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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1796**

Marcia A. Borg,
Relator,

vs.

Regina Medical Center,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 23, 2012
Affirmed as modified
Willis, Judge***

Department of Employment and Economic Development
File No. 27936095-3

Harvey N. Jones, Harvey N. Jones, P.A., Hastings, Minnesota (for relator)

Regina Medical Center, Hastings, Minnesota (respondent employer)

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

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Willis,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WILLIS, Judge

In this certiorari appeal, relator challenges a decision by an unemployment-law judge (ULJ) that she is ineligible for unemployment benefits because she was discharged from employment for aggravated misconduct. Although we conclude that the record does not provide substantial evidence of aggravated employment misconduct, Borg's aggressive treatment of a nursing-home resident establishes non-aggravated employment misconduct. We affirm as modified.

FACTS

Relator Marcia A. Borg was employed as a nursing assistant by Regina Medical Center, an assisted-living nursing home attached to a hospital, from August 1997 to June 15, 2011. At approximately 3 a.m. on June 10, 2011, two residents pushed their call lights. Another nursing assistant on duty at the time did not respond to the calls, which upset Borg. Borg assisted one resident, then entered the other resident's room. The second resident was elderly, suffered from dementia and hearing loss, and was not wearing her hearing aid. The resident had removed her gown, which was lying on the floor with her body pillow and a motion sensor. The resident asked Borg to remove a tight knot that was near the head opening of the gown. Without unknotting the gown, Borg attempted to put the discarded gown back on the resident. The resident resisted Borg's attempts, stating that she was hot and the gown was too tight and calling for help. Borg placed her hands on the resident's shoulders and loudly told her that she had to put

the gown on. Another nursing assistant saw Borg put the gown on the resident and told Borg that she thought Borg was “being a little harsh.”

In a subsequent interview with her supervisors, Borg admitted that she struggled to place the gown on the resident while the resident resisted and that she spoke to the resident in a harsh tone of voice. In a written statement, Borg admitted, “I know it was wrong of me to be a little aggressive with her.” Borg’s coworker also submitted a written statement describing Borg’s conduct and demeanor with the resident. On June 15, 2011, Regina Medical Center discharged Borg for “physical and verbal abuse of a vulnerable adult.”

Borg applied for unemployment benefits, and the Minnesota Department of Employment and Economic Development determined that she was ineligible for benefits. Borg appealed the determination, and a ULJ conducted a telephonic hearing on June 13, 2011. The ULJ concluded that Borg is ineligible for unemployment benefits because she was discharged for aggravated employment misconduct. Borg sought reconsideration, and the ULJ affirmed her decision. This certiorari appeal follows.

D E C I S I O N

When reviewing the decision of the ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the conclusion, decision, findings, or inferences are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other

error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2010).

“Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether an employee committed a particular act is a question of fact. *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 822 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010). We review a ULJ’s factual findings in the light most favorable to the decision. *Stagg*, 796 N.W.2d at 315. We will not disturb the findings on appeal if there is evidence that substantially tends to sustain those findings. Minn. Stat. § 268.105, subd. 7(d). But whether a particular act constitutes disqualifying misconduct presents a question of law, which we review *de novo*. *Stagg*, 796 N.W.2d at 315.

An employee who is discharged for aggravated employment misconduct is ineligible to receive unemployment benefits and is subject to cancellation of the wage credits that she would have earned from that employment. Minn. Stat. § 268.095, subd. 4(2), 10(c) (2010). Aggravated employment misconduct includes “an act of patient or resident abuse, financial exploitation, or recurring or serious neglect” committed by an employee of a nursing home, hospital, or other facility defined in Minn. Stat. § 626.5572 (2010). Minn. Stat. § 268.095, subd. 6a(a)(2) (2010); Minn. Stat. § 626.5572, subd. 6. “Abuse” is defined, in relevant part, as “[c]onduct which is not an accident . . . , which produces or could reasonably be expected to produce physical pain or injury or emotional distress.” Minn. Stat. § 626.5572, subd. 2(b).

Borg challenges the ULJ's conclusion that she committed aggravated employment misconduct by forcibly putting the gown on the resident despite the resident's resistance. The ULJ found that "the preponderance of the evidence shows that Borg used excessive force when putting the gown on the resident and yell[ing] at the resident" and that "[t]he resident was at risk and could have been seriously injured as a result of Borg's actions." The ULJ concluded that "Borg committed an act of resident abuse when she forced the gown on the resident," constituting aggravated employment misconduct. Under the circumstances of this case, we disagree.

The record shows that Borg's coworker saw her forcibly put the gown on the resident, despite the resident's resistance and calls for help, and Borg was upset and yelling at the resident. Borg admitted that the resident was resistant and called for help, that she spoke to the resident loudly, and that she was frustrated. The record also contains Borg's admissions to her employer that she "know[s] it was wrong of [her] to be a little aggressive" with the resident, that she spoke to the resident in a harsh tone of voice, and that she struggled to place a gown on the resident although the resident did not want to wear the gown.

This evidence supports the ULJ's findings that Borg forcibly put the gown on the resident and yelled at the resident, but we do not agree that the record establishes that Borg's conduct placed the resident at risk of serious injury. On this record, we conclude that Borg's actions did not constitute abuse within the meaning of Minn. Stat. § 626.5572, subd. 2(b), and that her actions are not, therefore, aggravated employment misconduct within the meaning of Minn. Stat. § 268.095, subd. 6a(a)(2).

Borg is nonetheless ineligible for benefits if her acts constitute non-aggravated employment misconduct. *See* Minn. Stat. § 268.095, subd. 4(1) (2010) (providing that an employee who commits employment misconduct is ineligible for unemployment benefits). 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.” Minn. Stat. § 268.095, subd. 6(a) (2010). “A single incident may constitute misconduct if the employee sufficiently disregards his or her employer’s expectations.” *Nieszner v. Minn. Dep’t of Jobs & Training*, 499 N.W.2d 832, 838 (Minn. App. 1993).

Because the ULJ determined that Borg committed aggravated employment misconduct, she did not reach a conclusion as to whether Borg’s conduct constitutes non-aggravated employment misconduct. But the ULJ found that the employer had a right to reasonably expect that its employees would perform their job duties without using force against residents. And the ULJ’s finding that Borg treated the resident with aggression and yelled at her are supported by substantial evidence and demonstrate that Borg seriously violated the standards of behavior that her employer had a right to expect. The ULJ’s findings, therefore, establish that Borg’s conduct constitutes non-aggravated employment misconduct.

Affirmed as modified.