STATE OF MINNESOTA
IN COURT OF APPEALS
A11-251

Jovita Luckett,
Relator,

vs.

Centerline Charter Corporation,
Respondent,
Department of Employment and Economic Development,
Respondent.

Filed September 26, 2011
Reversed
Stoneburner, Judge
Schellhas, Judge, dissenting

Department of Employment and Economic Development
File No. 25063577-5

Jovita Luckett, St. Paul, Minnesota (pro se relator)

Centerline Charter Corporation, St. Paul, Minnesota (respondent employer)

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

Considered and decided by Schellhas, Presiding Judge; Klaphake, Judge; and Stoneburner, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Relator challenges the determination of the unemployment-law judge (ULJ) that she is ineligible for unemployment compensation benefits. Because we conclude that relator's conduct does not constitute employment misconduct that would make her ineligible for unemployment compensation benefits, we reverse.

FACTS

Relator Jovita Luckett applied for employment as a bus driver with respondent Centerline Charter Corporation in May 2009. The application asked whether the applicant had been convicted of traffic-law violations in the last five years. Luckett failed to disclose that she had been issued a speeding ticket in February 2009. Centerline checked Luckett's driving record on May 13, 2009. Centerline hired Luckett in August 2009 even though her driving record revealed the February 2009 speeding ticket.

Luckett was required to complete a pre-employment physical examination to determine her fitness for being a bus driver. She completed a questionnaire in connection with the examination and responded "No" to a question asking whether she had incurred illness or injury within the past five years. Luckett attested to the truthfulness of her answers even though she did not disclose having been involved in a car accident in February 2009 that resulted in chiropractic treatment, which was ongoing at the time she filled out the questionnaire.

On December 8, 2010, Luckett was involved in an unavoidable work-related accident. Centerline's policy required that Luckett submit a urine sample for drug and

alcohol testing. The test results were negative but showed that the sample was diluted. Luckett was required to submit another urine sample. The test results on this sample were again negative, but again showed that the sample was diluted. Centerline intended to discuss the diluted tests with Luckett, but due to the Christmas break and a leave of absence that Luckett took for a non-work-related injury one day after she returned to work from the Christmas break, Centerline did not discuss the test results with Luckett and did not mention the diluted test results to Luckett until her employment was terminated more than three months later.

While Luckett was on leave, she spoke with several of Centerline's staff members and was informed that, in addition to return-to-work clearance from her treating doctor, she was required to have a "return to work" physical examination approved by the Minnesota Department of Transportation (DOT) before she could return to work. The examination was scheduled for March 9.

Luckett was instructed to immediately provide the results of the DOT physical examination to Centerline. Luckett called Centerline and explained that she had another appointment that would prevent her from going immediately to Centerline after the examination. She was told to "drop off" the examination results. When she dropped off the examination results, she was asked to wait "two minutes" for her supervisor to complete a meeting so that Luckett's return to work could be discussed. Luckett said she was not able to wait, and she left.

Luckett telephoned Centerline later on March 9 and left an angry message questioning whether Centerline was going to continue to make her "jump through hoops"

and whether she should contact a lawyer. On March 11, Luckett telephoned Centerline and was told that her file was being reviewed. She was asked to attend a meeting on March 19. Luckett was unable to attend the March 19 meeting, but she met with Centerline personnel on March 26. During the meeting, her employment was terminated because of the March 9 voicemail, which Centerline stated was the "last straw," demonstrating that Luckett was not an appropriate representative of Centerline.

Luckett applied to respondent Minnesota Department of Employment and Economic Development (DEED) for unemployment benefits. She was initially found eligible for benefits. Centerline appealed, submitting a statement to DEED asserting that Luckett's employment was terminated for failing to meet with a supervisor as requested and for leaving a rude telephone message. After a hearing, the ULJ determined that Luckett was discharged for unsatisfactory work performance that did not constitute employment misconduct and was, therefore, eligible for unemployment benefits.

Centerline requested reconsideration and submitted additional evidence in the form of documents discrediting Luckett's testimony that the February 2009 traffic ticket had been "thrown out" and her testimony that she had not disclosed her February 2009 injury at the time of her pre-hire physical because the doctor who performed the examination had examined her before and already knew about the February 2009 accident and treatment. In its request for reconsideration, Centerline argued that Luckett was discharged for "a pattern and history of dishonesty, repeated lying, placing her needs above those of the job, [and] avoiding critical calls and meetings that were necessary to her continued employment."

The ULJ granted reconsideration and ordered a new hearing. After the hearing, the ULJ set aside the earlier findings and decision. The ULJ found that Luckett was discharged for (1) the March 9 voicemail message; (2) two negative but diluted drug tests; and (3) inaccuracies in her employment record. The ULJ again found that the March 9 voicemail message constituted simple unsatisfactory conduct that did not make Luckett ineligible for unemployment benefits. But the ULJ concluded that "the other incidents" that led to her discharge "rise to the level of employment misconduct," making Luckett ineligible for unemployment compensation benefits. This appeal followed.

D E C I S I O N

Employees discharged for employment misconduct are disqualified from receiving unemployment compensation benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed the alleged act is a fact question. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court defers to the ULJ's credibility determinations and findings of fact that are supported by substantial evidence. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But whether a particular act constitutes employment misconduct under the terms of the relevant statutes is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

Luckett challenges the ULJ's determination that she was discharged for employment misconduct. On certiorari appeal, a reviewing court examines whether a

petitioner's substantial rights were prejudiced because the findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence in view of the whole record. Minn. Stat. § 268.105, subd. 7(d)(4), (5) (2010). Substantial evidence is "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). Applying these standards, we examine the basis of the ULJ's ineligibility determination.

I. Diluted test samples

After the first hearing, the ULJ found that the diluted drug test results did not evidence misconduct because the tests "d[id] not show [that] Luckett was under the influence of drugs" and her explanation for the diluted samples—that she drank a lot of water before the tests in order to be able to provide a sample—"is logical and convincing." After the second hearing, the ULJ determined that Luckett's testimony was not credible, "[t]herefore, her explanation for the diluted drug tests is also called into question. . . . As other testimony Luckett provided at the first evidentiary hearing has been shown to be false, it is not unreasonable to assume that her explanation for the diluted tests was also not credible." The ULJ gave no further explanation for its conclusion that the diluted samples therefore constituted employment misconduct that made Luckett ineligible for benefits.

On appeal, Luckett argues that the diluted samples were only a pretext for her discharge and that she was fired only because of the March 9 voicemail, and specifically because she threatened to contact a lawyer. An applicant for unemployment benefits cannot be determined to be ineligible to receive benefits unless the alleged employment misconduct is the reason for discharge. *Harringer v. AA Portable Truck & Trailer Repair, Inc.*, 379 N.W.2d 222, 224 (Minn. App. 1985).

Centerline's initial submission to DEED states that Luckett was discharged for "unprofessional behavior involving inconsistency in behavior, lack of direct communication, inability to follow clear directives, rude, insubordinate telephone message." In response to a question about the timing of the discharge, Centerline stated that Luckett "failed to follow directions" after her return-to-work physical examination. "She was asked to wait for 2 minutes but refused saying she had other appointments. Within a short period of time, she left an unprofessional, rude message." Centerline's representative stated that "the last straw . . . was the phone message." *See Monyoro v. Marriott Corp.*, 403 N.W.2d 325, 328 (Minn. App. 1987) (concluding that incidents not related in time or tenor, that might be minor infractions, when taken as a whole, demonstrated a lack of concern for the job and the type of disregard of the employer's interests encompassed in the definition of misconduct). But the ULJ did not address the "last straw" argument. Instead, the ULJ found that Luckett was discharged because of employment misconduct consisting of the diluted urine samples and failure to disclose the speeding ticket and her February 2009 injury in the application process.

The ULJ asked directly whether Centerline intended to discharge Luckett for the diluted tests, and Centerline's representative stated only that Centerline was "intending to . . . talk to her about the results." In fact, Centerline never discussed the samples with Luckett. The "[l]apse of time between the alleged misconduct and discharge, absent circumstances that would explain the delay, may tend to negate a causal relation between the misconduct and the discharge." *Redalen v. Farm Bureau Life Ins. Co*., 504 N.W.2d 237, 239 (Minn. App.1993). Although the Christmas break and Luckett's leave of absence may have postponed the discussion, Centerline scheduled a return-to-work physical examination without raising the issue of the samples and did not initially assert the diluted samples as a basis for discharge.

We conclude that the record does not support the ULJ's finding that the diluted drug samples were a basis for Luckett's discharge. Therefore, even if dilution of the samples constituted employment misconduct, that misconduct cannot disqualify Luckett from receiving unemployment benefits.

II. Nondisclosure of medical information for pre-hire physical examination

Luckett failed to disclose a February 2009 injury and subsequent treatment for that injury during her pre-hire DOT physical examination. But this injury was the reason Luckett gave Centerline for her January 2010 leave of absence, so Centerline knew about the undisclosed injury almost three months before terminating Luckett's employment. The ULJ nonetheless found that non-disclosure during the pre-hire examination constituted employment misconduct that was one of the bases for Luckett's discharge despite the fact that Centerline had scheduled a return-to-work physical examination for

Luckett and wanted to discuss Luckett's return to work with her before she left the March 9 voicemail. Luckett argues that her February 2009 injury was not material to her application for employment and that her omission of that fact was only a pretext for firing her for threatening to contact a lawyer on March 9.

In *Santillana v. Cent. Minn. Council on Aging*, this court discussed whether an employee engaged in employment misconduct when the employee provided inaccurate information during the hiring process, concluding that

> a material misrepresentation during the hiring process continues to fit within the statutory definition of employment misconduct. Intentionally misrepresenting a fact that is material to employment shows a substantial lack of concern for the employment. *See* Minn. Stat. § 268.095, subd. 6(a). A person making a material misrepresentation during the hiring process is therefore ineligible for unemployment benefits if he or she is later discharged because of the misrepresentation.

791 N.W.2d 303, 307 (Minn. App. 2010). But nonmaterial misrepresentations do not disqualify applicants from receiving unemployment benefits. *Indep. Sch. Dist. No. 709 v. Hansen*, 412 N.W.2d 320, 322–23 (Minn. App. 1987).

Whether a misrepresentation is material depends on whether "a truthful answer to the question would . . . have prevented [the applicant] from being hired." *Santillana*, 791 N.W.2d at 308 (quotation omitted). Here, Centerline did not assert and the ULJ did not find that a truthful answer would have precluded relator's employment. In *Heitman v. Cronstroms Mfg., Inc.*, this court remanded for findings regarding whether failure to disclose a back injury was material to a particular applicant's employment as a welder. 401 N.W.2d 425, 427–28 (Minn. App. 1987). The *Heitman* court noted that the issue

was not whether the employer had good cause to fire the employee for the misrepresentation, but whether the misrepresentation was material to the employment sought and thereby grounds for establishing employment misconduct and denying unemployment benefits under the statute. *Id*. at 428. Similarly in this case, Luckett's misrepresentation may have given good cause for termination of employment, but, without a determination that the misrepresentation was material to Luckett's employment, does not constitute employment misconduct. Because Luckett passed her pre-hire physical examination and Centerline was apparently willing to continue Luckett's employment after she passed her DOT return-to-work physical examinations following her leave-of-absence, a remand is not necessary. The record in this case would not support a determination that earlier knowledge of the injury would have precluded Luckett's employment. Because Luckett's nondisclosure was not material to her employment, it does not constitute employment misconduct that makes her ineligible for unemployment compensation benefits.

III. Nondisclosure of the traffic ticket

Centerline's employment application asked applicants to report "[t]raffic convictions and forfeitures for the past 5 years." Luckett's asserted reason for not disclosing the February 2009 traffic ticket was that she paid a fine and did not consider the ticket a "conviction." But she also provided inconsistent assertions about the ticket having been "thrown out." The ULJ found that Luckett deliberately misrepresented her driving record and that this misrepresentation constituted employment misconduct. But, as stated above, whether misrepresentation of facts during the application process

constitutes employment misconduct that later makes the applicant ineligible for unemployment benefits turns on whether the employer would have refused to offer the applicant employment had the applicant answered truthfully. *Santillana*, 791 N.W.2d at 308. In this case, the record shows that Centerline had knowledge, at least constructively, of the traffic ticket when it checked Luckett's driving record before it offered employment to Luckett. And Centerline personnel did not testify that the traffic ticket made Luckett ineligible for employment. The record, therefore, does not support a finding that a truthful answer would have prevented Luckett's employment. Luckett's misrepresentation was not a material misrepresentation that fits within the definition of employment misconduct.

Because neither of Luckett's misrepresentations constituted disqualifying employment misconduct, and the record does not support a finding that Luckett's discharge was based on the diluted urine samples, the ULJ erred in concluding that Luckett is ineligible for unemployment benefits.

Reversed.

SCHELLHAS, Judge (dissenting)

I respectfully dissent from the majority's decision to reverse the ULJ's decision. The majority concludes that Luckett's misrepresentations on her employment application and in her pre-employment physical examination were not material to her employment and therefore did not constitute employment misconduct because (1) Centerline had constructive knowledge of Luckett's traffic conviction when it hired her, and (2) "the record … would not support a determination that earlier knowledge of [her neck] injury would have precluded Luckett's employment." With respect to Luckett's diluted urine samples, the majority concludes that the record does not support the ULJ's finding that the diluted urine samples were a basis for Luckett's discharge. I disagree with the majority's conclusions.

The ULJ found that Centerline discharged Luckett from employment "due to the voicemail message on March 9, 2010, inaccuracies in her employment record, and two negative but diluted drug tests." The ULJ decided that Luckett engaged in employment misconduct with respect to the inaccuracies in her employment record and the two negative but diluted urine samples she provided. For the reasons set forth below, I would affirm the ULJ's decision.

Inaccuracies in Employment Record

In her application for employment as a school-bus driver, Luckett made misrepresentations by failing to disclose a traffic conviction. Luckett also made misrepresentations in her pre-employment physical examination by failing to disclose a neck injury, for which she was undergoing treatment at the time of her application.

Nondisclosure of Traffic Conviction

In her employment application, Luckett noted that she drove a school bus for Sunburst Transportation in Minneapolis from "2007 – Current." She also disclosed that she had a Class B Minnesota driver's license with an expiration date of September 4, 2009, with endorsements for "School Bus – Passenger." Luckett left blank the section of the application that called for a list of "Traffic convictions and forfeitures for the past 5 years (exclude parking violations)."

The majority notes that "Centerline checked Luckett's driving record on May 13, 2009" and hired Luckett in August 2009, "even though her driving record showed that she had received a speeding ticket in February 2009 that she did not disclose on her application." But when the ULJ asked Centerline's office manager, Teresa Fenne, when Centerline was "first aware of the speeding ticket," she responded:

> I believe when we had the negative dilute become an issue. . . . We started reviewing all of Ms. Luckett's file. One of the things we noticed was that some of her employers hadn't responded to employment verifications that we had mailed out to them. So we refaxed and mailed those out. Again at that time either a second or third time. By law we're required to have those in their file. When we got some of those back that's when we noticed that there were inconsistencies in her employment record . . . and, in finding those inconsistencies then we reviewed all of her file and found that there were many inconsistencies which raised a bunch of flags for us at that point.

And the ULJ again asked Fenne, "[S]o when was it that you were first aware of the speeding ticket," and she said, "December [20]09, January 2010." The ULJ then asked Fenne, "[C]an you explain to me why this one document we have then has the date of

May 13, it looks like she wasn't hired until August 13[?]," and she replied, "Yup, this would be when an employee comes in and fills out an application, the HR person runs this record on them and it gets put in their file." The ULJ then asked the obvious question, "[D]o you typically compare [the driving record] exhibit 11 with the application when you run it[?]," and Fenne replied, "I'm, that is not my area. I would say it is a consideration and the application is reviewing their motor vehicle record, yes."

During the first hearing before the ULJ, Luckett testified that the speeding ticket in question was thrown out, and the ULJ noted in her decision that "[t]he ticket was later thrown out." The ULJ summarized Luckett's testimony about why she did not list the speeding ticket on her application, as follows: "Luckett testified that she did not consider the ticket a conviction, and, therefore, did not list it on the application. Her explanation is persuasive. In addition, the ticket was later thrown out." But, after the second hearing, at which Centerline produced evidence that the speeding ticket had resulted in a traffic conviction, contrary to Luckett's testimony, the ULJ stated in her decision:

> [Luckett] failed to list a speeding ticket she received. The preponderance of the evidence shows Luckett was convicted of speeding in February 2009. Her testimony to explain the conviction on her record was concocted and not believable. As she had received a speeding ticket in February 2009, she should have included the ticket on her application. Her failure to do so was likely intentional, and at least negligent.

The majority concludes that because Centerline obtained Luckett's written driving record before it hired Luckett, it had constructive knowledge of her traffic conviction and "[t]he record, therefore, would not support a finding that a truthful answer would have prevented Luckett's employment and the misrepresentation was not a material

misrepresentation that fits within the definition of employment misconduct." The majority's conclusion implicitly embraces Luckett's argument that Centerline's reasons for her discharge were pretextual. Centerline's representatives testified about its reasons for terminating Luckett's employment, and the ULJ made credibility determinations based upon their testimony. I disagree with the majority's disregard of the ULJ's credibility determinations. *See Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (stating that reviewing court defers to ULJ's credibility determinations).

I also disagree with the majority's conclusion that because of Centerline's constructive knowledge of Luckett's traffic conviction, Luckett's "misrepresentation was not a material misrepresentation … within the definition of employment misconduct" reached without citation to legal authority. And I can find no legal authority that supports a conclusion that constructive knowledge by an employer diminishes or negates the materiality of an employee's misrepresentation.

I further disagree with the majority's conclusion because I believe that it contravenes long-standing law that supports the reasonableness of an employer's expectation that an employee will be honest in the hiring process and instead rewards Luckett's dishonesty. "Intentionally misrepresenting a fact that is material to employment shows a substantial lack of concern for the employment." *Santillana v. Cent. Minn. Council on Aging*, 791 N.W.2d 303, 307 (Minn. App. 2010). By hinging the materiality of an employee's misrepresentation on whether the *employer* knew or should have known about the misrepresentation, the majority disregards an employee's duty of honesty and shifts to the employer a burden to show that it neither knew nor should have

known about the misrepresentation. Such a burden may be relevant to an employer's liability for damage caused by the employee to a third party. *See Johnson v. Peterson*, 734 N.W.2d 275, 278 (Minn. App. 2007) (holding that "liability for intentional torts is imposed when the employer knows or should have known" of employee's violent or aggressive nature). But it is not relevant to a determination of employment misconduct for the purposes of unemployment-benefits eligibility.

In *Heitman v. Cronstroms Mfg.*, 401 N.W.2d 425, 428 (Minn. App. 1987), we held that in order for a misrepresentation on an employment application to constitute misconduct, the misrepresentation must be material to the position that is obtained. A misrepresentation is material if a truthful answer would necessarily have prevented the applicant from being hired. *Santillana*, 791 N.W.2d at 308. Here, Genevieve Rossow, an officer of Centerline, testified that Luckett's failure to "include the speeding ticket" in the section of her job application, which asked for traffic convictions and forfeitures for the past five years, is "extremely important" in a driving position. Fenne testified that "[Centerline] transport[s] children to and from school and it is our job to make sure the drivers are qualified and physically capable to do so." Further, the parents of the children its school buses transport and the school district it serves "expect us to do flawless work" when transporting their children every day, and "we have a high standard that we set to meet that expectation," of which Luckett was aware. In Rossow's closing statement, she stated that those at

> Centerline have the unique privilege and immense responsibility of safety and I wish to emphasize safely transporting children . . . to and from school . . . through all

> extremes of weather and road conditions. . . . We require the individuals at the wheel of our school buses to be knowledgeable, consistent, professional and fully aware of their important duties. Therefore, these characteristics are part of our school bus driver's job description.

Although the ULJ did not explicitly discuss the materiality of Luckett's nondisclosures to the position she sought, I would conclude as a matter of law that Luckett's traffic conviction is material to her position as a Centerline school-bus driver. The ULJ's decision, as supported by substantial evidence in the form of the Fenne's and Rossow's uncontradicted testimony, demonstrates that the omission of the information about the speeding ticket on Luckett's job application was material as a matter of law. The ULJ concluded that "[a]n employer has a right to expect that its employees will provide accurate information on their applications for employment," that "[t]he preponderance of the evidence shows Luckett was convicted of speeding in February 2009," and that Luckett failed to disclose the speeding ticket on her employment application. The ULJ concluded that these actions "displayed clearly a serious violation of the standards of behavior an employer has the right to reasonably expect of its employees." And I would further conclude that, as the ULJ found, an employee's misrepresentation about her driving record on an employment application for a position as a school-bus driver constitutes employment misconduct.

Nondisclosure of Neck Injury

In her pre-employment physical examination, Luckett failed to disclose a neck injury, for which she was undergoing treatment at the time of her employment application. The majority concludes that the record "would not support a determination

that earlier knowledge of the injury would have precluded Luckett's employment." But Luckett passed her pre-employment physical examination only after failing to disclose her neck injury to the treating physician and Centerline. The physician's clearance on fitness to drive was based, in part, on Luckett's misrepresentation that she had no injuries. Yet the record shows that at the time she applied for employment, Luckett was treating her neck injury. Centerline was not aware of Luckett's injury and treatment until January 2010.

Centerline's policy regarding employees' non-work related injuries that cause employees to be absent from work requires that they provide a statement from their own doctor that they can return to work driving a school bus and that Centerline's own physician must also ensure that they are qualified to return to work. Centerline's job is "to make sure the drivers are qualified and physically capable" of transporting children to and from school. In her closing statement, Rossow said that Luckett had failed to list "physical conditions on the preemployment medical exam report for commercial driving fitness." Luckett herself agreed that it was important to provide accurate medical information on the medical examination report, although she admittedly did not do so.

The ULJ stated in her decision:

> As for the injury to her neck, Luckett should have disclosed the injury on the medical documentation she completed. Her testimony that she had discussed the injury with the doctor who performed the physical is not credible. The employer has since provided the full medical form, indicating a different doctor performed Luckett's physical from the one she testified she had informed. The preponderance of the evidence shows Luckett failed to disclose her injury on the medical form, to the treating physician, and to the employer.

Again, although the ULJ did not explicitly discuss the materiality of Luckett's nondisclosure on her medical information form, the ULJ's decision demonstrates that she found the omitted disclosure to be material. As discussed above, the ULJ concluded that Luckett's conduct—the omission of the speeding ticket and the medical information—"displayed clearly a serious violation of the standards of behavior an employer has the right to reasonably expect of its employees." This is supported by substantial evidence in the record, based on the testimony by Fenne as well as testimony by Luckett herself, which shows that the omitted disclosure was material to the position. Contrary to the majority's conclusions, I would conclude that Luckett's misrepresentation about her neck injury, for which she was treating at the time of her application, was material as a matter of law, was based on substantial evidence in the record, and supports a determination in this case that earlier knowledge of Luckett's neck injury would have precluded her employment with Centerline.

Diluted Urine Samples

The ULJ also found that one of the bases for Luckett's discharge was her provision of diluted urine samples. The majority concludes "that the record does not support the ULJ's finding that the diluted urine samples were a basis for Luckett's discharge, therefore, even if dilution of the samples constituted employment misconduct, that misconduct cannot disqualify Luckett from receiving unemployment benefits." I disagree.

Centerline's policy required that Luckett provide a urine sample for drug and alcohol testing after she was involved in an accident. Luckett provided two diluted urine samples. Rossow testified that it was Centerline's policy to terminate an employee who provides a diluted urine sample and that Centerline

> would have terminated [Luckett] but after that there was a break at Christmas and so we were off at that time as was she and so we were prepared to bring her in after that and discuss that and then she was not able—did not return to work because of her personal injury.

The ULJ asked Rossow to identify the reasons for Luckett's discharge, and Rossow replied, "There were several reasons over a period of time." Rossow explained that one of the reasons was that "[Luckett] had a couple of drug tests that were diluted." Later, when the ULJ asked Fenne what Luckett was told about why she was being discharged, Fenne said, "Based on the last straw of events being the very rude and insubordinate voicemail that she left on Ms. Rossow's voicemail, together with all the other events leading up to that point." Additionally, the record contains a document entitled, "Chronological employment information," which Centerline submitted in its appeal from DEED's initial determination of eligibility. The document identifies, among other events, the dates of Luckett's two urine tests and notes that they were both diluted. The last entry, the date of Luckett's discharge, reads as follows:

> Terminated [Luckett] based on "Last Straw" of events, with the voicemail that was left on March 9, 2010 in a very rude and insubordinate manner being the last straw. As an employer we felt that [Luckett] did not show a conduct of behavior that we felt was professional and representative of our company.

The ULJ stated the following regarding Luckett's testimony about the diluted drug tests:

> [Luckett's] explanation for the diluted drug tests is also called into question. At the first evidentiary hearing she testified that she drank a lot of water in advance of the test in order to provide the sample needed for the test. As other testimony Luckett provided at the first evidentiary hearing has been shown to be false, it is not unreasonable to assume that her explanation for the diluted tests was also not credible.

The ULJ's finding that Luckett was discharged from employment because of the two diluted drug tests is supported by substantial evidence in the record. *See* Minn. Stat. § 268.105, subd. 7(d)(5) (2010) (stating that reviewing court considers whether findings are supported by "substantial evidence in view of the entire record"). Substantial evidence is "more than a scintilla of evidence." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Based on the record as a whole, I conclude that the ULJ's factual finding that the diluted drug tests were a basis for Luckett's discharge is supported by substantial evidence in the record. And I would affirm the ULJ's conclusion that Luckett's provision of the diluted drug tests constituted employment misconduct.

Conclusion

Unemployment benefits are for those who are "unemployed through no fault of their own." Minn. Stat. § 268.03, subd. 1 (2010). I would conclude that Luckett engaged in employment misconduct when she misrepresented her driving record in her in her employment application for the position of school-bus driver, when she misrepresented

her physical condition in her pre-employment physical examination, and when she provided two diluted urine samples.

I would affirm the ULJ's decision that Luckett was discharged for employment misconduct and is therefore ineligible for unemployment benefits.