

No. A07-1644

State of Minnesota
In Court of Appeals

MICHAEL MARN,

Relator,

vs.

FAIRVIEW PHARMACY SERVICES LLC,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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I. LEGAL ISSUE

Under the law, an applicant who was discharged from employment because of a violation of the standards of behavior an employer had a right to expect of that individual as an employee is disqualified from the payment of unemployment benefits. Michael Marn, a patient financial advocate for Fairview Pharmaceutical Services left voicemails with a business partner of Fairview's in which he sought to persuade the business partner to terminate its contract with Fairview. The contract is worth millions of dollars and its termination would affect numerous jobs. Did Marn violate the standards of behavior Fairview had a right to expect of him as an employee?

The Unemployment Law Judge found that Marn violated the standards of behavior Fairview had a right to expect of him as an employee, and held Marn disqualified from unemployment benefits on the basis that he was discharged for employment misconduct.

II. STATEMENT OF THE CASE

Michael Marn filed an application for unemployment benefits and established a benefit account after his discharge from employment with Fairview Pharmacy Services. A department adjudicator initially determined that Marn was disqualified from the payment of unemployment benefits on the basis that he was

discharged for employment misconduct.¹ Marn appealed that determination, and a de novo hearing(s) was held. An unemployment law judge (ULJ) affirmed the initial determination, holding that Marn was discharged for employment misconduct and disqualified from the payment of unemployment benefits.² Marn filed a request for reconsideration, and the ULJ issued an order affirming her decision.³

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Marn under Minn. Stat. § 268.105, subd. 7(a) (2006) and Minn. R. Civ. App. P. 115.

III. DEPARTMENT'S RELATIONSHIP TO THE CASE

The Department is charged with the responsibility of administering and supervising the unemployment insurance program.⁴ Unemployment benefits paid are paid from state funds, the Minnesota Unemployment Insurance Trust Fund, not from the employer or employer funds.⁵ The Department's interest therefore carries over to the Court of Appeals' interpretation and application of the Minnesota Unemployment Insurance Law. So, the Department is considered the

¹ (D1). Transcript references will be indicated as "T." Exhibits in the record will be "D" for the department, with the number following.

² Appendix to Department's Brief, A3- A5

³ Appendix, A1-A2

⁴ Minn. Stat. § 116J.401, subd. 1(18)

⁵ Minn. Stat. § 268.069, subd. 2

primary responding party to any judicial action involving an Unemployment Law Judge's decision.⁶

The Department does not represent the employer in this proceeding and this brief should not be considered advocacy for Fairview Pharmacy Services.

IV. STATEMENT OF FACTS

Michael Marn was employed by Fairview Pharmacy Services (Fairview), a wholly owned subsidiary of Fairview Health Services, from March 24, 1980 until February 16, 2007.⁷ He was last employed as a patient financial advocate.⁸ That job entailed helping transplant patients (post transplant) understand their insurance and making sure they had adequate coverage for their prescriptions as many need help wading through their choices. Part of Marn's role was to guide transplant patients toward full prescription coverage because they have great prescription needs that last their lifetime.⁹

Fairview entered into a multimillion dollar contract with Blue Cross Blue Shield (BCBS), effective January 1, 2006, to provide prescription drugs to persons covered by BCBS.¹⁰

⁶ Minn. Stat. § 268.105, subd. 7(e)

⁷ T.9, 78

⁸ T.10

⁹ T.61

¹⁰ T.21, 45, 47

At some point, Marn, having concern about Fairview being able to handle the volume of work, spoke with Fairview's process improvement manager telling her that the biggest problem was the lack of leadership at Fairview.¹¹

During that last week of January 2007, Kari Amundson, the director of Specialty Services for Fairview, the unit in which Marn worked attended a conference. While there, she was approached by Al Heaton, the director of pharmacies for BCBS.¹² Heaton told Amundson that he had received a number of voicemails from a person identifying himself as an employee of Fairview, talking about poor service at Fairview.¹³ Heaton also said that he had spoken with a Health Partners pharmacy person, as well as some direct competitors of Fairview, and they had received similar calls.¹⁴

Based on the calls, Heaton requested a tour of Fairview's facility.¹⁵ Amundson arranged for Heaton to come to the offices of Fairview on February 13.¹⁶ While at Fairview's facility on February 13, Heaton did a remote access of his voicemail so that he could play the two voicemails that he had saved.¹⁷ Heaton played the calls for Amundson and Vicki Stevens, the director of human resources.¹⁸ The first call played was made on January 16, 2007 at 1:46 p.m. The

¹¹ T.69

¹² T.4, 12, 13

¹³ T.13

¹⁴ T.14

¹⁵ T.30

¹⁶ T.18

¹⁷ T.32

¹⁸ T.20, 32

caller said he was calling on behalf of Fairview Pharmacy Services staff, and strongly recommended that BCBS terminate the contract. He stated that Fairview made promises it couldn't keep, that administration was utterly unprepared for the volume of work, and repeated several times that it would be a good idea for BCBS to terminate the contract.¹⁹

The second call played was from January 22 at 12:56 p.m. The caller identified himself as a "concerned employee" from Fairview Pharmacy Services, saying that he wanted BCBS to know that a pharmacist had resigned because she was fed up with the Fairview administration, and others were ready to follow.²⁰

Both Amundson and Stevens recognized the caller as Michael Marn.²¹ On February 16, after being confronted about the calls, to which he replied, "No comment," Marn was discharged.²²

V. STANDARD OF REVIEW

The standard of review for unemployment insurance matters is set out in Statute as follows:

(d) The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;

¹⁹ T.15, 33, 34

²⁰ T.34

²¹ T.14, 34

²² T.45

- (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.²³

The Court of Appeals recently held in *Skarhus v. Davannis* that the issue of whether an employee committed employment misconduct is a mixed question of fact and law.²⁴ Whether the employee committed a particular act is a fact question.²⁵ Whether the employee's acts constitute employment misconduct is a question of law.²⁶

The *Skarhus* Court reiterated the long-held standard that it views the ULJ's factual findings "in the light most favorable to the decision,"²⁷ and gives deference to the ULJ's credibility determinations.²⁸ The Court also stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.²⁹ The Court, however, reviews de novo the legal question of whether the employee's acts constitute employment misconduct.³⁰

²³ Minn. Stat. §268.105, subd. 7(d) (2006)

²⁴ 721 N.W.2d 340, 344 (Minn. App. 2006)

²⁵ *Id.* (citing *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997).

²⁶ *Id.*

²⁷ *Id.* (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)

²⁸ *Id.* (citing *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000)

²⁹ *Id.* (citing Minn. Stat. § 268.105, subd. 7(d))

³⁰ *Id.* (citing *Scheunemann*, 562 N.W.2d at 34)

VI. ARGUMENT

Under the law, there is no presumption of entitlement to unemployment benefits, and there is no equitable or common law entitlement to benefits.³¹

An applicant who is discharged from employment is disqualified from benefits if the conduct for which the applicant was discharged amounts to employment misconduct. The statute provides:

Subd. 4. Discharge. An applicant who was discharged from employment by an employer shall be disqualified from all unemployment benefits according to subdivision 10 only if:

- (1) the applicant was discharged because of employment misconduct as defined in subdivision 6,³²

The definition of “employment misconduct” reads:

“Subd. 6. Employment misconduct defined.

(a) Employment misconduct means any intentional negligent or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment in judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

* * *

(e) The definition of employment misconduct provided by this subdivision shall be exclusive and no other definition shall apply.”³³

³¹ Minn. Stat. § 268.069, subd. 2 and subd. 3.

³² Minn. Stat. § 268.095 (2006)

³³ Minn. Stat. § 268.095 (2006)

In *Vargas v. Northwest Area Foundation*, the Court of Appeals, citing a number of statutory provisions, stated that employment misconduct is determined based upon a preponderance of the available evidence without regard to any burden of proof.³⁴ A preponderance of the available evidence shows that Marn was discharged for employment misconduct.

Marn made at least two telephone calls to BCBS, probably a lot more, and likely made calls to Health Partners Pharmacy Unit as well as direct pharmacy competitors of Fairview. When Marn was asked how many phone calls he made to BCBS, he answered that he couldn't recall how many, but it was more than one. He was not asked about calls to anyone else. What is absolutely clear is that he made two phone calls to BCBS, and when he was asked what he left on the messages, he testified that he could not recall exactly but that Fairview was really being stretched to the limit of its capacity to operate and it was not good, it was detrimental to patients. While Marn testified that he did not remember saying BCBS should cancel the contract, he admitted he certainly said the contract should be "re-evaluated."³⁵ Regardless of the differences with the testimony of Amundson and Stevens, whose testimony the ULJ credited, what Marn admits to is employment misconduct.

The Minnesota courts have never addressed a case like this, and this writer has not encountered one similar in over 30 years of being involved in

³⁴ 673 N.W. 2d 200 (Minn. App. 2004)

³⁵ T.73, 77

unemployment insurance appeals. The Minnesota courts have said that employees owe a duty of loyalty to their employers.³⁶ Thus, an employer has the right to expect basic loyalty from its employees. Certainly, this explanation is not absolute. No employer can expect that an employee will not report to regulatory authorities and other government officials violations of law or rules. This is codified in the “whistleblower” provisions of Minnesota law.³⁷ But this is not a whistleblower action because Marn was not calling a government agency, nor expressing his concerns to Fairview corporate. He called a business partner.

By looking at what Marn admits he said to BCBS, that the contract should be “re-evaluated,” and mentioning the possibility of BCBS starting their own specialty pharmacy, it’s clear that Marn sought to end or at least damage the business partnership that Fairview had with BCBS. Marn never identified himself in those telephone calls because he knew what would happen if Fairview found out that he made those calls.

Curiously, Marn maintains that Fairview was violating the Board of Pharmacy rules by not double checking the contents of prescriptions to match what was on the labels. But he does not suggest that he said that to BCBS. He does not suggest that he told BCBS exactly what was, in his belief, occurring. Instead, he suggested to BCBS the action he wanted BCBS to take, which was to either end its relationship with Fairview by ending the contract, or to start its own

³⁶ *Rehabilitation Specialists, Inc. v. Koering*, 404 N.W. 2d 301 (Minn. App. 1987)

³⁷ Minn. Stat. §181.932, subd. 1 (2006)

pharmacy. If Marn was simply trying to get Fairview to follow the Board of Pharmacy rules, he wouldn't have said what he did. Ending the business relationship that BCBS had with Fairview would not necessarily result in Fairview's changing any of its business processes or practices, and could have actually resulted in the opposite because the loss of millions of dollars and the layoff of hundreds of employees.³⁸ If Fairview did not adhere to the Board of Pharmacy rules (assuming such was true) while they had a business relationship with BCBS, ending that relationship would not *per se* mean compliance.

If he thought Fairview was in violation of Board of Pharmacy rules, Marn could have, and should have, simply filed a complaint with the Board of Pharmacy. He didn't. Interestingly, Marn never testified about contacting the Board of Pharmacy. His attorney, Jerry Laurie, mentioned on page 84 of the transcript that Marn did go to the Board of Pharmacy anonymously and posed a hypothetical situation. Marn was never asked, and he never explained, why he didn't file a complaint (formal or otherwise) with the Board of Pharmacy. Marn did testify to the rather lame excuse, (if patient safety really was at issue), the Fairview pharmacists supposedly gave him for their not doing so, even though Marn says he encouraged them to contact the Board.³⁹ Marn says the pharmacists at Fairview told him that if the Pharmacy Board knew what was happening, the

³⁸ T.45, 47, 78

³⁹ T.84

Board would take action.⁴⁰ But he did not take that proper and rather simple, reasonable avenue of redress. Compliance with the Board of Pharmacy rules is the objective, but Marn did not pursue compliance through the Board. Additional reasonable avenues could have been contacting the attorney general's office, contacting Fairview Health Services corporate offices, or by using Fairview's anonymous complaint hotline.⁴¹ Instead, Marn sought to damage the business relationship that Fairview had with BCBS. That is the action that is a violation of the standards of behavior Fairview had a right to expect of Marn as an employee, and is misconduct under the exclusive statutory definition.

Because what Marn admits he said to BCBS constitutes misconduct, it goes without saying that it is misconduct for Marn to have said what Amundson and Stevens testified and what the ULJ, the determiner of conflicts in the evidence, found. The finding was that Marn told BCBS to terminate its contract with Fairview.

VII. MARNS' ARGUMENTS

Marn is uninformed when he, on page 15 of his brief, cites to a 1981 Supreme Court decision for the proposition that Fairview has a burden of proof. That case was decided well before the statutory amendments which provide that

⁴⁰ T.68

⁴¹ T.82

there is no burden of proof in unemployment insurance proceedings.⁴² The Court of Appeals in *Vargas v. Northwest Area Foundation*, as set forth earlier in this brief, recognized the statutory changes and its effect.⁴³

Marn argues the 1984 Supreme Court case of *Sticha v. McDonald's* for the proposition of good faith errors in judgment not being misconduct.⁴⁴ But that case also was decided before the legislature adopted an exclusive definition of employment misconduct. The statute now provides that good faith errors in judgment, “if judgment was required,” is not misconduct. No judgment was required of Marn. Even if some judgment could be said to have been required of Marn regarding this issue, it is not good faith to attempt to end the business relationship that BCBS had with Fairview. Again, Marn did not simply limit his voicemails to BCBS that he thought a violation of pharmacy rules was occurring, that there was not a double check. He went far beyond that. Even by his own admission he suggested that BCBS should start its own pharmacy, thus eliminating the need for a relationship with Fairview. The testimony of Amundson and Stevens is that in one voicemail he talked about the pharmacists who left Fairview. Telling that to BCBS has nothing to do with an error in judgment.

Marn, throughout his brief, refers to his job as “patient advocate.” He was, in fact, a “patient financial advocate.” In no way can his job duties be construed

⁴² Minn. Stat. §268.069, subd. 2, Minn. Stat. §268.101, subd. 3(d), and Minn. Stat. §268.105, subd. 1.

⁴³ 673 N.W. 2d 200 (Minn. App. 2004)

⁴⁴ 346 N.W. 2d 138 (Minn. 1984)

as encompassing contacting BCBS seeking to have them sever their business relationship with Fairview.

Marn argues that what an average reasonable employee would do in the circumstances is what he did. On the contrary, the Department posits that an average reasonable employee in Marn's circumstances would, if he believed the violation of the Board of Pharmacy rules was occurring, contact the Board of Pharmacy. An average reasonable employee wouldn't attempt to get BCBS to terminate its business relationship with Fairview. Again, terminating a business relationship would not necessarily result in Fairview correcting its business practices and could well result in the opposite.

Marn argues the "best evidence rule," asserting that the "tape" of the voicemails should be obtained and played at a hearing. But the law clearly states that the Department may adopt rules on evidentiary hearings, and those rules need not conform to common law or statutory rules of evidence.⁴⁵ The rules adopted provide that the ULJ is not bound by the statutory or common law rules of evidence and that the ULJ may receive any evidence which possesses probative value, including hearsay, if it is the type of evidence on which reasonable prudent persons are accustomed to rely on the conduct of their affairs.⁴⁶

There is no tape. Heaton, when he played the two voicemails that he had saved, did so by remotely accessing his voicemail system. Fairview had requested

⁴⁵ Minn. Stat. §268.105, subd. 1(b).

⁴⁶ Minn. Admin. R. §3310.2922.

of BCBS that they make a recording of those voicemails and provide that recording to Fairview. BCBS has not done so. Marn apparently contends that the ULJ should issue a subpoena compelling BCBS to make a recording of the voicemails and provide a copy of that recording. It's unnecessary for a number of reasons. Both Amundson and Stevens testified that they took contemporaneous notes at the time the voicemails were played, and they testified from those notes. Further, Marn was given the full opportunity to testify to what he said in his phone calls to Heaton. He offered some testimony that he remembers encouraging BCBS to open its own pharmacy. He testified he couldn't recall exactly whether he told BCBS to terminate the contract but that he may well have said it should be "re-evaluated."⁴⁷

Amundson and Steven's hearsay testimony is admissible and in this case probative. While compelling BCBS to make a recording and produce that recording may cause adherence to the rules of evidence that is neither required nor warranted.

Marn argues there is a constitutional violation of due process in that the ULJ did not, on reconsideration, order an additional evidentiary hearing. Marn had a hearing at which he was represented by counsel. His counsel on page 84 of the transcript, just after Marn testified, was asked by the ULJ if he had anything further and counsel said, "No, Your Honor." There is no due process right to a

⁴⁷ T.73, 77

second hearing, and Marn cites to no authority because there isn't any.

Marn contends that an affidavit of a pharmacy assistant, which he submitted on reconsideration, would show that some of the testimony submitted by Fairview was false. First of all, Marn was represented by seasoned counsel at the evidentiary hearing. Nothing prevented him from calling as a witness, by subpoena if necessary, not only a pharmacy assistant, but pharmacists. He didn't. At no time during the course of the evidentiary hearing did he or his legal counsel request a continuance for the purpose of calling additional witnesses.

Additionally, the point Marn seeks to make by the affidavit would not change the outcome. Even if there were to be finding that Fairview was, in fact, violating pharmacy rules, the action Marn took is misconduct. Again, he didn't contact the Board of Pharmacy, the attorney general, or any other governmental agency. He sought BCBS to terminate the business relationship with Fairview.

In his request for reconsideration, Marn makes various assertions about actions he took, but he did not testify at the hearing that he took the actions he later claims. He was represented by counsel and in no way restricted in his testimony. The case must be decided on the evidence presented at the hearing. Additionally, those assertions on reconsideration are not consistent with his testimony on page 84 of the transcript.

Marn argues at length about his motives. Marn's motives are irrelevant to the question of employment misconduct under the current statute, and the same is true for whether he would personally benefit, financially or otherwise, by his

actions. In *Houston v. International Data Transfer Corp.*, the Supreme Court discussed a two-pronged approach to misconduct under the then existing statute, that approach arguably encompassing motive.⁴⁸ But subsequent to the *Houston* decision, the legislature amended the statute. As the Court of Appeals states in *Hebrink v. Crows Nest Programs, Inc.*,⁴⁹

“...,but in 2003, the *Houston* Court’s interpretation of employment misconduct was superseded when the legislature changed the statutory definition of employment misconduct. 2003 Minn. Laws 1st Spec. Sess. ch. 3, art. 2, § 13, at 1473-74.”

As recently as January 30, 2007, the Court of Appeals rejected the *Houston*-based argument that the motive of an individual is to be considered, indicating that the *Houston* analysis “was construing the language in a definition of misconduct that is no longer part of the statute...”⁵⁰ Marn’s violating the standards of behavior Fairview had a right to expect of him as an employee is misconduct, regardless of his motive or whether he would personally benefit.

Marn argues that there ultimately was no harm to Fairview because BCBS did not terminate the contract or start its own pharmacy. But the Court of Appeals in *Sivertson v. Sims Security, Inc.*, a case where a security guard left his post, held that actual harm to the employer is unnecessary for there to be employment

⁴⁸ 645 N.W.2d, 144 (Minn. 2002)

⁴⁹ A05-1608 (unpublished) (Minn. Court of Appeals, filed July 18, 2006), (Appendix, A12-A17)

⁵⁰ *Post v. Plaza Management Company, Inc.*, A06-284, (unpublished) (Appendix, A6-A11)

misconduct.⁵¹ While the current statute does provide special consideration for single incidents that don't have a significant adverse impact on the employer, Marn does not argue that portion of the statute, most likely because Marn, when asked how many phone calls he made to Heaton, testified, "I made more than one. I don't recall how many."⁵² Marn's actions went beyond what could be construed as a single incident.

VIII. RESPONDENT FAIRVIEW PHARMACY SERVICES' ARGUMENTS

Unfortunately, respondent Fairview Pharmacy Services on page 8, 9 and 11 of its brief cites to *Vargas v. Northwest Area Foundation*, with a further citation to *Houston*, for authority on the issue of misconduct. As stated above, those cases were construing the language in the definition of misconduct that is no longer part of the statute.

IX. CONCLUSION

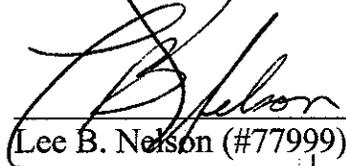
Marn's attempt to get BCBS to end its business relationship with his employer, Fairview, violated the standards of behavior Fairview had a right to expect of Marn as an employee and that is misconduct.

The Department respectfully requests the Court affirm the decision of the Unemployment Law Judge holding Marn disqualified from the payment of unemployment benefits.

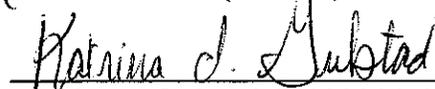
⁵¹ 390 N.W. 2d 868 (Minn. App. 1986)

⁵² T.26

Dated this 31st day of December, 2007.



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