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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1183**

DeeAnn Schack,
Relator,

vs.

Vision Optical, Inc.,
Respondent,

Department of Employment &
Economic Development,
Respondent.

**Filed May 7, 2012
Affirmed
Hudson, Judge**

Department of Employment &
Economic Development
File No. 26965114-4

DeeAnn Schack, Bovey, Minnesota (pro se relator)

Vision Optical, Inc., Grand Rapids, Minnesota (respondent)

Lee B. Nelson, Department of Employment & Economic Development, St. Paul,
Minnesota (for respondent department)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Hudson,
Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that she was discharged because of employment misconduct and therefore is ineligible for unemployment-compensation benefits. Because the record evidence sustains the ULJ's findings, we affirm.

FACTS

Relator DeeAnn Schack worked as a manager at Vision Optical, Inc. from May 2003 until January 2011, when she was discharged. Vision Optical has an oral policy that each employee is entitled to one free pair of glasses per year. Vision Optical also has an arrangement with an insurance plan that pays for certain items, but when expenses are incurred for other items, such as frames or lenses, Vision Optical is billed for those amounts.

In December 2010, the owner of Vision Optical received an insurance statement that showed outstanding unpaid claims attributable to three pairs of glasses for Schack's husband, who is not a Vision Optical employee. The claims, which dated from April 2008, November 2009, and May 2010, totaled approximately \$900. Vision Optical uses an invoicing procedure with three copies, including a yellow copy that goes to accounting. The owner testified that the yellow copies of the order forms for the glasses ordered for Schack's husband were missing, so that the orders were not originally recorded on the invoicing system and did not show up on Schack's bill. When the owner

confronted Schack about the claims and she refused to immediately pay the amounts due, she was discharged.

Schack established a benefits account with the Minnesota Department of Employment and Economic Development (DEED), which granted her unemployment-compensation benefits. Vision Optical appealed. At a hearing before a ULJ, Schack acknowledged that, although she was unable to verify the information on the insurance statements, she believed they were correct. But she testified she thought she had turned in a bill for the glasses to accounting because she had “never not done it”; she had never received information about owing money for the glasses; and the billing person would have informed her if there had been a problem.

The ULJ denied unemployment benefits, determining that Schack was discharged because of employment misconduct based on her negligent failure to follow procedures in obtaining the glasses, which clearly displayed a serious violation of the employer’s reasonable expectations. The ULJ found that Schack’s testimony that she submitted the required order forms to billing contradicted her prehearing-questionnaire statement that she “thought nothing was owed so did not send statement to billing [department].” Schack requested reconsideration, and the ULJ affirmed. The ULJ noted Schack’s additional argument that she had been unable to produce the order forms because the employer would not release her “health records,” but found that it had not been shown that during the normal course of business at Vision Optical the order forms would be included in a patient’s health record. This certiorari appeal follows.

DECISION

This court reviews a ULJ's decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence in view of the record as a whole or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2010). If an applicant for unemployment benefits was discharged from employment because of employment misconduct, the applicant is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Whether an employee committed employment misconduct is a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). "Whether the employee committed a particular act is a fact question, which we review in the light most favorable to the decision and will affirm if supported by substantial evidence." *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 539 (Minn. App. 2011). But "[d]etermining whether a particular act constitutes disqualifying misconduct is a question of law that we review de novo." *Stagg*, 796 N.W.2d at 315.

Employment misconduct is "intentional, negligent, or indifferent conduct" that clearly displays "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee" or "a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a) (2010). The statute excludes from misconduct "conduct that was a consequence of the applicant's inefficiency or inadvertence," "simple unsatisfactory conduct," "conduct an average reasonable employee would have engaged in under the circumstances," and "good faith errors in judgment if judgment was required." *Id.*, subd. 6(b)(2)–(4), (6) (2010).

Schack does not dispute that she was discharged, that she is aware of the company policy allowing only one free pair of glasses per year for employees, or that she ultimately owes money for the glasses. But she argues that her conduct did not amount to employment misconduct because she believed she had informed the billing department that the glasses had left the office. She testified that she believed she had submitted the required forms to billing because she had “never not done it.” But the ULJ expressly found this testimony not credible because it contradicted Schack’s previous statement, made in applying for benefits, that she “thought nothing was owed so did not send statement to billing dept.” The ULJ properly set out the reasons for the determination of credibility. *See* Minn. Stat. § 268.105, subd. 1(c) (2010) (“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.”). This court defers to the ULJ’s credibility determinations. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ULJ also credited the owner’s testimony that the yellow portion of the forms for the glasses ordered for Schack’s husband was missing, so that the orders did not get invoiced. The ULJ found that, absent the actual order forms, “which the employer convincingly testified they did not have,” Schack failed to submit the forms. Based on the record, the ULJ’s finding that Schack failed to submit the required forms is not clearly erroneous.

Schack maintains that the billing department failed to notify her of amounts due and that the ULJ did not consider the physical evidence of the order forms. But “[c]ircumstantial evidence is adequate to support a decision if the evidence justifies the

fact-finder's reasonable inferences and these inferences outweigh conflicting evidence.” *Kellogg v. Woods*, 720 N.W.2d 845, 851 (Minn. App. 2006). The weight of the evidence presented, including the owner's testimony, reasonably supports the ULJ's decision. *See Frank v. Heartland Auto. Servs., Inc.*, 743 N.W.2d 626, 630 (Minn. App. 2008) (deferring to ULJ's credibility assessments).

Schack also contends that she was improperly denied access to the order forms because they were “patient files,” which she had a right to obtain under Minn. Stat. §§ 144.292, .291 (2010) (stating that patient has right to obtain copies of “a patient's health record,” defined as “any information . . . that relates to the past, present, or future physical or mental health or condition of a patient”). But she has presented no information tending to indicate that the forms qualify as “health records,” and the ULJ properly rejected this argument. We also note that the ULJ offered Schack the opportunity to subpoena additional evidence at a rescheduled hearing, but Schack failed to do so. *See* Minn. Stat. § 268.105, subd. 4 (2010) (stating ULJ has authority to issue subpoenas to compel production of documents).

Schack additionally maintains that the ULJ improperly considered invoices from the lens-manufacturing lab used by Vision Optical. She contends that the invoices were protected patient health records because they contained lens prescriptions. *See* Minn. Stat. § 144.293 (2010) (stating that a provider may not release a patient's health record without written consent). But the ULJ stated that if it became necessary to consider the invoices, they could be produced by subpoena. No subpoena was issued, and the ULJ did not consider the invoices in making his decision.

Finally, Schack argues that the real reason for her discharge was not her failure to follow Vision Optical's policy, but the owner's dissatisfaction with her other work-related conduct. *See* Minn. Stat. § 268.095, subd. 4(1) (2010) (stating that to be disqualified from receiving unemployment benefits, a person must be "discharged *because of* employment misconduct") (emphasis added). Schack maintains that the owner knew that she had a conflict with another employee and that the owner threatened to give her a poor job recommendation, citing Minn. Stat. § 181.967, subd. 2 (2010) (permitting cause of action for false and defamatory disclosure of employment reference information). Based on our review of the record, we conclude that substantial evidence supports the ULJ's decision that Schack's negligent conduct of failing to follow her employer's policy of paying for glasses amounted to employment misconduct and that she was discharged because of that misconduct.

Affirmed.