that after Walters abused her knowledge of the medical profession to obtain narcotics for her own use, MCH could no longer trust Walters to perform her duties as a charge nurse.

Walters also appears to argue that the ULJ erred in ruling that the chemical-dependency exception does not apply. The definition of employment misconduct excludes conduct that is a direct result of an applicant’s chemical dependency. Minn. Stat. § 268.095, subd. 6(a)(9). But the definition of aggravated employment misconduct does not include a similar exception. Minn. Stat. § 268.095, subd. 6a (2008); *see Lyons v. Health & Human Servs. Dep’t*, 413 N.W.2d 264, 266 (Minn. App. 1987) (concluding that the chemical-dependency exception applies only to employment misconduct, not gross employment misconduct, under prior version of statute). Further, “[t]he definition of aggravated employment misconduct provided by this subdivision is exclusive and no other definition applies.” Minn. Stat. § 268.095, subd. 6a(c). Thus, the chemical-dependency exception does not apply under the plain language of the statute. *See Carlson v. Dep’t of Emp’t & Econ. Dev.*, 747 N.W.2d 367, 371 (Minn. App. 2008) (applying plain language rule to interpretation of unemployment-compensation statute).

Finally, Walters argues that even if she is not eligible for unemployment benefits based on her discharge from MCH, she should be eligible for benefits based on the separation from her full-time position with the hospice. DEED responds that Walters is ineligible for all unemployment benefits under Minn. Stat. § 268.095, subd. 4 (2008).

The ULJ did not squarely address this issue, and this court, therefore, cannot do so on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court must only consider those issues that were presented and considered by the trial court).

Affirmed.