

No. A08-1587

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State of Minnesota  
In Court of Appeals

BRADLEY R. BANGTSON,

*Relator,*

vs.

ALLINA MEDICAL GROUP-CAMBRIDGE CLINIC,

*Respondent,*

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

*Respondent.*

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RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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DENNIS B. JOHNSON (#124564)  
CHESTNUT & CAMBRONNE PA  
204 NORTH STAR BANK BUILDING  
4661 HIGHWAY 61  
WHITE BEAR LAKE, MINNESOTA 55110  
(651) 653-0990  
*Attorney for Relator*

ALLINA MEDICAL GROUP-CAMBRIDGE CLINIC  
PO BOX 1469  
MINNEAPOLIS, MINNESOTA 55440-1469  
(952) 238-2757  
*Respondent- Employer -Pro se*

Lee B. Nelson (#77999)  
Katrina I. Gulstad (#0322891)  
MINNESOTA DEPARTMENT OF EMPLOYMENT  
AND ECONOMIC DEVELOPMENT  
1<sup>ST</sup> NATIONAL BANK BUILDING  
332 MINNESOTA STREET, SUITE E200  
ST. PAUL, MINNESOTA 55101-1351  
(651) 259-7117  
*Attorneys for Respondent-Department*

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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**

Employees, who are discharged due to conduct that shows a serious violation of the employer's reasonable expectations, or conduct that shows a substantial lack of concern for their employment, are ineligible for all unemployment benefits. Allina Medical Group discharged Bradley Bangston, an anesthesiologist, for attacking a co-worker after he was notified he would be discharged for stealing narcotics. It is undisputed that Dr. Bangston diverted narcotics for his own use on three separate occasions, and that when he was informed of an impending discharge, he physically assaulted his co-worker. Is Dr. Bangston ineligible for unemployment benefits?

The Unemployment Law Judge found that Dr. Bangston was discharged for reasons of employment misconduct and that he was ineligible for all unemployment benefits.

## **II. STATEMENT OF THE CASE**

This case involves whether Relator Bradley Bangston is entitled to unemployment benefits. Dr. Bangston established a benefit account with the Minnesota Department of Employment and Economic Development (the "Department"). A Department adjudicator initially determined that Dr. Bangston was discharged for reasons other than employment misconduct and held him

eligible for all unemployment benefits.<sup>1</sup> Allina Medical Group appealed that determination, and a de novo hearing was held. A Department Unemployment Law Judge (“ULJ”) reversed the initial determination, holding that Dr. Bangston was discharged for reasons of employment misconduct and that he was ineligible for unemployment benefits.<sup>2</sup> Dr. Bangston filed a request for reconsideration with the ULJ, who affirmed the decision that Dr. Bangston was discharged for employment misconduct.<sup>3</sup>

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Dr. Bangston under Minn. Stat. § 268.105, subd. 7(a) 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.<sup>4</sup> Unemployment benefits paid are paid from state funds, the Minnesota Unemployment Insurance Trust Fund, not from the employer or employer funds.<sup>5</sup> 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

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<sup>1</sup> (D1) Transcript references will be indicated as “T.” Exhibits in the record will be “D” for the department, with the number following.

<sup>2</sup> Appendix to Department’s Brief, A5-A8

<sup>3</sup> Appendix, A1-A4

<sup>4</sup> Minn. Stat. § 116J.401, subd. 1(18).

<sup>5</sup> Minn. Stat. § 268.069, subd. 2.

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

The Department does not represent the employer in this proceeding and this brief should not be considered advocacy for Allina Medical Group.

#### **IV. STATEMENT OF FACTS**

Bradley Bangston worked full-time for Allina Medical Group as an anesthesiologist and director of anesthesiology at its Cambridge Medical Center from December 1, 2002, through July 19, 2007.<sup>7</sup> He earned a final pay rate of \$30,700 per month.<sup>8</sup>

Dr. Bangston admits that at least three different times in April 2007, he "took garbage medication, medication that was destined for the garbage, took it home, and administered it to myself that evening."<sup>9</sup> The "garbage medications" Dr. Bangston stole from the clinic were Fentanyl, a powerful opiate pain killer that is commonly used to treat breakthrough cancer pain, and Versed, a drug administered to children prior to anesthesia.<sup>10</sup>

In mid April 2007, a co-worker saw Dr. Bangston steal the drugs and reported him to his supervisors. On April 19, 2007, Dennis Doran, president of the Cambridge Medical Center, and Dr. Dale Berry, lead physician, confronted Dr.

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<sup>6</sup> Minn. Stat. § 268.105, subd. 7(e).

<sup>7</sup> T. 17-19; D6

<sup>8</sup> T. 19

<sup>9</sup> T. 113-114

<sup>10</sup> T. 62 and 112

Bangston about the stolen drugs.<sup>11</sup> Dr. Bangston initially denied any wrongdoing, and then admitted to taking the Fentanyl and Versed for his own use.<sup>12</sup>

Dr. Bangston went on a paid leave of absence April 23, 2007.<sup>13</sup> He went to treatment at Hazeldon from May 3, 2007, through June 2, 2007, where he testified he was diagnosed with “drug abuse, not drug addiction, but drug abuse.”<sup>14</sup> Dr. Bangston was treated at Hazeldon in October 2001 for alcohol abuse. He attended Alcoholics Anonymous meetings for some time, but stopped attending AA meetings eight months before he abused the drugs in April.<sup>15</sup> As Dr. Bangston testified, “Most, you know, people with chemical problems relapse when they stop working their program, as I did. I stopped working my program, going to AA, eight, nine months before I relapsed.”<sup>16</sup>

On July 12, 2007, the Cambridge Medical Center’s directors, president, and lead physicians discussed Dr. Bangston’s employment at the executive operations meeting.<sup>17</sup> They decided at the meeting to discharge Dr. Bangston, because of a lack of trust in Dr. Bangston and patient safety concerns arising from his drug diversion.<sup>18</sup>

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<sup>11</sup> T. 55

<sup>12</sup> T. 55

<sup>13</sup> T. 25-26

<sup>14</sup> T. 63-64

<sup>15</sup> T. 60

<sup>16</sup> T. 68

<sup>17</sup> T. 34-35 and 94

<sup>18</sup> T. 95

On July 16, 2007, the medical center's president, Doran and the human resources director, LeeAnn Vitalis, met with Dr. Bangston about his employment.<sup>19</sup> Vitalis and Doran gave Dr. Bangston a drafted separation and release agreement, which said that Dr. Bangston's employment would "terminate" effective July 20, 2007.<sup>20</sup>

Dr. Bangston abruptly stood up, thrust his pop can against the wall, and erupted into a temper tantrum.<sup>21</sup> Dr. Bangston yelled at Doran, calling him "spineless," and angrily shook his finger in Doran's face.<sup>22</sup> Dr. Bangston left, and Vitalis called security.<sup>23</sup> But before security could arrive, Dr. Bangston returned and demanded his things from his office.<sup>24</sup>

Doran escorted Dr. Bangston to his office, where Dr. Bangston took a mirror off the wall, thrust his fist through it, and threatened, "That should have been your face!"<sup>25</sup> Doran told Dr. Bangston it was time to leave, and the two started to walk toward the surgeon's lounge. While in the lounge, Dr. Bangston threw down his box of belongings and announced, "Let's have it out." He then grabbed Doran in the throat and shoved him into a coat hook.<sup>26</sup> Dr. Bangston

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<sup>19</sup> T. 22

<sup>20</sup> T. 22; D9, p. 1

<sup>21</sup> T. 22-23 and 35-36

<sup>22</sup> T. 22-23 and 35-36

<sup>23</sup> T. 23

<sup>24</sup> T. 23 and 36-37

<sup>25</sup> T. 37

<sup>26</sup> T. 37

continued his angry rage and tried to flip Doran by his tie. Doran yelled for security, and Dr. Bangston fled the scene.<sup>27</sup>

On July 18, 2007, Allina Medical Group mailed Dr. Bangston a letter notifying him that his employment ended effective July 16 due to his assault of Doran.<sup>28</sup>

## **V. ARGUMENT**

### **A. SUMMARY OF ARGUMENT**

Dr. Bangston's employment ended after he attacked Doran in the surgeon's lounge. Though Allina Medical Group had given Dr. Bangston notice of impending discharge that week, he had continuing work available to him through July 20, 2007. He was not, therefore, discharged prior to the assault. Dr. Bangston's assault and drug theft displays clearly a serious violation of the standards of behavior Allina Medical Group had a right to reasonably expect, and is employment misconduct.

### **B. STANDARD OF REVIEW**

The standard of review for unemployment insurance matters is set out in the 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

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<sup>27</sup> T. 37-38

<sup>28</sup> D6

substantial rights of the petitioner 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 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.<sup>29</sup>

The Court of Appeals held in *Skarhus v. Davannis*, that the issue of whether an employee committed employment misconduct is a mixed question of fact and law.<sup>30</sup> Whether the employee committed a particular act is a fact question.<sup>31</sup> And whether the employee's acts constitute employment misconduct is a question of law.<sup>32</sup>

The *Skarhus* Court reiterated the long-held standard that it views the ULJ's factual findings "in the light most favorable to the decision,"<sup>33</sup> and gives deference to the ULJ's credibility determinations.<sup>34</sup> The Court also stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.<sup>35</sup>

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<sup>29</sup> Minn. Stat. § 268.105, subd. 7(d) (2007).

<sup>30</sup> 721 N.W.2d 340, 344 (Minn. App. 2006).

<sup>31</sup> *Id.* (citing *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997)).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)).

<sup>34</sup> *Id.* (citing *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. App. 2000), review denied (Minn. Dec. 20, 2000)).

<sup>35</sup> *Id.* (citing Minn. Stat. §268.105, subd. 7(d)).

The Court, however, reviews de novo the legal question of whether the employee's acts constitute employment misconduct.<sup>36</sup>

### C. ARGUMENT FOR INELIGIBILITY

An applicant who is discharged from employment is ineligible for benefits only if the conduct for which the applicant was discharged amounts to employment misconduct. The 2007 statute applies.<sup>37</sup> The statute provides:

**Subd. 4. Discharge.** An applicant who was discharged from employment by an employer is ineligible for all unemployment benefits according to subdivision 10 only if:

- (1) the applicant was discharged because of employment misconduct as defined in subdivision 6, or
- (2) the applicant was discharged because of aggravated employment misconduct as defined under subdivision 6a.<sup>38</sup>

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 a 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 if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

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<sup>36</sup> *Id.* (citing *Scheunemann*, 562 N.W.2d at 34).

<sup>37</sup> See Laws 2007, Ch. 128, Art. 1, sec. 17, and Art. 5, sec. 4.

<sup>38</sup> Minn. Stat. §268.095, subd. 4 (2007)

(e) The definition of employment misconduct provided by this subdivision is exclusive and no other definition applies."<sup>39</sup>

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.<sup>40</sup> A preponderance of the available evidence shows that Dr. Bangston was discharged for misconduct and is ineligible for all unemployment benefits. Notably, Dr. Bangston's attorney is silent as to the issue of misconduct. But Dr. Bangston's admitted behavior supports the ULJ's legal conclusion that he was discharged for employment misconduct.

Clearly, stealing powerful opiates from your employer for personal use and assaulting a co-worker are employment misconduct. Notably, counsel is inexplicably silent as to whether or not Dr. Bangston's admitted actions were employment misconduct. Rather, counsel argues that Dr. Bangston was discharged during the July 16 meeting with Doran and Vitalis, prior to the assault on Doran, and that the assault should not be considered a reason for his discharge.<sup>41</sup> But under the clear and unambiguous definitions of "quit" and "discharge," in the Minnesota Unemployment Insurance Law, Dr. Bangston cannot be considered discharged during the meeting.

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<sup>39</sup> Minn. Stat. §268.095, subd. 6 (2007)

<sup>40</sup> 673 N.W. 2d 200 (Minn. App. 2004)

<sup>41</sup> Relator's Brief, pp. 8-15

A “discharge” is defined in Minn. Stat. §268.095, subd. 5(a), as occurring “when any words or actions by an employer would lead a reasonable employee to believe that the employer would no longer allow the employee to work for the employer in any capacity.” Counsel claims that Dr. Bangston was discharged when he received the drafted separation and release agreement, because he knew at that point he would be discharged in the future. In effect, he argues that Dr. Bangston was discharged at the time he received notice of the discharge. This argument ignores the language of Minn. Stat. §268.095, subd. 2(b), which says that “[a]n employee who has been notified that the employee will be discharged in the future, who chooses to end the employment while employment in any capacity is still available, is considered to have quit the employment.” If an individual’s employment ends when he receives notice of impending discharge, as counsel contends, then how could he be considered to have quit for not working out the notice period? Clearly, under the Minnesota Unemployment Insurance Law, an individual’s employment does not end at the moment he is given notice of a future discharge.

The Court of Appeals analyzed a similar situation in *Martinson v. University of Minnesota*, where it held that a professor, who was told a year in advance that his employment would end, was *not* discharged on the date the notice was given, but when the University stopped paying him a year later.<sup>42</sup> The court

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<sup>42</sup> *Martinson v. University of Minnesota*, 370 N.W.2d 462 (Minn. App. 1985).

reasoned that even though the professor was no longer teaching classes during his final year of employment, he was still being paid, and was under the control of the University (which directed him not to teach), and so he was an employee.<sup>43</sup> Similarly, Dr. Bangston was still under the control of Allina Medical Group July 16, and he would have remained employed through July 20 had he not assaulted his co-worker in the interim. As such, he was not discharged when handed the separation agreement.

Looking at the situation from a different viewpoint, had Dr. Bangston tripped and injured himself while leaving Doran's office July 16, would he not be employed for worker's compensation purposes? Certainly, he would still be considered an employee in that situation, where he was still under the direction and control of Allina Medical Group at the time. Simply being handed an unexecuted separation agreement and told of a future discharge does not mean the employment had ended immediately.

Even if, for argument's sake, Dr. Bangston was discharged July 16, substantial evidence supports the ULJ's legal conclusion that he was discharged for employment misconduct. It is undisputed that Dr. Bangston, on three separate occasions, stole powerful opiates from his employer for his own use. This theft is clearly misconduct. In fact, Dr. Bangston's counsel does not even attempt to argue otherwise. And though Dr. Bangston went to treatment at Hazeldon, his

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<sup>43</sup> *Id.*

own testimony shows he does not fit within the exception to ineligibility for individuals who are discharged for actions directly related to a chemical dependency, for which they did not, after diagnosis or treatment, make consistent efforts to control.<sup>44</sup> Dr. Bangston denies having a chemical dependency (testifying he was diagnosed with “drug abuse, not drug addiction, but drug abuse”), and admits he stopped attending AA eight months before the drug abuse, and so did not make consistent efforts to control his chemical problems.<sup>45</sup> As such, regardless of when Dr. Bangston was discharged, substantial evidence supports the ULJ’s legal conclusion, which the Court reviews de novo, that he was discharged for employment misconduct.

## **VI. CONCLUSION**

The Unemployment Law Judge correctly concluded that Dr. Bangston was discharged for employment misconduct.

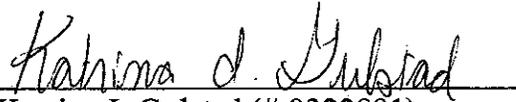
The Department respectfully requests that the Court affirm the agency decision.

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<sup>44</sup> Minn. Stat. §268.095, subd. 6(b)(2007).

<sup>45</sup> T. 63-64 and 68

Dated this 2<sup>nd</sup> day of January, 2009.



Katrina I. Gulstad (# 0322891)

Lee B. Nelson (#77999)

Department of Employment and  
Economic Development  
1<sup>st</sup> National Bank Building  
332 Minnesota Street, Suite E200  
Saint Paul, Minnesota 55101-1351  
(651) 259-7117  
Attorneys for Respondent Department