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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1655**

Kari A. Overby,
Relator,

vs.

Halla Nursery, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 23, 2012
Affirmed
Peterson, Judge**

Department of Employment and Economic Development
File No. 26516717-3

Kari A. Overby, Chanhassen, Minnesota (pro se relator)

Halla Nursery, Inc., Chaska, Minnesota (respondent employer)

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

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

This appeal is from a decision of an unemployment-law judge that relator is ineligible for unemployment benefits because she was discharged for employment misconduct. We affirm.

FACTS

Relator Kari Overby worked for respondent Halla Nursery Inc. (Halla Nursery) from March 1992 through November 2010, when she was discharged by Halla Nursery's chief executive officer, Don Halla (Halla). In 2009, Halla contacted police and reported that relator stole \$38,000 from a company credit-card account. Relator was charged with theft by check, but the district court dismissed the charge for lack of probable cause. Before Halla discharged relator, Halla's wife died, and Halla and his stepchildren were involved in a will contest. According to relator, Halla's stepdaughter contacted her at work and made "some very serious accusations against [Halla]" regarding the distribution of the wife's estate. A few months later, while looking for a letter in another employee's computer, relator found a document in a sub-file labeled "Don's documents" that appeared to be random pages of the wife's will. Relator believed that the document "was very important to [the stepchildren's] case" and "[made] the stepchildren aware that this document existed." One of the stepchildren came to the business and "took the document off [of the computer] and brought it to their attorney." Relator knew that the stepchild had taken the document, but she did not inform Halla because "[she] knew he'd be very

angry.” Several weeks later, relator voluntarily testified at the will-contest trial about how she found the document. The following Monday, Halla discharged relator.

Relator applied for unemployment benefits, and respondent Department of Employment and Economic Development (DEED) determined that relator was eligible for benefits. In determining relator’s eligibility, DEED initially noted “[t]he applicant claimed to have been fired for testifying at a hearing pertaining to a family matter.” Halla Nursery appealed, but, at first, DEED did not recognize that the document received from Halla Nursery was an appeal. Approximately six months later, DEED sent a notice of appeal to relator and Halla Nursery that stated that a hearing before an unemployment-law judge (ULJ) was scheduled. Relator and Halla appeared at the hearing and agreed that relator had been discharged.

With regard to the incident involving the credit-card account, the ULJ concluded that there was not “a sufficient basis in the evidence to support a finding of aggravated employment misconduct based upon theft.” With regard to disclosing the document in the company computer to Halla’s stepchildren, the ULJ found that

[relator’s] discharge was triggered by her accessing her employer’s personal file, without permission or authorization . . . and then disclosing the information obtained from this covert activity, which she either knew or assumed would be harmful to Halla’s interests, to his stepchildren. Moreover, it is clear that [relator] agreed to testify willingly and without need of a subpoena regarding what she had discovered without permission [Relator’s] actions were a clear breach of loyalty owed her employer . . . and constitute a serious violation of standards of behavior which an employer would have a right to reasonably expect from its employee.

The ULJ determined that relator was ineligible to receive unemployment benefits and that she had been overpaid benefits in the amount of \$9,607. Relator requested reconsideration, and the ULJ affirmed. This certiorari appeal followed.

D E C I S I O N

This court reviews a ULJ's decision to determine whether the petitioner's substantial rights may have been prejudiced because the ULJ's findings, inferences, conclusion, or decision are affected by an error of law or unsupported by substantial evidence in view of the record as a whole. Minn. Stat. § 268.105, subd. 7(d) (2010). Substantial evidence means "(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 Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). This court views factual findings in the light most favorable to the decision and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

"Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). "Whether the employee committed a particular act is a question of fact." *Brisson v. City of Hewitt*, 789 N.W.2d 694, 696 (Minn. App. 2010) (quotation omitted). "Determining whether a particular act constitutes disqualifying misconduct is a question of law that we review de novo." *Stagg*, 796 N.W.2d at 315.

I.

Relator challenges the ULJ's finding that her actions in discovering the will document were "covert" and that she accessed the computer or the sub-file labeled "Don's documents" without permission. Both parties agreed that the will document was not on Halla's personal computer. Halla characterized relator's actions as "stealing records from the company's computer" and twice characterized the will document as a "company record." Halla stated that relator has unquestionable access to such records. Relator testified that she discovered the will document while searching for an unrelated letter that Halla asked her to find and that the likely location of that letter was in the file labeled "Don's documents." Halla did not contradict relator's testimony. Rather, Halla testified that relator had access to the records but "[s]he didn't have the right though to take records without discussing it with me and giving it to a third party." Based on the parties' testimony, there is not substantial evidence that supports the ULJ's finding that relator accessed a personal file of her employer's without permission or authorization.

But it is undisputed that the will document was in a company computer, relator discovered the document because she was an employee of the company, and relator disclosed the document to the stepchildren without permission or authorization to do so. "[E]mployees owe a duty of loyalty to their employers," and violation of that duty is employment misconduct. *Marn v. Fairview Pharmacy Servs. LLC*, 756 N.W.2d 117, 121-22 (Minn. App. 2008). *review denied* (Minn. Dec. 16, 2008). The content of the document might not have been related to the employer's business, but an employer has a reasonable expectation that an employee who discovers a document within a company

filing system will not disclose or discuss the document with a non-employee without having authorization or permission to do so. Although relator's discovery of the document was not covert, disclosing the document was a serious violation of the standard of behavior the employer had the right to reasonably expect of relator. Accordingly, the ULJ did not err in concluding that relator committed employment misconduct and is ineligible for employment benefits.

II.

A ULJ is to conduct the evidentiary hearing as an evidence-gathering inquiry and must ensure that all relevant facts are fully developed. Minn. Stat. § 268.105, subd. 1(b) (2010). The ULJ “must exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing.” Minn. R. 3310.2921 (2011). The ULJ has an obligation to interpret the parties’ claims, especially when one of the parties appears pro se. *Miller v. Int’l Express Corp.*, 495 N.W.2d 616, 618 (Minn. App. 1993).

Relator argues that the hearing was unfair because the ULJ (1) allowed Halla to make a lengthy closing statement, but rushed her through her closing statement; (2) allowed Halla to testify at length about the use of the company credit card, which allowed little time to address the real issue; and (3) admitted he had not had time to go through the documents that relator submitted.

1. The record reflects that Halla made a substantially longer closing statement than relator. Toward the end of Halla’s statement and before relator began her closing statement, the ULJ said, “You know I’m ten minutes into my next hearing.” After relator finished just a few sentences of a closing statement, the ULJ said “I’m gonna close the

record.” The record, however, does not demonstrate that the ULJ disregarded relator’s closing statement. And while it is true that relator did not indicate that she had finished her statement, she also did not indicate that she had not finished, and she has not identified any information that she was not permitted to present to the ULJ. Because relator was afforded an opportunity to give a closing statement and the record does not reflect that the ULJ disregarded her statement, relator’s right to a fair hearing was protected.

2. The record demonstrates that both parties testified about relator’s use of the company credit card. Relator’s use of the credit card was one of the reasons Halla gave for discharging relator. The ULJ analyzed the evidence regarding relator’s use of the credit card and concluded that it did not support a finding of aggravated employment misconduct. Because relator’s use of the credit card was an issue at the hearing, it was not improper for the ULJ to receive evidence about the issue. Furthermore, we assume that relator’s reference to “the real issue” means the will-document issue. Relator’s argument fails to recognize that because both the use of the credit card and the disclosure of the will document were identified as reasons for discharging relator, both were real issues to be addressed during the hearing before the ULJ.

3. During Halla’s testimony about relator’s use of the credit card, the ULJ stated:

Now in that regard I do have some information, I’m assuming [relator] submitted and there’s a court order [from the] First Judicial District. You know I’ll be honest I didn’t have a chance to look at any of this stuff. That’s why I was

late. I pulled it off our printer so that I would have it but this looks like, conclusions of law and order.

The record does not reflect that the court order or any of the “stuff” submitted with it were received into evidence. The ULJ’s statement and the fact that the documents were not discussed or received into evidence, indicate that the ULJ’s duty to conduct the hearing as an “evidence-gathering” inquiry was compromised. But it also appears that the documents that were not received were relevant to the credit-card issue. The ULJ determined that relator’s use of the credit card did not support a finding of aggravated employment misconduct, and relator has not explained how she was prejudiced by the failure to admit evidence that is relevant to an issue on which she prevailed. Consequently, relator has not shown that failing to admit and consider this evidence made the hearing unfair to her.

Finally, relator objects to DEED’s failure to inform her that an appeal had been filed until six months after the employer filed a notice of appeal. The hearing was held approximately seven months after relator was determined to be eligible for benefits, and during that time, relator received \$9,607 in benefits, which now must be repaid. Although DEED’s oversight has put relator in this difficult position, the applicable statute states:

Upon a timely appeal having been filed, the department must send, by mail or electronic transmission, a notice of appeal to all involved parties that an appeal has been filed, and that a de novo due process evidentiary hearing will be scheduled. The notice must set out the parties’ rights and responsibilities regarding the hearing. The notice must explain that the facts will be determined by the unemployment law judge based upon a preponderance of the evidence. The notice must

explain in clear and simple language the meaning of the term “preponderance of the evidence.” The department must set a time and place for a de novo due process evidentiary hearing and send notice to any involved applicant and any involved employer, by mail or electronic transmission, not less than ten calendar days before the date of the hearing.

Minn. Stat. § 268.105, subd. 1(a) (2010). Because the plain language of the statute does not specify a period within which DEED must notify parties that an appeal has been filed, this court cannot grant relator any relief based on the timing of DEED’s notice to relator.

Affirmed.