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07-1644

STATE OF MINNESOTA

IN COURT OF APPEALS

Michael Marn,

Relator,

vs.

Fairview Pharmacy Services, LLC,

Respondent,

Department of Employment & Economic Development,

Respondent.

LEGAL ISSUES

1. Did the unemployment law judge commit reversible error by concluding that patient advocate Marn was ineligible for unemployment compensation benefits where he was fired for calling a contractor of his employer about patient safety concerns resulting from its contract after first reporting those concerns to two managers and the pharmacy board?

The judge concluded that FPS discharged Mr. Marn for employment misconduct and was ineligible for unemployment benefits.

Apposite Legal Authority: Jenkins v. American Exp. Financial Corp. 721 N.W.2d 286 (Minn. 2006); Sticha v. McDonald's No. 291, 346 N.W.2d 138 (Minn. 1984); Minn. Stat. § 268.095, subd. 6(a) (2006)

2. Were Mr. Marn's substantial rights prejudiced by the unemployment law judge's refusal to require FPS to produce the tapes containing the statements on which it based Mr. Marn's discharge and, on reconsideration, her refusal to consider new evidence.

The judge overruled Mr. Marn's evidentiary objections and denied his request to present new evidence.

Apposite Legal Authority: Schulte v. Transp. Unlimited, Inc. 354 N.W.2d 830 (Minn. 1984); Juster Bros., Inc. v. Christgau, 7 N.W.2d 501 (1943); Minn. Stat. § 268.105, subds. 1, 2, 7(d).

STATEMENT OF THE CASE

On February 16, 2007, respondent Fairview Pharmacy Services (FPS) terminated relator Michael Marn's employment. Mr. Marn applied for unemployment compensation benefits. Respondent Department of Employment and Economic Development (DEED) denied his application.

Mr. Marn appealed. A telephone hearing was held on April 24 and May 17, 2007, unemployment law judge (ULJ) Colette B. Davis presiding. On May 18, Judge Davis issued her Findings of Fact and Decision concluding that Mr. Marn was discharged for employment misconduct and ineligible for benefits.

Mr. Marn submitted a timely request for reconsideration, offering new evidence. But on July 30, Judge Davis issued an order affirming her earlier order denying benefits. By writ of certiorari, Mr. Marn now challenges that order, arguing that DEED committed reversible error by concluding that he was discharged for employment misconduct rendering him ineligible to receive benefits. He further argues that his substantial rights were prejudiced by the judge's evidentiary rulings.

Appellate counsel is representing Mr. Marn through the Minnesota Bar Association's pro-bono appellate program.

STATEMENT OF FACTS

Fifty-year-old relator Michael Marn served as a patient advocate at the University of Minnesota Hospital and its successor Fairview systems for 26 years. (T. 59-60). His passion to work in that profession to provide safe and affordable patient care came from a very personal place. (T.59, 62). As a child, Mr. Marn had open heart surgery to treat a congenital heart defect. (T. 59). That same defect had caused the death of two of his siblings. (T. 59). After Mr. Marn's surgery, he spent three years receiving follow-up care at the University Hospital, which became his second home. (T. 59). There he learned firsthand the trust patients put in their caregivers. (T. 62).

These experiences as a patient impelled him to complete his undergraduate studies at the U. (T. 60, 62). While studying there he began working at the University Hospital. (T. 60). That job led to his over a quarter-century career in patient services. (T. 60).

In 1997, about 16 years into his career, the Fairview system acquired the University Hospital system and respondent Fairview Pharmacy Services (FPS) became Mr. Marn's employer. (T. 61). He was given the title of patient financial advocate. (T. 60). In this capacity, he was an all-purpose customer service representative for transplant patients. (T. 61). FPS served approximately 1800 transplant patients, to whom prescriptions are essential for the rest of their lives to prevent their bodies from rejecting their new organs. (T. 26-27, 61, 64). These patients' safety was FPS' number one priority. (T. 47, 57). Among other services, Mr. Marn helped patients understand their insurance benefits and assisted them in obtaining adequate coverage for their post-transplant prescriptions. (T. 61).

In this position Mr. Marn worked as closely with pharmacists as he did with patients. (T. 61). His commitment and expertise to patient service did not go unrecognized. For the effort he put into advocating for his patients Mr. Marn was twice nominated, each time by a different group of pharmacists, for the Fairview Care Award recognizing outstanding service to patients. (T. 61). FPS also recognized Mr. Marn's superior advocacy in his job reviews, which described his job performance as excellent and stellar and him as a role model. (T. 61). He worked as many 10-hour to 12-hour days as he worked eight-hour days. (T. 62). He and other FPS staff prided themselves in the excellent, personal care they provided their patients. (T. 64).

In 2005 due to his heart condition, Mr. Marn took a four-month leave for surgery. (T. 63). About that time FPS secured a new multi-million dollar contract with Blue Cross Blue Shield (BCBS) to provide specialty injectable medications. (T. 21, 63-64-65). Patients needing this service included non-transplant patients, such as people with cystic fibrosis. (T. 64).

According to Mr. Marn, he returned from his leave to chaos. (T. 64). FPS had enlisted a much greater number of patients needing these medications than its system could accommodate. (T. 47, 64). Exacerbating the situation was a change in the way prescriptions were funded due to Medicare Part D, which required a new billing system. (T.47, 64). Staff worked together to meet the increased demand but, with the number of new patients increasing each month, they simply could not keep up. (T. 64).

Mr. Marn believed that the quality of service and care to transplant patients was greatly compromised. (T. 65). Patients could not get through to medical staff. (T. 65).

Pharmacists told Mr. Marn that they were making mistakes because they lacked time to double check the medications they were distributing. (T. 65-66). Staff was told that the prescriptions had to get out, even if that required cutting vital legally-required steps such as checking the product with the label before it was sent. (T. 66; Minn. Rule 6800.3100)

Mr. Marn attempted to speak with FPS president Bob Beacher about his concern for patient safety. (T. 3, 70). Mr. Beacher cut him off and said that the specialty services director (the boss of Marn's boss) Kari Amundson, was doing a fantastic job. (T. 4, 12, 70).

But the situation deteriorated. One of the problems was that the FPS computer system could not accommodate the increased volume of patients resulting from the BCBS contract. (T. 66). In July 2006 FPS installed a new system to handle the greater volume. (T. 66). Unfortunately, it was less capable than its predecessor. (T. 67). It was slow and crashed several times a day. (T. 67). That month FPS sent out thousands of prescriptions a day from its specialty mail order pharmacy. (T. 67). Pharmacists informed Mr. Marn that many of them were not checked in the manner required by Minnesota's pharmacy rules. (T. 67; See Minn. R. 6800.3100).

Pharmacists openly vented their frustrations and concerns. (T. 68). They commented repeatedly that the pharmacy board would shut FPS down if it knew what was occurring. (T. 68). When Mr. Marn asked why they were not reporting their concerns, the pharmacists said it would be futile and expressed concern about being labeled as troublemakers, which would affect their reputations both inside FPS and within the greater pharmacy circle. (T. 71, 84). They did not even trust that a report to

the pharmacy board would remain confidential (T. 84). Mr. Marn called the pharmacy board anonymously; he was informed that, based on the information he provided, his employer was violating the rules for dispensing medication. (T. 84).

Based on staff concerns about the increase in patient volume, FPS hired Kathy Mount as a process improvement manager. (T. 48-50). She met with the pharmacists and the patient advocates separately. (T. 68). At the advocates' meeting Mr. Marn mentioned the computer system problem. (T. 68). Other advocates were reluctant to speak up for fear of being viewed as negative by management. (T. 68). Mr. Marn later met with Mount individually and, after her guarantee of confidentiality, relayed more specifics about his concerns for patient safety. (T. 69-70).

Within months Mount quit FPS because, among other challenges within the organization, she was frustrated by FPS' views on process improvement. (T. 37-38). Two of FPS' five pharmacists also quit. (T. 22, 35).

Meanwhile, in his advocate capacity, Mr. Marn was in contact with the BCBS transplant program director Ann Karrick. (T. 71). During one of their conversations, he relayed to her the problems that had arisen due to the new contract. (T. 71). Karrick told him to call Al Heaton, BCBS pharmacy director. (T. 13, 71). When Mr. Marn expressed his reluctance, she assured him that this type of call was always confidential. (T. 71). She gave Mr. Marn Heaton's phone number as well as the number for the BCBS confidentiality line and encouraged him to call. (T. 72).

Mr. Marn called Heaton numerous times but hung up when he received Heaton's voicemail. (T. 72). In January 2007 he finally left messages relaying the gist of the

problems and his belief that they were harmful to both transplant patients and those receiving injectable medications. (T. 72-73, 15, 17, 33). In one message he mentioned that the top FPS pharmacist had resigned and others were leaving. (T. 17, 34). He left these messages to serve his patients. (T. 76)

FPS learned of the messages when Kari Amundson saw Heaton at a conference. (T. 13). Heaton told her that an unidentified FPS employee had left a message that FPS was providing poor service to BCBS patients. (T.13). According to Amundson, Heaton mentioned that he had heard that FPS' competitors had also received calls. (T. 13-14).

Heaton visited FPS to tour the facilities and play the messages for Amundson. (T. 30, 32). During the tour, Amundson was with Heaton so Mr. Marn and others could not speak to him about their concerns. (T. 30, 74).

Heaton later played the messages for Admundson and human resource director Vicki Stevens. (T. 14, 32-33). They recognized Mr. Marn's voice. (T. 14, 34). Stevens told Beacher about the tape; he became involved in the investigation of Mr. Marn for recommending the termination of an FPS' business contract. (T. 34).

On February 16, 2007, Stevens and Beacher met with Mr. Marn to inform him of the investigation. (T. 40, 42). They told him about the voicemails and asked if he had left them. (T. 42-43). Mr. Marn replied, "no comment." (T. 43). They replied that they thought it was him. (T. 43). According to Beacher, he told Mr. Marn he could resign if he told Beacher whom he had called and what information he had provided. (T. 45). After taking a few minutes, Mr. Marn told Beacher he wanted to resign. (T. 45). Beacher

refused, saying he wanted the information. (T. 45). When Mr. Marn wouldn't provide it, Beacher fired him. (T. 43, 46).

In contrast, Mr. Marn recalled Beacher telling him that he would be terminated whether or not he cooperated. (T. 75). But only if he cooperated would he receive two weeks severance pay. (T. 75). When Mr. Marn wouldn't say if he was the caller, Beacher fired him. (T. 75).

Stevens then went around the office speaking with other people to try to get more information about the voicemails. (T. 43). She was concerned that Mr. Marn indicated in the voicemails that he was calling on behalf of other staff. (T. 44). If this was determined to be true, FPS might have also fired them. (T. 44). According to Stevens, "any involvement that would jeopardize Fairview business may lead to corrective action, up to and including termination." (T. 44).

Mr. Marn applied for unemployment benefits. FPS opposed benefits on the ground that "Employees should act in a manner that is not contrary to the company's interests." (Exhibit, Appendix at 1). For that reason, respondent Minnesota Department of Employment and Economic Development (DEED) found he was disqualified from receiving benefits. (T. 12).

At the hearing relating to his appeal of the denial of benefits, there was conflicting testimony about what Mr. Marn said about the contract in the voicemails. From the time of termination until that hearing, FPS had two and a half months to obtain a copy of the tapes. (T. 19). The first day of the hearing, Mr. Marn challenged any testimony about his statements on the tapes as violating the best-evidence rule and demanded that FPS obtain

and play the tapes. (T. 16-17, 33). The unemployment law judge (ULJ) overruled the objection.

Amundson claimed that, on February 13, FPS had asked Heaton for a copy of the tapes and he agreed to provide them. (T. 19). While Amundson indicated FPS was going to get the tapes, three weeks later at the second half of the hearing FPS still didn't present them. (T. 53-56). Instead, Stevens and Amundson testified that they had listened to the tapes and heard Mr. Marn encourage Heaton to terminate the BCBS contract. (T. 3-4, 17, 33). Mr. Marn did not recall saying that. (T. 73). He believed that he told Heaton that BCBS should reevaluate the contract. (T. 73). The volume of patients it generated was too great for FPS' pharmacists to provide adequate patient care. (T. 73). Amundson agreed that Mr. Marn identified himself as a concerned employee and expressed concern that patient service was jeopardized by problems resulting from the BCBS contract. (T. 14-15). Stevens' notes also indicated that Mr. Marn said that service to transplant patients had suffered greatly. (T. 33).

At the hearing, Amundson denied that the BCBS contract resulted in any problems with dispensing prescriptions. (T. 21). Information like that would have been brought to her attention. (T. 24). Stevens testified that "errors within the Specialty department were not brought to my attention, nor was I involved in any of the improvements that occurred within Specialty after that." (T. 40).

While Amundson acknowledged that two pharmacists had resigned, she said that they simply left for different opportunities that were "more appropriate" and "a better fit." (T. 22). This reflected forty percent of FPS pharmacist staff. (T. 22). One of the

pharmacists shared information about her concerns in an exit interview. (T. 36). But Stevens noted there were “process improvement” activities in that area and it was improving by the end of 2006. (T. 37).

Amundson acknowledged that throughout Mr. Marn’s 25 years of employment he was a good patient advocate. (T. 27). Stevens noted that Mr. Marn did not participate in the process improvement activities at FPS. (T. 38). According to Amundson, he did not hurt the safety of the patients by expressing his concerns to BCBS. (T. 27-30).

Beacher also testified. He insisted that FPS’ patients are its number one priority. (T. 57). Its performance standards say that other duties should not interfere with service to patients. (T. 57). He knew staff had been concerned about the increased volume of patients and had numerous discussions about needing to ensure that FPS’ processes and systems remained effective. (T. 48). Based on a pharmacist’s input, FPS instituted the process improvement exercise directed by Mount. (T. 50). In his view, one of the complaining pharmacists later quit because she had a different opportunity that was a better fit for her. (T. 50). Beacher reviewed reports about the number of errors made in dispensing drugs during that period. (T. 49). The incidence of errors based on volume was no higher than before. (T. 49). He did not recall any error that caused harm or death. (T. 49).

As for firing Mr. Marn, Beacher explained that the BCBS contract was worth millions of dollars, and if it was cancelled, people would be laid off. (T. 45). Beacher believed that Mr. Marn is an honorable man, and he had no idea what Mr. Marn had to gain from leaving the messages for Heaton. (T. 48).

At the end of the hearing, Stevens made a “rebuttal” statement for FPS. She testified that FPS verifies each prescription at the time of dispense and conducts other checks as required by the pharmacy board. (T. 78). FPS has a complaint hotline on which employees can identify any concerns anonymously. (T. 82). Employees can also report patient safety concerns anonymously on FPS’ tracking systems. (T. 82). She testified that she had met with Mr. Marn monthly and he did not express concerns to her about patient safety in those meetings. (T. 83). FPS terminated Mr. Marn for acting in a manner “contrary to the company’s best interest” by urging BCBS to cancel its contracts with FPS. (T. 79)

The ULJ found that Mr. Marn called BCBS, stated that FPS was jeopardizing patient safety and urged it to cancel its contract with FPS. (See Findings of Fact and Decision, Appendix at 2-4). She concluded that Mr. Marn had committed employment misconduct because his actions were against the standards of behavior that FPS had a right to reasonably expect of him. Id. The judge reasoned that: Marn had a duty of loyalty to Fairview; his interference with business contracts violated that duty; the evidence did not show that public safety was in danger; and, the evidence did not show that Mr. Marn had no other avenues to pursue other than reporting concerns to business partners. Id.

Mr. Marn requested reconsideration of that decision, presenting as new evidence the affidavit of a former FPS pharmacy technician who stated that, in July 2006, FPS dispensed “thousands of prescriptions to unsuspecting patients without proper inspection by licensed pharmacists in violation of state rules.” (See July 11, 2007, letter, Appendix

at 5-7 and Affidavit of Rhonda L. Johnson, Appendix at 8-11) The technician personally received a significant increase in the number of complaints from patients who reported their prescriptions were filled incorrectly, received late, or not received at all. Id. These errors placed transplant patients, the most vulnerable of patients, at great risk of harm. Id. The judge refused to consider the affidavit after finding lack of good cause for not presenting the evidence earlier and noting it would not likely change the outcome of the judge's decision.

In the request, Mr. Marn also asserted that he had reported his concerns to the state attorney general's office. (See Appendix at 6). Mr. Marn asked that he be granted another hearing to call a named pharmacy board member to provide his opinion about FPS' rule violations. (Id. at 5).

The judge affirmed her earlier decision. (See Order of Affirmation, Appendix at 12-13). She reasoned that FPS rebutted Mr. Marns' claim of public safety, and Mr. Marn violated his duty of loyalty to Fairview. Id. The judge also stated that Mr. Marn could have contacted a regulatory agency with a specific complaint if he truly feared for public safety. Id.

ARGUMENT

I.

PATIENT ADVOCATE MARN'S REPORTS OF HIS PATIENT SAFETY CONCERNS TO AN FPS' CONTRACTOR AND HIS REQUEST THAT IT TAKE ACTION DID NOT CONSTITUTE "EMPLOYMENT MISCONDUCT" WARRANTING DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS.

A. Introduction.

The parties agree that patient safety is FPS' stated number one priority (T. 47, 57, 64). They also agree that, as a patient advocate, Mr. Marn spent over a quarter century vigorously pursuing this goal. (T. 27, 61). Finally, they agree that to that end, Mr Marn contacted BCBS to report his concerns that its contract with FPS was jeopardizing patient care and to ask that BCBS intervene. (T. 14-15, 33, 72-73). On this record, the ULJ's determination that Mr. Marn committed employment misconduct by making these calls was reversible error.

B. Standard of review.

Unemployment compensation statutes are liberally construed in favor of awarding benefits to an unemployed individual. Jenkins v. American Exp. Financial Corp. 721 N.W.2d 286, 289 (Minn. 2006). Applicants who have been discharged from employment through no fault of their own are presumed to be eligible for unemployment compensation benefits, and all provisions that would disqualify an applicant from benefits must be narrowly construed. Id. at 289.

"An employer's standards for discharging an employee for cause may differ from the misconduct standard enunciated in the economic security law." St. Williams Nursing Home v. Koep, 369 N.W.2d 33, 34 (Minn. App. 1985). The issue is not whether the employer can terminate employment, but rather, once the employee has been terminated, whether he or she can receive unemployment compensation Schmidgall v. FilmTec Corp., 644 N.W.2d 801, 806 (Minn. 2002). FPS has the burden of proving that Mr. Marn is ineligible for benefits. Brown v. Port of Sunnyside Club, Inc. 304 N.W.2d 877, 879 (Minn. 1981).

The determination of whether an employee's acts constitute employment misconduct disqualifying him or her from benefits is a question of law over which this Court exercises its own independent judgment. Lolling v. Midwest Patrol, 545 N.W.2d 372, 377 (Minn. 1996). This Court may reverse if it finds the ULJ's decision is unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d).

The judge concluded that Mr. Marn's reports to BCBS violated the standards of behavior that FPS had a right to reasonably expect of him. (See App. at 3). Conduct "that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee" is employment misconduct. See Minn. Stat. § 268.095, subd. 6(a)(1).

In contrast, conduct an average reasonable employee would have engaged in under the circumstances or good faith errors in judgment if judgment was required are not

employment misconduct. See Minn. Stat. § 268.095, subd. 6(a)(1). An independent review of this record shows that Mr. Marn did not commit employment misconduct.

C. Mr. Marn's calls did not display a serious violation of the standards of behavior that FPS had the right to expect from a patient advocate.

For an act to constitute misconduct, it must violate an employer's expectation that "was reasonable under the circumstances." Jenkins, 721 N.W.2d at 290. The judge based her determination of misconduct in part on her finding that the record does not support that public safety was in danger, implying that it was reasonable for FPS to expect Mr. Marn wouldn't call BCBS seeking cancellation of the contract based solely on the pharmacists' reports and the board of pharmacy's opinion. (See App. at 3). While there is conflicting evidence on the public safety issue, FPS staff acknowledged and the judge found that Mr. Marn made the report because he believed that patient safety was in jeopardy. (T. 14-15, 33; App. at 2). Given FPS' first priority is patient safety and FPS' prior affirmations in job reviews of Mr. Marn's advocacy work doggedly pursuing that end, it was unreasonable for FPS' management to believe that, when reports to management did not result in action, Mr. Marn would not report his concerns to others he felt could affect change. See Jenkins, 721 N.W.2d 291 (holding it was unreasonable for the employer to expect employee to report to work where employer's prior communications with employee indicated employer knew employee couldn't report without employer taking affirmative steps, which it told employee it would do). See also Fujian v. Ruffridge-Johnson, Equip., 535 N.W.2d 393, 396 (Minn. App. 1995) (holding

employee's incorrect report that president of company was stealing was not misconduct because she believed the information to be true).

The judge viewed this as misconduct after finding that Mr. Marn's calls violated his duty of loyalty to FPS by interfering with its business contracts. (See App. at 3). A duty of loyalty prohibits an employee from competing with the employer or obtaining financial gain to the employer's detriment. See, e.g. Rehabilitation Specialists, Inc. v. Koering, 404 N.W.2d, 301, 304 (Minn. App. 1987) (holding an employee owes a duty of loyalty to her employer that prohibits her from competing with her employer while she is employed); Webb Publ'g Co. v. Fosshage, 426 N.W.2d 445, 450 (Minn. App. 1988) (stating employers have a legitimate interest in protecting themselves against the deflection of trade or customers by the opportunity given the employee through employment). Here there was no financial gain to Mr. Marn or financial loss to FPS. In fact, the record shows that Mr. Marn had absolutely nothing to gain from his report other than the knowledge that he was attempting to serve FPS' patients.

And FPS lost nothing as a result of Mr. Marn's calls. Staff acknowledged that its number one priority of patient safety was not compromised by the calls. (T. 27-30). Beacher claimed that Mr. Marn had jeopardized a multi-million dollar contract. But it is difficult to imagine how this could have been given Beacher's claims that FPS was following state pharmacy rules designed to protect patient safety were credited. In response to Mr. Marn's voicemails, BCBS could have simply verified Beacher's assertion by talking to FPS' pharmacists. It didn't even do that. Upon receiving the messages, Heaton simply mentioned the calls at a conference in passing to Amundson

and later toured FPS. This record shows that, by calling Heaton, patient advocate Marn did not harm FPS or commit misconduct; he simply attempted to honor his duty of loyalty to FPS' patients.

Mr. Marn's concerns that FPS was not checking prescriptions before they went out not only raised patient safety issues; they revealed possible unlawful conduct. See, e.g. Minn. R. Pharm. 6800.3100, subp. 3 (requiring at time of dispensing certification that item in container is that on written prescription); State v. Red Owl Stores, Inc. 92 N.W.2d 103, 108 (1958) (indicating that the pharmacy act was enacted to protect public health and welfare by regulating the sale of drugs and medicines); State v. Red Owl Stores, Inc. 115 N.W.2d 643, 651 (1962) (holding pharmacy act gave the pharmacy board broad power to regulate and control the sale of drugs). Minnesota encourages employees to report even suspected violations of rules enacted to protect public safety. Cf. Vonch v. Carlson Cos., 439 N.W.2d 406, 408 (Minn. App. 1989) (construing Minn. Stat. § 181.932, subd. 1) (stating that under Whistleblower Statute, an employer is prohibited from discharging an employee if the employee, in good faith, reports a *suspected* violation of a state rule designed to protect the public interest). DEED could have rightfully denied benefits had FPS fired Mr. Marn for failing to advocate for patients or failing to comply with the pharmacy rules. Cf. Hein v. Gresen Div., 552 N.W.2d 41, 44 (Minn. App. 1996) (holding employer terminated heavy machinery operator who was using drugs for misconduct because he posed a danger to others).

Ironically, Mr. Marn was denied benefits because he was fired for acting with intent to protect FPS' patients and to ensure FPS complied with these rules. While FPS

may have had the right to fire him for his calls, under the circumstances here FPS could not have reasonably expected Mr. Marn to refrain from making them. Cf. Auger v. Gillette Co., 303 N.W.2d 255, 257 (Minn. 1981) (holding that the nature of an employer's interest and what constitutes misconduct will vary depending upon the job); Eyler v. Star & Tribune Co., 427 N.W.2d 728 (Minn. App. 1988) (holding “as a matter of law” that it is not misconduct for an employee to fail or refuse to follow an employer’s unlawful order).

D. Under the circumstances, an average reasonable patient advocate would’ve called Blue Cross Blue Shield seeking action.

Because under these circumstances an average, reasonable patient advocate would have made the calls, Mr. Marn did not commit misconduct. See Minn. Stat. § 268.095, subd. 6. (stating conduct an average reasonable employee would engage in is not misconduct). He reported his safety concerns to individuals in management—the president and Mount, the manager charged with addressing what FPS named a “process management” problem. (T. 69-70). Based on comments made by pharmacists, Mr. Marn also contacted the Board of Pharmacy. (T. 84). Staff there verified that the conduct he described was occurring at his employment violated the pharmacy rules. (T. 84). A BCBS transplant program director then encouraged him to call Heaton. (T. 71). Given these extraordinary efforts made to alert those who could intervene to address patient safety concerns, an average, reasonable patient advocate would have gone, as a last resort, to Heaton and asked him to intervene.

The judge found misconduct based partially on a finding that Mr. Marn did not show he lacked other avenues to pursue. (App. at 3). At the hearing, Stevens argued that

there were other internal confidential avenues Mr. Marn could have pursued. (T. 82). It's unlikely that a reasonable advocate would've done that after speaking to two FPS managers, particularly given that any promise of confidentiality was suspect. Mr. Marn was fired for calling Heaton, whose line he was told was confidential, because Mr. Marn's voice was readily recognizable to FPS' managers. (T. 14, 34). Under these circumstances, a reasonable patient advocate who had bumped up against these dead ends within FPS would have taken Karrick's suggestion and called Heaton directly.

E. If wrong, Mr. Marn's calls to Heaton were simply good-faith errors in judgment.

Good-faith errors in judgment do not establish misconduct. Sticha v. McDonald's No. 291, 346 N.W.2d 138, 140 (Minn. 1984). Considering Mr. Marn's position and his well-founded belief that FPS was jeopardizing patient safety, he needed to do something. In her order of affirmation, the judge stated that Mr. Marn could have contacted a regulatory agency with a specific complaint if he truly feared for public safety. Id. He did contact the pharmacy board. (T.84).¹ And a more specific report to a regulatory agency may have offered him greater job security. Compare Minn. Stat. § 181.932, subd. 1(a) (prohibiting employer from terminating or penalizing an employee for making a good faith report of a suspected violation of any state rule to any governmental body or law enforcement official); with, id. at subd. 1(d) (prohibiting employer from terminating or penalizing an employee for making a good faith report of a situation in which the

¹ In his request for reconsideration, Mr. Marn stated that he also reported his concerns to the attorney general's office. (App. at 6).

quality of health-care services provided violates a standard established by state law or an ethical standard and potentially places the public at risk of harm).

But it's unclear from the judge's order why Mr. Marn's initiation of an investigation by a state agency would have been a less serious violation of his "duty of loyalty" than his contacting BCBS directly, especially given that the company did not even bother investigating the situation. Even if doing so would've been the more prudent choice, Mr. Marn's decision to call Heaton was, at worst, a good-faith error in judgment. In fact, Beacher openly admitted that Mr. Marn was an honorable man and that he knew of nothing Mr. Marn had to gain from calling Heaton; Beacher could suggest no ulterior motive for him leaving the voicemails. (T. 48). Consequently, the calls did not constitute misconduct. Sticha, 346 N.W.2d at 140 (holding employee's one-time good-faith error in judgment during her 10 years of employment that did not adversely affect the employer's business is not misconduct).

II.

MR. MARN'S DUE PROCESS RIGHT TO A FAIR HEARING WAS VIOLATED BY THE JUDGE PERMITTING FPS TO PRESENT TESTIMONY ALLEGING THAT MR. MARN ENCOURAGED BLUE CROSS BLUE SHIELD TO CANCEL ITS CONTRACT WITH FPS INSTEAD OF THE TAPES CONTAINING HIS ACTUAL STATEMENTS AND BY THE JUDGE'S FAILURE TO CONSIDER AS NEW EVIDENCE AN AFFIDAVIT PREPARED BY AN FPS PHARMACY TECHNICIAN AND TESTIMONY FROM A PHARMACY BOARD STAFFER.

The record shows that Mr. Marn did not commit misconduct. But even if this Court finds the ULJ correctly denied Mr. Marn benefits, it did so based on a procedure that prejudiced his substantial rights. This Court "may reverse or modify" the ULJ's decision if Mr. Marn's substantial rights "may have been prejudiced" because the findings, inferences, conclusion, or decision are: (1) in violation of constitutional provisions; (2) in excess of the statutory authority of the department; (3) made upon unlawful procedure; or, (4) affected by other error of law. Minn. Stat. § 268.105, subd. 7(d). Because the judge's decision was based on evidentiary procedures that violated the constitution and the unemployment statute, that decision must be reversed.

- A. Mr. Marn's substantial rights may have been prejudiced because the judge's finding that he encouraged Blue Cross Blue Shield to terminate its contract with FPS was based on an unlawful procedure.**

An unemployment-benefits hearing is an evidence-gathering inquiry not an adversarial proceeding. Minn. Stat. § 268.105, subd. 1(b). The judge must ensure that all relevant facts are developed. *Id.*

Mr. Marn had an ongoing objection under the best-evidence rule to Amundson's and Steven's testimony that, in his messages, he told BCBS to cancel its contract with FPS. (T. 16-17, 33); Minn. R. Evid. 1002 (requiring a party to produce the original of a recording to prove the statements on it). The judge overruled that objection and permitted Amundson's and Steven's testimony. This was error.

The purpose of the best-evidence rule is to ensure reliability--that the statements alleged to have been made actually were made. See McCormick on Evidence, § 232 at 88 (6th ed. 2006) (stating that the best evidence rule's based on the premise that the oral testimony purporting to tell from memory what the recording contains is probably subject to a greater risk of error than testimony regarding other situations). The preference for the original is justified by the danger of mistransmitting critical facts. Id. Mr. Marn understands that, at an unemployment hearing, a judge need not strictly apply the rules of evidence. Pichler v. Alter Co., 240 N.W.2d 328, 329 (Minn. 1976). When there is little question as to the reliability of the statements made, the judge does not err by permitting testimony about them instead of requiring the original. Brunello v. Mill City Auto Body, 348 N.W.2d 409, 411 (Minn. App. 1984) (holding statements made on department forms the parties knew would be used to decide whether the employee was entitled to benefits were as reliable as "best evidence" in the form of the parties' testimony).

Unlike the declarants' formal statements in Brunello, Amundson's and Steven's testimony was hearsay based on notes they jotted down while they were listening to the tapes about what Mr. Marn had said. The reliability of their testimony was placed in question by Mr. Marn's memory of what he said. He remembered merely encouraging

BCBS to review the contracts. (T. 3-4, 17, 33, 73). And FPS had every opportunity to get the tapes. On the first day of the hearing, staff claimed they had asked Heaton for the tapes and he was getting them. (T. 19) Yet three weeks later on the second day of the hearing, they still didn't produce them. (T. 53-56). Given that the tapes were readily available and their contents contested, the judge erred by not insisting that FPS' produce the tapes of the voicemails.

The judge's decision to deny Mr. Marn benefits turned on the judge apparently crediting the testimony of Amundson and Stevens over that of Marn. See App. at 3 (finding Marn urged BCBS to cancel its contracts with FPS). Consequently, the judge's failure to require FPS to produce the tapes and listen to Mr. Marn's statements prejudiced his substantial rights.

B. Mr. Marn's substantial rights were prejudiced because the judge violated her statutory authority and the constitution by refusing to consider evidence Mr. Marn presented and proposed to present upon reopening his case.

Unemployment benefits are an entitlement protected by the Fourteenth Amendment's procedural due process requirements. Schulte v. Transp. Unlimited, Inc. 354 N.W.2d 830, 832 (Minn. 1984). Due process requires that a party have an opportunity to be heard. Id. at 833-34. This means Mr. Marn had the right to present any relevant evidence he had. Juster Bros., Inc. v. Christgau, 7 N.W.2d 501, 507 (1943); see also Minn. Stat § 268.105, subd. 1(b) (stating an unemployment judge must ensure that all relevant facts are developed at a hearing). Yet when considering Mr. Marn's request for reconsideration, the judge refused to consider the former FPS pharmacy technician's

affidavit or to grant a new hearing on Mr. Marn's offer of proof that he would present the testimony of a pharmacy board staff member.

When considering a request for reconsideration, the ULJ must order an additional evidentiary hearing if the employee shows that evidence that was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not submitting it earlier; or (2) would show that the evidence submitted at the hearing was likely false and that the likely false evidence had an effect on the outcome of the decision. See Ywswf v. Teleplan Wireless Services, Inc., 726 N.W.2d 525, 534 (Minn.App. 2007) (citing Minn. Stat. § 268.105, subd. 2(c)). The judge refused to consider the affidavit Mr. Marn presented with his request because the judge felt he failed to prove prong (1) above. (See App. at 12-13). Even assuming this is true, Mr. Marn met prong (2)--the proposed evidence would have shown that testimony at Mr. Marn's hearing, which had an effect on the outcome of the judge's decision, "was likely false."

The judge's decision turned in great part on her conclusions that "Marn represents that he was protecting public safety and following Fairview's mission to provide safe affordable healthcare" and "the evidence does not show public safety was in danger." (See App. at 3). In fact, in her affirmation order, the judge asserted that the new evidence wouldn't likely change the outcome of the case in part because, "his claims of public safety were sufficiently rebutted by Fairview." (See App. at 12-13). Consequently, evidence showing that FPS staff's testimony on the issue of public safety "was likely

false” would have had an effect on the judge’s decision. The affidavit and the proposed testimony from the pharmacy board show just that.

At the hearing, Stevens testified that, in addition to verifying “each prescription * * * at the time of dispense,” FPS does “quality assurance on every prescription within two or three days after a [prescription] is dispensed.” (T. 78). Amundson denied that the BCBS contract resulted in any problems with dispensing prescriptions. (T. 21). Beacher testified that the incidence of errors in filling prescriptions based on volume was no higher than before FPS entered the contract. (T. 48-49).

The proposed affidavit, written by a pharmacy technician who had first-hand knowledge of dispensing prescriptions, directly contradicts these statements. She stated that the FPS’ computer system could not properly handle the increased prescription business generated by the new contract. (See App. at 9). In July 2006, new software was installed but it could not accommodate the volume of prescriptions either. Id. As a result, FPS dispensed “thousands of prescriptions to unsuspecting patients without proper inspection by licensed pharmacists in violation of state rules.” Id. at 10. And she personally received a significant increase in the number of complaints from patients who reported their prescriptions were filled incorrectly, received late, or not received at all. Id. Mr. Marn’s offer of proof on the pharmacy board staff’s testimony was that the violations this technician described violated the most important of pharmacy rules promulgated to protect public safety and poses a great danger to public safety. (App. at 5). Because this information comes from credible sources and conflicts with the evidence

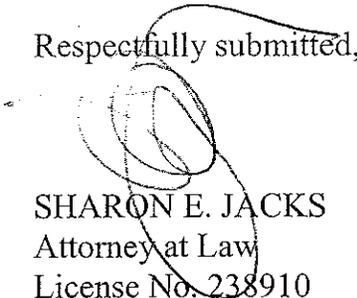
on which the judge based its conclusion that public safety was not placed at risk, admitting this evidence would've shown that evidence "was likely false."

In sum, the statutory provision relating to reconsideration requests as well as due process protections required the ULJ to consider this information when reconsidering her decision and to order a new hearing. Her failure to do so prejudiced Mr. Marn's substantial rights. Thus, the affirmation order must be reversed.

CONCLUSION

Mr. Marn lost his career while trying to do his job. The ULJ's decision that this was misconduct making him ineligible for benefits was not based on substantial evidence and was filed after a hearing at which his substantial rights were violated. Accordingly, the order must be reversed. In the alternative, Mr. Marn asks that this matter be remanded for a new hearing at which he is permitted to present the evidence proffered in his reconsideration request.

Respectfully submitted,



SHARON E. JACKS
Attorney at Law
License No. 238910

2221 University Ave. SE #425
Minneapolis, MN 55414
Telephone: (612) 627-6980

ATTORNEY FOR RELATOR