STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1899

Mary Lou Locks,
Relator,

vs.

Volunteers of America of Minnesota, Corp.,
Respondent,
Department of Employment and Economic Development,
Respondent.

Filed September 17, 2012
Affirmed; motion denied
Rodenberg, Judge

Department of Employment and Economic Development
File No. 28126891-3

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Considered and decided by Rodenberg, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

RODENBERG, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that she is ineligible for unemployment benefits because she was discharged for employment misconduct. Relator argues that (1) she did not engage in misconduct because she acted reasonably under the circumstances or because her conduct was the result of inability and a good-faith error in judgment and (2) the ULJ failed to fully develop the record because a subsequent investigation by the Minnesota Department of Human Services (DHS) concluded that relator acted reasonably. Relator moved to remand the matter for consideration of a DHS report because the report amounts to new evidence that should be considered by the ULJ in a new evidentiary hearing. We deny the motion and affirm.

FACTS

Respondent-employer Volunteers of America of Minnesota Corp. (Volunteers of America) is a nonprofit corporation. Among other activities, Volunteers of America operates adult foster-care homes for developmentally disabled adults. Relator Mary Lou Locks was employed at one of these homes as a direct support professional.

On July 16, 2011, relator reported as scheduled to begin work at an adult foster-care home at 8:00 a.m. Relator was the only employee scheduled to work at the home until 12:00 p.m.

When relator arrived at the home, she was informed by the night-shift employee that E.F., one of the residents, had been uncooperative during the night but was now lying quietly on the floor of his room. When relator went to investigate some fifteen minutes

later, she found E.F. lying naked on the floor surrounded by some liquid. E.F. was unable or unwilling to stand up and was too heavy for one person to lift without assistance.

At the hearing before the ULJ, relator claimed the liquid on the floor was water, not urine, and that E.F. was not wet when she found him. However, L.Z., another employee who arrived on the scene later that morning, reported in a written statement that relator had initially informed L.Z. that there was urine on the floor. L.Z. also reported that when she arrived on the scene, she observed that E.F. was wet with urine. In the "Critical Incident Report" relator drafted following this occurrence, relator stated that she found E.F. "laying on a wet bedroom floor."

Relator tried to engage E.F. in conversation to determine whether he was alright, but E.F. only mumbled and relator could not understand him. Relator decided that E.F. was behaving in a manner consistent with his usual behavior, which included a tendency to lie down on the floor until the staff lifted him up. Relator testified that at this same time the three other residents of the adult foster-care home were waking up and were very agitated, and that relator did not have enough time to both address E.F.'s situation and tend to the other residents.

Relator left E.F. where he was and did not clean up the liquid. Relator testified that she returned regularly to check on E.F.

Relator attempted to call the night-shift employee by telephone at around 8:30 a.m. to ask her to return and assist relator to lift E.F. However, relator was unable to reach the night-shift employee. Relator then called another adult foster-care home

operated by Volunteers of America, and asked whether a particular male employee, whom relator knew was strong enough to lift E.F., was present. L.Z., the employee working at the other home, stated that the male employee was not scheduled to begin work until 12:00 p.m. Relator briefly explained the situation to L.Z. and asked her to relay a message to the male employee once he arrived.

In her written statement, L.Z. reported that at around 9:40 a.m. she called relator to determine if the situation had changed. L.Z. informed relator that two of the residents in L.Z.'s foster-care home had been picked up for home visits, and L.Z. offered to go to relator's location with the two remaining residents to assist relator with E.F.

L.Z. arrived with her clients at relator's location at 10:00 a.m. and spent ten minutes reviewing and familiarizing herself with E.F.'s file. L.Z. reported that the atmosphere in the house on her arrival was very calm. Relator and L.Z. then went into E.F.'s room, which L.Z. reported smelled of urine. L.Z. moved E.F.'s bed in order to get into a position where she could assess his situation. L.Z. observed a large, fresh bruise on E.F.'s right hip and buttock. L.Z. asked relator about the bruise and relator did not know anything about it.

L.Z. reported that she and relator attempted to roll E.F. over to help him stand up, but that they stopped when E.F. made noises indicating pain. L.Z. again reviewed E.F.'s file and attempted to contact the night-shift employee and another, unnamed employee in order to learn more about the bruise. When no further information was obtained, L.Z. and relator again attempted to move E.F., and he again made pained noises.

Suspecting that E.F. might have a hip fracture, L.Z. contacted a supervisor to discuss the situation and then called for an ambulance. Relator accompanied E.F. to the hospital in the ambulance, while L.Z. remained behind and continued to make phone calls, notifying superiors of the situation and calling other employees to secure additional staffing coverage.

Volunteers of America terminated relator's employment due to her mishandling of the July 16, 2011 incident. Respondent Minnesota Department of Employment and Economic Development (DEED) determined that relator was not eligible for unemployment benefits by reason of misconduct. Relator appealed the determination of ineligibility, and the matter came on for a telephone hearing before a ULJ, who determined that relator had been terminated for employment misconduct and was therefore not eligible for unemployment benefits.

Relator's testimony at the hearing differed from L.Z.'s account in several respects. First, relator disputed that the liquid on the floor was urine or that she had informed L.Z. that the liquid was urine. Second, in relator's account, the bruise on E.F.'s hip was only discovered *after* relator and L.Z. rolled E.F. onto his side, rather than being visible before relator and L.Z. rolled him over. Finally, relator disputed the timeline provided by L.Z. and disputed that E.F. had remained on the floor as long as L.Z. claimed. However, relator was not able to offer her own timeline of the events.

While relator did not dispute that the atmosphere at the house was calm when L.Z. arrived, relator testified that she had worked very hard to calm the other three residents and that L.Z. had not been present to witness the earlier tumult.

The ULJ found L.Z.'s written accounts of the events more credible than relator's testimony. The ULJ found that L.Z. had no reason to provide a false statement, and that L.Z.'s statement was more "certain" than relator's testimony. The ULJ concluded that relator had failed to respond to the situation with an appropriate sense of urgency and that relator had left E.F. lying naked on the floor in his own urine for a period of two hours. The ULJ held that Volunteers of America had terminated relator for employment misconduct.

The ULJ affirmed his decision following relator's request for reconsideration. Relator petitioned this court for a writ of certiorari, which this court issued.

Subsequent to the filing of relator's petition for a writ of certiorari, DHS issued a report based on its investigation into the events of July 16, 2011, and determined that Volunteers of America had not subjected E.F. to neglect within the meaning of Minn. Stat. §§ 626.557, subd. 9c(b), .5572, subds. 15, 17(a) (2010). Relator subsequently brought a motion asking this court to remand this matter to the ULJ so that he could consider the DHS report.

D E C I S I O N

I.

Relator first argues that the record does not support the ULJ's finding that she committed employment misconduct.

A. Standard of review

Whether an employee committed misconduct sufficient to disqualify her from receipt of unemployment benefits is a mixed question of fact and law. *Stagg v. Vintage*

Place Inc., 796 N.W.2d 312, 315 (Minn. 2011). "Whether [an] employee committed a particular act is a question of fact." *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). However, "[d]etermining whether a particular act constitutes disqualifying misconduct is a question of law." *Stagg*, 796 N.W.2d at 315.

When reviewing the decision of a ULJ, questions of law are subject to de novo review. *Id.* However, this court may reverse or modify the ULJ's factual findings if they are "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5) (2010). "Substantial evidence" is defined as "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; and 5. Evidence considered in its entirety." *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984) (addressing the standard of review for administrative agency decisions); *see also* Minn. Stat. §§ 14.69 (establishing the standards of review for administrative agency actions, and containing language that is virtually identical to that in section 268.105, subd. 7(d)), 645.17(4) ("When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.") (2010).

This court must defer to the ULJ's credibility determinations if they are supported by substantial evidence. *Compare Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006) (stating that credibility determinations are "the exclusive province of

the ULJ and will not be disturbed on appeal"), *with Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (stating that the ULJ's credibility determination will be upheld if supported by substantial evidence) (citing *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532–33 (Minn. App. 2007) (upholding a ULJ's credibility determination after subjecting it to substantial-evidence review)). However, the ULJ is required to "set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2010).

B. Definition of unemployment misconduct

The definition of employment misconduct appears in Minn. Stat. § 268.095, subd. 6 (2010), which reads as follows:

> Subd. 6. **Employment misconduct defined**.
> (a) Employment misconduct means 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.
>
> (b) Regardless of paragraph (a), the following is not employment misconduct: . . .
> (5) conduct that was a consequence of the applicant's inability or incapacity;
> (6) good faith errors in judgment if judgment was required;
>
> . . . .
>
> (e) *The definition of employment misconduct provided by this subdivision is exclusive and no other definition applies.*

(Emphasis added.)

Respondent DEED correctly observes in its brief that the definition of misconduct advanced by relator in her brief is no longer good law. *Ress v. Abbott Nw. Hospital, Inc.*, 448 N.W.2d 519 (Minn. 1989), on which relator relies to argue that misconduct needs to be "deliberate," was decided under the definition of misconduct announced in *Tilseth v. Midwest Lumber Co.*, 295 Minn. 372, 374–75, 204 N.W.2d 644, 646 (1973). *See Ress*, 448 N.W.2d at 523–24 (noting that "[t]he statute does not define 'misconduct'" and quoting the definition from *Tilseth*). However, the *Tilseth* definition was superseded by statute in 1997 when the legislature defined employment misconduct. *Houston v. Int'l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002). *Tilseth*-grounded cases "remain instructive as to the areas in which the *Tilseth* and [current] statutory definitions overlap." *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 823 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010). However, the intent requirements in *Tilseth* and Minn. Stat. § 268.095, subd. 6(a), do not overlap because *Tilseth* requires conduct that is "willful," "wanton," or "deliberate" and the statute requires only conduct that is "intentional, negligent, or indifferent." Minn. Stat. § 268.095, subd. 6; *Tilseth*, 295 Minn. at 374–75, 204 N.W.2d at 646.

C. Substantial evidence supports the ULJ's findings of fact

The ULJ was presented with conflicting evidence on whether the liquid on the floor around E.F. was urine or water. The ULJ determined that L.Z.'s written statement asserting that the liquid was urine was more credible than relator's assertion that it was water. The ULJ based this finding on his determination that L.Z. had no reason to fabricate the story, and on relator's testimony that relator had initially believed the liquid

to be urine and had only decided after later reflection that the liquid had been water. The ULJ set out the reasons for his credibility determination, as required by Minn. Stat. § 268.105, subd. 1(c), and the ULJ's factual finding that the liquid was urine is supported by substantial evidence. This court thus defers to his finding that E.F. was lying in urine.

The ULJ was also presented with conflicting evidence on whether the adult foster-care home was short-staffed the morning of July 16, 2011, so as to render relator unable to respond with appropriate urgency to E.F.'s situation. Relator insisted that the home was short-staffed because no second employee was scheduled to arrive until 12:00 p.m. However, the ULJ found that this assertion was undermined by the fact that the events had occurred before 10:00 a.m., the regular start time for a second employee, and by the fact that despite relator's protests to the contrary, none of the care plans for the residents required one-to-one attention. The ULJ set out the reasons for his credibility determination, as required by Minn. Stat. § 268.105, subd. 1(c), and the ULJ's factual finding is supported by substantial evidence. This court thus defers to his finding that the home was not short-staffed.

Based on these two facts, substantial evidence supports the ULJ's conclusion that relator's "failure to either clean [E.F.] or make urgent attempts to find help for [E.F.] meant that he was left with an untreated medical condition and that he was left in a position that stripped him of basic human dignity." These facts support the ULJ's legal conclusion that relator's intentional, negligent, or indifferent conduct displayed a serious violation of the standards of behavior that Volunteers of America had the right to

reasonably expect from relator. Therefore, the ULJ's determination that relator was discharged due to employment misconduct was not erroneous.

D. Exceptions relied on by relator do not apply

Relator argues that even if her conduct violated Minn. Stat. § 268.095, subd. 6(a), it falls within one of two exceptions to the provision.

Relator first argues that because she was physically incapable of lifting E.F. to his feet, her conduct "was a consequence of [her] inability or incapacity" within the meaning of Minn. Stat. § 268.095, subd. 6(b)(5). However, the fact that relator was unable to lift E.F. was not the basis for the ULJ's determination. Instead, the ULJ found that relator committed employment misconduct by failing to make urgent attempts to find help for E.F. There is no evidence to show that L.Z.'s efforts upon arriving on the scene, which included moving E.F.'s bed in order to assess his condition and calling supervisors and an ambulance, were beyond relator's capacity to have done earlier.

Relator also argues that this was a situation where judgment was required and that she merely demonstrated a good-faith error of judgment within the meaning of Minn. Stat. § 268.095, subd. 6(b)(6). A situation where judgment is required is one in which the employee is afforded the discretion to select an appropriate course of action. *See Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 877 (Minn. App. 2011) (holding that an employee's conduct does not fall within this exception when his employer has afforded him no discretion), *review denied* (Minn. Nov. 15, 2011). Relator did not have the discretion to choose to leave E.F. "in a position that stripped him of basic human dignity" for a two-hour period. Nor was relator's failure to adequately assess E.F.'s situation an

appropriate exercise of discretion afforded by her employer. Therefore, relator's conduct does not amount to a good-faith error in judgment.

II.

Relator has moved this court to remand this matter to the ULJ so that the ULJ can consider a DHS report which was not issued until after the ULJ had already denied appellant's request for reconsideration.[1] Appellant bases her argument on the observation that *courts* are permitted to consider whether newly discovered evidence should be permitted to modify the outcome of a case. *See generally* Minn. R. Civ. P. 59.01(d), 60.02(b) (permitting district courts to consider motions for new trials based on newly

[1] Because the DHS report was not part of the record below, it will not be independently considered by this court on appeal. *See* Minn. R. Civ. App. P. 110.01 (stating that the record on appeal consists of "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any"). "An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below." *Thiele v. Stitch*, 425 N.W.2d 580, 582–83 (Minn. 1988). Even if this court were to consider the DHS report, the fact that a different administrative body considering the same basic facts may have resolved conflicting evidence differently does not provide a basis for reversing the ULJ's finding, to which this court must defer. *Cf. State ex re. Jenson v. Civil Serv. Comm'n of Minneapolis*, 268 Minn. 536, 538–39, 130 N.W.2d 143, 146 (1964) (noting that "this type of judicial review require[s] . . . refrain[ing] from substituting [our] judgment concerning the inferences to be drawn from the evidence for that of the agency . . . even though . . . contrary inferences would be better supported or we would be inclined to reach a different result"). The DHS report, even if considered, is an investigation of Volunteers of America for licensing purposes. It does not address whether relator engaged in employment misconduct. An employee might commit misconduct without having subjected a vulnerable adult to neglect sufficient to constitute a licensing violation by the employer. Thus the DHS report presents a determination on a different question made by a different agency for a different purpose after the record in the present matter had already been closed.

discovered evidence). We have carefully considered the motion, but deny the motion as the ULJ's authority is statutory and we have a limited role upon certiorari review.[2]

Relator relies on two cases to argue that this court should grant the motion for remand. Both are distinguishable.

The first case advanced by relator is *Ketola v. St. Paul Ry. Co.*, in which the supreme court remanded a case to the district court based on newly discovered evidence so that the district court could consider whether to grant a renewed motion for a new trial. 245 Minn. 583, 584, 72 N.W.2d 370, 370–71 (1955). The remand in *Ketola* was to a district court rather than to an administrative agency. District courts are endowed with powers that are not within the statutory authority granted to ULJs. The case has no application in the present context.

Relator next relies on *Fennert v. Medtox Laboratories Inc.*, an unpublished decision. 2004 WL 2521303 (Minn. App. Nov. 9, 2004). Because it is unpublished,

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[2] The statutes governing DEED's jurisdiction "should be strictly construed, regardless of mitigating circumstances." *King v. Univ. of Minn.*, 387 N.W.2d 675, 677 (Minn. App. 1986) (referring to deadlines for appealing from administrative decisions), *review denied* (Minn. Aug. 13, 1986). "[T]here are no extensions or exceptions to the . . . appeal period." *Smith v. Masterson Personnel, Inc.*, 483 N.W.2d 111, 112 (Minn. App. 1992). Thus, once a ULJ is no longer authorized by statute to undertake further actions, DEED loses jurisdiction to take action on a case, even to correct an erroneous decision. *Rowe v. Dep't of Emp't & Econ. Dev.*, 704 N.W.2d 191, 195–96 (Minn. App. 2005). Because DEED's jurisdiction is derived from statute, and not from inherent judicial authority, this court is without authority to revive the ULJ's jurisdiction to permit him to consider the new evidence. Expansion by this court of the authority granted to the ULJ under the statute would "usurp or diminish the role" of the legislature, violating the separation of powers. *See Brayton v. Pawlenty*, 781 N.W.2d 357, 364–65 (Minn. 2010) (stating that "the legislative branch has the responsibility and authority to legislate" and that "[u]nder the Separation of Powers Clause, no branch can usurp or diminish the role of another branch") (citing Minn. Const. arts. III, § 1, IV, §§ 17–23).

Fennert is not precedential and is of limited value in deciding this appeal. *See* Minn. Stat. § 480A.08, subd. 3 (2010); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800–01 (Minn. App. 1993) (stating that unpublished opinions are "[a]t best" persuasive, and "remind[ing] the bench and bar firmly that neither the trial courts not practitioners are to rely on unpublished opinions as binding precedent").

However, even if this court were to consider *Fennert*, the facts in that case are distinguishable from those before this court. In *Fennert*, relator's request to introduce new evidence was made as part of what would now be the request for reconsideration. 2004 WL 2521303, at *1. Thus, *Fennert* was an appeal of the denial of a request for a new evidentiary hearing in light of new evidence submitted to the ULJ. In the present case, relator is asking this court to order a new evidentiary hearing based on evidence that was never presented to the ULJ. *Fennert* is thus inapposite.

Affirmed; motion denied.