STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1891

Shalonda Baker,
Relator,

vs.

Divine Healthcare Corporation,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 9, 2012
Reversed
Connolly, Judge

Department of Employment and Economic Development
File No. 27811055

Benjamin L. Weiss, Southern Minnesota Regional Legal Services, Inc., St. Paul, Minnesota (for relator)

Divine Healthcare Corporation, St. Paul, Minnesota (respondent)

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

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Huspeni, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CONNOLLY, Judge

In this certiorari appeal, relator challenges the decision of the unemployment-law judge (ULJ) that she was ineligible for unemployment benefits because she had worked unauthorized overtime and was not willing to have a civil conversation about it. Because the ULJ erred as a matter of law in determining that relator engaged in employment misconduct, we reverse.

FACTS

Relator Shalonda Baker worked as a Personal Care Attendant (PCA) for respondent-employer Divine Healthcare Corporation (DHC) from January 2010 until she was fired on April 12, 2011. PCAs assist vulnerable adults with daily activities such as grooming, dressing, bathing, mobility, eating, and toileting. *See* Minn. Stat. § 626.5572, subd. 21(a)(3) (2010) (defining recipients of PCA services as vulnerable adults); Minn. Stat. § 256B.0659, subds. 1(b), 4(b)(1) (2010) (describing services provided by PCA program). PCAs must be employed by a provider agency. Minn. Stat. § 256B.0659, subd. 11(a)(2) (2010). The provider agency is required to "employ or contract with a personal care assistant that a qualified recipient brings to the [provider agency] as the recipient's choice of assistant and who meets the employment qualifications of the provider." Minn. R. 9505.0335, subp. 6C. Pursuant to this rule, relator was brought to DHC as the chosen PCA for a client, Henry, who lives with relator and is the father of her children. DHC also assigned relator to work with another client, Rosela.

During relator's time working at DHC, Rosela's authorized PCA hours increased from four to ten hours per day, while Henry's authorized PCA hours increased from 1.75 hours to 4.25 hours per day. By the spring of 2011, relator was scheduled to work 29.75 hours per week with Henry and more than 40 hours per week with Rosela, totaling more than 69 scheduled hours per week. As a result, during the spring of 2011, relator worked 48 regular hours per week (96 hours per pay period) and anywhere between 21.50 to 53.50 hours of overtime during her two-week pay periods. Despite being scheduled to work over 69 hours per week in the spring of 2011, relator was only authorized by DHC to work 58.75 hours per week—48 hours of regular time and 10.75 hours of overtime.

In October 2010, the Minnesota Department of Labor (DOL) cited DHC for failure to pay earned overtime, resulting in payment of more than $10,000 in back pay for overtime to 24 employees, including relator. At the hearing, a DHC representative testified that its policy was to tell the PCA "the particular hours they are going to work, and if they have to work overtime they have to get permission from the office to get it authorized before they can do it."

DHC was responsible for making relator's schedule. On occasion, DHC authorized relator to work additional overtime, but many of relator's additional overtime hours were not officially approved by DHC. According to DHC, it spoke with relator about working unauthorized overtime hours, meeting with her on February 23, March 3, March 22, and March 29, 2011 to discuss the issue. Relator's April 2011 schedule indicates that she was scheduled to work 343.50 hours. A note at the bottom of the

schedule states, "Need to give up 68.5 hours to be within 275 hours but we will (sic) like you to do 96 hours/pay period to avoid overtime."

DHC asked relator to give up some of her hours with Henry. But relator testified that she informed DHC that Henry's cognitive impairments made it difficult for him to recognize individuals outside of the family and that he may refuse to allow other PCAs into the home. Relator arranged for her son to take over some of Henry's PCA hours, but her son was unable to continue because he became incarcerated. DHC admitted that Henry had the right to choose his PCA.

DHC also admitted that it had the responsibility to make sure that Rosela's PCA hours were covered and had the authority to decide who worked what hours. DHC admitted that it knew relator was working a large number of emergency shifts for Rosela, resulting in additional overtime hours, either because DHC could not find anyone else to cover those hours or because the scheduled PCA did not show up.

Rosela often called relator directly when her scheduled PCA did not show up. For example, Rosela once called relator at 10 p.m. because her evening PCA never came. When relator arrived, Rosela was still wearing the diaper relator had left her in at 1 p.m. Sometimes DHC would authorize relator to work these emergency shifts, but DHC representatives testified that they often did not know relator had taken an emergency shift until after the fact. Relator testified that when she received an emergency call from Rosela, she would repeatedly call DHC's after-hours phone line and leave messages if the scheduler did not answer. DHC representatives did not testify that this procedure was

improper or that relator had been warned against taking emergency after-hours shifts without express approval.

On April 11, 2011, relator was told by a DHC staff member that she would not be paid for the overtime hours she had worked. That same day, relator called the DOL and filed a complaint. Relator testified that she told DHC's scheduler that she had reported DHC. The following day, April 12, relator met with DHC's nursing director to discuss overtime hours. The parties dispute when this meeting was scheduled. Relator testified that the meeting was scheduled on the same day, while DHC testified that the meeting had been scheduled several days in advance. The parties agree that at the meeting, the nursing director became upset and accused relator of recording the conversation with her cellphone. Relator and the nursing director began to yell and argue. At one point, relator said she was quitting and would take her client with her, but the nursing director told relator that she was fired. At the hearing, the parties agreed that relator was fired.

Relator filed for unemployment benefits, and was initially determined to be ineligible for benefits because respondent Department of Employment and Economic Development (DEED) determined that she had quit her employment. Relator appealed the quit determination and a ULJ conducted a telephone evidentiary hearing. The ULJ determined that relator was ineligible for unemployment benefits because she was discharged for misconduct. The ULJ determined that, given its financial interest in minimizing employee overtime, DHC "more likely than not . . . was making reasonable attempts to control the amount of overtime [relator] worked and communicating its expectations to [relator]." The ULJ noted that, "[d]espite [DHC's] efforts, [relator]

continued to work overtime," and that, while some overtime hours were authorized, many were not. The ULJ concluded that relator engaged in employment misconduct, finding:

> [Relator's] continued failure to adhere to DHC's overtime policy and failure to make reasonable efforts to ensure she had authorization for all of her overtime, along with her unwillingness to have a civil conversation with [the nursing director] about this, displayed a serious violation of the standards of behavior DHC had a right to reasonably expect.

Relator filed a request for reconsideration. The ULJ affirmed the denial of benefits, concluding again that "it is more likely than not that [DHC] was attempting to rein in [relator's] overtime and [relator] continued to work unauthorized overtime." This certiorari appeal follows.

D E C I S I O N

As a threshold matter, relator argues that in an unemployment-benefits case, the employer has the burden of proof to show that the employee engaged in behavior amounting to employment misconduct. Because we conclude that relator did not commit employment misconduct regardless of whether or not the employer has the burden of proof, we decline to address this issue.

Relator challenges the decision of the ULJ that she was ineligible for unemployment benefits because she engaged in employment misconduct by working unauthorized overtime and being unwilling to have a civil conversation about it, arguing that the decision is not supported by substantial evidence in view of the entire record.

This court may reverse or modify a decision of a ULJ if the "substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or

decision are . . . unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5) (2010). Findings are viewed in the light most favorable to the decision, and if substantially sustained by the evidence, will not be reversed. *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). This court defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But "[w]hen the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the [ULJ] must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2010).

An employee discharged for employment misconduct is disqualified from receiving unemployment compensation benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct is "any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a) (2010). The question of whether an employee engaged in employment misconduct is a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). "Whether the employee committed a particular act is a question of fact," which this court will not disturb if substantially supported by the evidence. *Skarhus*, 721 N.W.2d at 344. Whether that act constitutes employment misconduct is a question of law subject to de novo review. *Stagg*, 796 N.W.2d at 315.

The ULJ erred in concluding that relator engaged in employment misconduct because: (1) her conduct did not violate the standard of behavior her employer had the right to reasonably expect; (2) the employer's policy regarding how overtime hours were scheduled was not reasonable; and (3) the argument between relator and her supervisor was not misconduct.

I. Relator did not violate standards of behavior that DHC had a right to reasonably expect

The issue in an employment misconduct case is whether the conduct in question displays clearly "a serious violation of the standards of behavior *the employer* has the right to reasonably expect of *the employee*." Minn. Stat. § 268.095, subd. 6(a)(1) (emphasis added). The standards of behavior an employer has the right to reasonably expect of the employee will vary with the circumstances of each particular case. At the hearing, DHC repeatedly claimed that it had requested relator to reduce her number of hours working with Henry, the live-in father of relator's children. Relator provided undisputed testimony that Henry's particular condition made the use of a PCA outside of the family difficult. Relator also provided uncontroverted testimony that she gave up some of Henry's PCA hours to her son until her son became incarcerated. DHC did not deny that it was aware of relator's son's incarceration or that Henry had a legal right to the PCA of his choice. *See* Minn. Stat. § 256B.0659, subd. 21(a)(14) (requiring that provider agencies "not burden recipients' free exercise of their right to choose service providers . . . ."). Because relator was brought to DHC as Henry's chosen PCA pursuant

to state law, the employer did not have a right to reasonably expect relator to give up her hours with Henry.

DHC also did not have a right to reasonably expect that relator would not work unauthorized overtime hours because DHC controlled her schedule, made no effort to reduce relator's PCA hours with Rosela, and did nothing to address Rosela's repeated need for emergency PCA services.

Tellingly, at the hearing, DHC's representatives did not testify that they had asked relator to give up hours with Rosela. Instead, they testified that they had difficulty finding reliable PCAs to work for Rosela. It is undisputed that DHC was in charge of scheduling Rosela's PCA hours. DHC presented no evidence as to why it did not reassign some of relator's PCA hours with Rosela to another PCA, other than vague and unsupported comments that relator "intimidated" other PCAs who worked with Rosela.

DHC representatives testified that they were aware that relator often worked emergency shifts for Rosela. DHC claimed that relator did not follow proper procedure and obtain authorization for these hours. However, relator provided testimony that she called the after-hours number provided by DHC to report her hours and that, if she was unable to reach someone directly, she would leave a message. DHC did not testify that this procedure was improper or that it had given relator alternative instructions on how to deal with emergency calls from Rosela. As a "caregiver" under Minn. Stat. § 626.5572, subd. 4, relator could have subjected herself and her employer to charges of neglect by refusing to supply Rosela with care or services. *See* Minn. Stat. § 626.5572, subd. 17 (defining "neglect" as a "failure or omission by a caregiver to supply a vulnerable adult

with care or services" and stating that a finding of neglect will subject the provider to a correction order). Moreover, to the extent that relator should have employed some other means of ensuring Rosela's care, relator's decision to care for a vulnerable adult in an emergency situation would qualify as an exception to employment misconduct as either a "good faith error[] in judgment" or "conduct an average reasonable employee would have engaged in under the circumstances." Minn. Stat. § 268.095, subds. 6(b)(4), (6) (2010).

II. DHC's overtime policy was not reasonable

"An employer has a right to expect its employees to follow reasonable instructions and directions." *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004). Thus, an employee's "knowing violation of an employer's policies, rules, or reasonable requests constitutes misconduct." *Montgomery v. F&M Marquette Nat'l Bank*, 384 N.W.2d 602, 604 (Minn. App. 1986), *review denied* (Minn. June 13, 1986); *see also Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002) (holding that employee's refusal to abide by employer's reasonable policy constituted employment misconduct); *Bibeau v. Resistance Tech., Inc.*, 411 N.W.2d 29, 32 (Minn. App. 1987) (upholding decision that employee who deliberately chose to disobey her employer's instructions committed employment misconduct). A conclusion that relator's failure to obtain advance approval for unauthorized overtime hours constitutes misconduct therefore requires a determination that the policy is reasonable. Strict enforcement of DHC's policy essentially requires its employees, whose responsibility it is to ensure that his or her vulnerable adult client is provided with necessary care, to knowingly and intentionally withhold such care in the absence of any indication that the care will

otherwise be provided by the employer. DEED fails to advance any argument that such a policy is reasonable. In the absence of any basis to conclude the policy is reasonable, we conclude that relator's failure to comply with the policy is not employment misconduct.

III. Relator's argument with her supervisor was not misconduct

The ULJ made a legal error in concluding that relator engaged in employment misconduct because she was "unwilling[] to have a civil conversation" with the nursing director about her unauthorized overtime hours. The only finding that the ULJ made about relator's conduct at the meeting was that the nursing director began speaking to relator about relator's overtime hours, then noticed that relator appeared to be recording the conversation, and confronted relator. They then "began to argue and yell. . . . [Relator] was then discharged."

Respondent has cited no caselaw in support of the position that getting into an argument with an employer, without more, constitutes misconduct. *See, e.g.*, *Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 876 (Minn. App. 2011) (finding misconduct where employee was not only angry with coworker, but poked him in the ribs as well). Instead, DEED argues that relator's repeated disregard for DHC's instructions not to work overtime without authorization, "in conjunction with her refusal to discuss the employer's concerns" constituted misconduct. *See Flannigan v. Meadow Lane Health Care Ctr.*, 347 N.W.2d 852, 853-54 (Minn. App. 1984) (finding that employee's refusal to continue discussing vague complaints of her coworkers was not misconduct, but noting that "refusal to discuss an employer's complaints, if coupled with a clear progression of conduct evincing disregard for the job, may constitute misconduct . . . ."). However,

there is no evidence in the record that relator refused to discuss her overtime hours with the nursing director at the meeting. Instead, the record shows that relator and the nursing director argued over whether relator was recording the conversation. Because the record does not support the conclusion that relator was terminated for refusing to discuss her employer's complaints, the ULJ erred in concluding that relator committed employment misconduct by arguing with her employer at the termination meeting. Moreover, at oral argument, DEED conceded that relator's behavior at the termination meeting on its own would not support a finding of misconduct.

Reversed.