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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2288**

Jodi Johnson,
Relator,

vs.

Allina Health System,
Respondent,

Department of Employment
and Economic Development,
Respondent.

**Filed September 7, 2010
Reversed and remanded
Hudson, Judge**

Department of Employment and
Economic Development
File No. 23312137-3

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Allina Health System, Minneapolis, Minnesota (respondent)

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

UNPUBLISHED OPINION

HUDSON, Judge

On certiorari appeal from the unemployment-law judge's (ULJ) decision that she is ineligible for unemployment benefits because she was discharged for misconduct, relator argues that the ULJ failed to make findings resolving conflicts in the testimony and that the ULJ's finding that relator falsified medical records was arbitrary and capricious. Because the ULJ failed to make sufficient factual findings and failed to make credibility determinations, we reverse and remand.

FACTS

Relator Jodi Johnson worked as a staff nurse at United Hospital from May 1989 until she was discharged for alleged employee misconduct on August 27, 2009. Relator worked 70 hours every two weeks in shifts from 1:00 p.m. to 11:30 p.m.

On August 13, 2009, relator was caring for a post-surgical patient. The patient's girlfriend complained to relator and her supervisors about the care that relator gave to the patient. The post-surgical patient-care manager testified that the patient's girlfriend raised a number of concerns with her, including that relator took too long to replenish medication, connected drainage tubes improperly, and flushed the tubes in a way that caused the patient pain, and most relevant to this matter, failed to ask the patient to rate his pain on a scale of 1 to 10. A second hospital manager who reviewed relator's conduct testified that relator admitted during the course of the investigation that she did not chart the patient's pain medication, the output of the nasogastric tube, or the patient's first bowel movement.

Relator, on the other hand, claimed that she properly performed a physical assessment of the patient, properly charted his medication, and properly flushed his tube, but admitted that she did not chart the patient's first bowel movement. Relator strongly disputed the allegation that she did not properly chart the patient's pain level in accordance with hospital regulations. The patient's chart showed that, on August 13, 2009, relator assessed his pain on a scale of 1 to 10 at approximately 4:00 p.m. and again at approximately 8:30 p.m. and marked a "3" each time. Hospital representatives testified that relator told them that she wrote the 8:30 p.m. number "3" after observing that the patient looked the same as he did during the first assessment. Relator denied that she simply looked at the patient and wrote a "3," and claimed that she instead asked the patient how he felt. Relator testified that the patient told her that his pain was a "3" on a scale of 1 to 10 during the 4:00 p.m. assessment and that when she asked him again how he felt at 8:30 p.m., the patient responded that he felt "the same." Relator claimed that she then marked "3" for the second assessment based on the logical connection between her first assessment and the patient's response of "the same."

After an internal investigation, relator was terminated for the alleged conduct described above. Relator was determined ineligible for unemployment benefits because she had been discharged for employment misconduct. Relator appealed the determination, and, after a hearing, the ULJ also found that relator was discharged for misconduct and is therefore ineligible for benefits. The ULJ determined that "a preponderance of the evidence shows that [relator] did not obtain any verbal assessment from the patient about his pain level before charting the pain level inappropriately." The

ULJ did not make any written credibility determinations and made few factual findings. Relator filed a request for reconsideration, and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct is “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). Employment misconduct does not include inefficiency or inadvertence, simple unsatisfactory conduct, poor performance because of inability or incapacity, or good-faith errors in judgment. *Id.*, subd. 6(b) (Supp. 2009).

Whether an employee engaged in employment misconduct is a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). A ULJ’s factual findings are reviewed in the light most favorable to the decision and will not be disturbed on appeal if there is evidence that reasonably tends to sustain them. *Schmidgall*, 644 N.W.2d at 804. But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

“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). Here, the ULJ found that relator committed employment misconduct because she “did not get [a] verbal level of [pain] assessment from the patient[,]” and because “charting a number not reported by the patient was a falsification.” The ULJ determined that a preponderance of the evidence showed that relator never asked the patient about his pain before charting a pain level inappropriately. The ULJ did not, however, make any credibility determinations or explain why the manager’s testimony or the hearsay testimony from the patient and his girlfriend were credited over relator’s testimony.

If a credibility determination significantly affects the outcome of the case, the ULJ is required to make specific findings on credibility. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007). In *Wichmann*, this court recognized that it “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.” *Id.* In the absence of findings addressing credibility, when the finding of misconduct relies on a credibility assessment, this court will remand for additional findings that satisfy the statute. *Id.*

The ULJ determined that it was not necessary to “resolve all of [the] conflicts in testimony” because the evidence showed that relator did not ask for a specific numerical pain indicator on a scale of 1 to 10. But relator claimed that she asked the patient what his pain level was, to which he replied that it was “the same,” and she recorded the same level—“3”—that she recorded earlier. The ULJ stated that, even if this were true,

relator's failure to ask for a specific number was not in compliance with the employer's reasonable expectations and that "charting a number not reported was a falsification." The ULJ ultimately concluded that relator did not obtain *any* verbal assessment from the patient about his pain level before charting the pain level inappropriately. This shows that the ULJ weighed the credibility of the witnesses, believed the testimony that relator did not ask for a second pain assessment, and disbelieved other testimony. But the ULJ failed to explain why that testimony was more believable. Because the ULJ failed to make specific findings on credibility, we cannot undertake meaningful review of those determinations. *See Wichmann*, 729 N.W.2d at 29. We therefore reverse and remand for further findings.

Reversed and remanded.