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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-207**

Judy Hernandez,  
Relator,

vs.

Family HealthServices Minnesota, P.A.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed December 21, 2010  
Affirmed  
Peterson, Judge**

Department of Employment and Economic Development  
File No. 23827346

Judy L. Hernandez, South St. Paul, Minnesota (pro se relator)

Family HealthServices Minnesota, P.A., St. Paul, 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## UNPUBLISHED OPINION

**PETERSON**, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that she is ineligible to receive unemployment benefits because she was discharged for employment misconduct. Because substantial evidence in the record supports the ULJ's finding that relator failed to obey the employer's instructions and relator does not claim that this failure to obey instructions is not disqualifying misconduct, we affirm.

### FACTS

Relator Judy Hernandez worked for respondent Family Health Services Minnesota, P.A., from June 2006 until November 4, 2009, when she was discharged. Relator was originally hired as a telephone receptionist/scheduler, but, in March 2007, she began working as an office float, and, in June 2008, she became an account coordinator. In April 2009, relator was asked to step down from her position as account coordinator because of poor work flow and inconsistent work performance. Relator was told that she could accept a demotion to patient representative or be discharged. Relator accepted the demotion and began working as a full-time patient representative on May 11, 2009. As a patient representative, relator's duties included "checking in patients, giving them forms to fill in, verifying insurance, scanning documents and other miscellaneous duties."

Relator was scheduled to be on leave pursuant to the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654 (2006), from June 3 through September 9, 2009. Two days before relator went on FMLA leave, the clinic manager met with her to discuss the

importance of verifying patients' insurance because relator was not consistently completing this task. Relator told the clinic manager that she would work harder.

In late September, after relator returned from FMLA leave, the clinic manager noticed that relator was still not taking the appropriate steps to verify insurance and was, instead, writing on forms "unable to verify." Because of these continuing problems, the clinic manager held a group business-office meeting to discuss her work expectations for each position. At the meeting, the four employees who verified insurance "were told that you never should have unable to verify, that you can always verify insurance. It's a matter of whether it's checking on line or a phone call." Relator and the other patient representative also "were notified about scanning and making sure appropriate forms were filled out."

Relator was out sick from October 26 through October 30, 2009. Relator returned to work on November 2 and notified her employer that she needed the following day off for a court appearance. While relator was out, five patient-authorization forms that had not been scanned into the patients' charts were discovered at relator's desk. The forms were supposed to be scanned every day but had not been scanned for several weeks, and one was a month old. On November 4, when relator returned to work, the clinic manager asked her about the authorization forms that had been found at her desk. Relator denied that she was the one responsible for checking in those patients and claimed that she scanned in all of the forms that she had been given. After some discussion, relator was discharged.

Relator filed a claim for unemployment benefits with respondent Minnesota Department of Employment and Economic Development (DEED). A department adjudicator determined that relator was discharged for employment misconduct and was ineligible for unemployment benefits. Relator appealed to an unemployment-law judge (ULJ). Following an evidentiary hearing, by findings of fact and decision issued December 22, 2009, the ULJ determined that relator was discharged for employment misconduct and, therefore, was ineligible to receive unemployment benefits. Relator filed a request for reconsideration. On January 20, 2010, the ULJ issued an order affirming the December 22, 2009 decision. On January 25, 2010, the ULJ issued an order labeled “Amended Findings of Fact and Decision.” The amended decision states that there was an error in the January 20 order but does not identify the error. Both the January 20 order and the January 25 amended decision state that the December 22, 2009 order is factually and legally correct. This certiorari appeal followed.

## **D E C I S I O N**

Employment misconduct includes conduct that shows “a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a)(2) (Supp. 2009). Whether an employee’s acts are employment misconduct is a question of law, on which this court exercises its independent judgment, but whether an employee committed an act alleged to be employment misconduct is a fact question. *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19-20 (Minn. App. 2003). “This court views the ULJ’s factual findings in the light most favorable to the decision. This court also gives deference to the credibility determinations made by the ULJ. As a result, this court will not disturb the ULJ’s factual

findings when the evidence substantially sustains them.” *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citations omitted), *review denied* (Minn. Oct. 1, 2008).

The ULJ explained the misconduct determination as follows:

Several patient authorization forms were not timely scanned in. The explanation from [relator] that perhaps other employees who covered for her while she was away from her desk did not scan in the forms was not plausible. [Relator] did not claim she had difficulty performing her assigned tasks. Scanning patient forms does not require specialized skill. [Relator] was told on several occasions she was not completing tasks in a timely fashion. She was given additional training. Despite that, [relator’s] performance did not improve. Her failure to obey the employer instructions showed a substantial lack of concern for the employment and her indifference amounted to misconduct.

Relator disputes the ULJ’s finding that she failed to obey the employer’s instructions. She argues that “there is no telling who checked in those patients and didn’t scan in the forms” because everyone has access to each other’s computers. But the ULJ found that relator’s testimony was not credible, and this court defers to the ULJ’s credibility determinations and resolutions of conflicts in testimony. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007) (conflicts in testimony); *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (credibility determinations). In light of the deference owed to the ULJ’s credibility determinations, the ULJ’s finding that relator failed to obey the employer’s instructions is supported by substantial evidence. Relator does not claim that this failure to obey instructions is not employment misconduct. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn.

2002) (stating that “[a]s a general rule, refusing to abide by an employer’s reasonable policies and requests amounts to disqualifying misconduct”).

Relator also argues that she was discharged in retaliation for taking leave under the FMLA. Although the alleged retaliation was not explicitly addressed in the ULJ’s decision, by finding that relator was discharged for employment misconduct, the ULJ implicitly concluded that her termination was not retaliatory. Relator supported her claim of retaliatory discharge with only her own testimony disputing the evidence presented by the employer regarding relator’s job performance. But the ULJ’s findings and explanation of the misconduct determination show that the ULJ found the employer’s evidence credible, and we defer to that credibility determination. The ULJ did not err in determining that relator was discharged for employment misconduct and, therefore, is not eligible to receive unemployment benefits.

**Affirmed.**