

No. A10-327

State of Minnesota
In Court of Appeals

KRISTA SANTILLANA,

Relator,

vs.

CENTRAL MINNESOTA COUNCIL ON AGING INC,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

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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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Legal Issue

Employees who are discharged for misconduct or aggravated employment misconduct are ineligible for all unemployment benefits. Krista Santillana committed financial exploitation of a vulnerable adult in the amount of \$6,342, which is a felony. Santillana did not disclose to the Central Minnesota Council on Aging (CMCOA), an agency that provides support and advocacy for older adults, that she had been discharged from her previous employment for this act, instead stating during her interview that she was on maternity leave and looking for part time work. Santillana later pled guilty to a crime and after reading about it in the newspaper, CMCOA discharged her. Was Santillana discharged for aggravated employment misconduct?

Unemployment Law Judge (“ULJ”) Sasha Mackin found that Santillana was discharged for aggravated employment misconduct and that she was ineligible for all unemployment benefits.

Statement of the Case

The question before this court is whether Krista Santillana is entitled to unemployment benefits. A Department adjudicator determined that Santillana was ineligible for benefits, because she was discharged by CMCOA for employment misconduct.¹

¹ E-1. Transcript references will be indicated “T.” Exhibits in the record will be “E” with the number following.

Santillana appealed that determination, and ULJ Sasha Mackin held a de novo hearing. The ULJ initially found that Santillana was discharged for reasons other than employment misconduct, and was therefore eligible for benefits.² CMCOA filed a request for reconsideration with the ULJ, who reversed herself and held that Santillana was discharged for aggravated employment misconduct, and was therefore ineligible for benefits.³

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Santillana under Minn. Stat. § 268.105, subd. 7(a) (2009) and Minn. R. Civ. App. P. 115.

The Department is charged with the responsibility of administering and supervising the unemployment insurance program, and is the primary responding party in this case.⁴ The Department does not represent the co-respondent in this proceeding, and this brief should not be considered advocacy for CMCOA.

Statement of Facts

Krista Santillana worked for CMCOA from October 21, 2008 to September 21, 2009.⁵ She worked 24 hours per week as a grants manager, and her final rate of pay was \$16.73 per hour.⁶ CMCOA is an agency that oversees the fund

² Appendix to Department's Brief, A7-A12.

³ Appendix A1-A6.

⁴ Minn. Stat. § 116J.401, subd. 1(18); Minn. Stat. § 268.105, subd. 7(e).

⁵ T. 9.

⁶ T. 10, 11.

distribution of the Federal Older Americans Act funding and provides support and assistance to older adults in the community.⁷

Santillana was discharged from her previous employment with Good Shepherd, a nursing home, in August 2008.⁸ Santillana was on maternity leave at the time, and Good Shepherd contacted Santillana by phone and told her she was discharged.⁹ Santillana was discharged from Good Shepherd because she took \$6,342 out of a resident's checking account for her own personal use.¹⁰ As a Good Shepherd employee, Santillana was responsible for helping the resident pay his bills.¹¹ Good Shepherd placed Santillana under investigation.¹²

When Santillana interviewed for her position at CMCOA, Lori Vrolson, executive director, asked Santillana why she was leaving her employment with Good Shepherd.¹³ Santillana told Vrolson that she was on maternity leave from Good Shepherd and that she was seeking part time employment.¹⁴ Santillana did not tell Vrolson that she had been discharged from Good Shepherd or that she was under investigation.¹⁵

⁷ T. 9.

⁸ T. 13, 31.

⁹ T. 32.

¹⁰ T. 30, 34.

¹¹ T. 30.

¹² T. 15.

¹³ T. 5, 14.

¹⁴ T. 14.

¹⁵ T. 14, 15.

Santillana was convicted of felony financial exploitation of a vulnerable adult on May 14, 2009.¹⁶ She was sentenced to a fine of \$100, one weekend in jail, and community service.¹⁷ Santillana did not tell CMCOA about the conviction.¹⁸ On September 21, 2009, a CMCOA employee read about Santillana's conviction in the local newspaper and informed Vrolson.¹⁹ Vrolson asked Santillana about the conviction and Santillana told Vrolson that she had borrowed money from a resident at Good Shepherd and that it was less than \$1,000.²⁰

In her position at CMCOA, Santillana had access to personal information about older adults in the community, including their names, addresses, social security numbers, and whether they have family in the area.²¹ Vrolson feared that Santillana might use this information to financially exploit these individuals. Vrolson was also concerned that Santillana might misrepresent information to the director of a nonprofit that worked with CMCOA, in an effort to obtain funds from the director.²² Vrolson spoke with Santillana, who confirmed that she had been convicted of felony financial exploitation of a vulnerable adult that involved a resident at her prior employment.²³

¹⁶ T. 26, 27.

¹⁷ T. 27.

¹⁸ T. 27.

¹⁹ T. 12, 19.

²⁰ T. 20.

²¹ T. 16.

²² T. 18.

²³ T. 13, 20.

Vrolson discharged Santillana on September 21, 2009, because Santillana was dishonest in her hiring interview, and because Vrolson felt that Santillana posed a risk to CMCOA and its reputation because of her criminal history.²⁴

Standard of Review

When reviewing an unemployment-benefits decision, the Court of Appeals may affirm the decision, remand for further proceeding, reverse, or modify the decision if Santillana's substantial rights were prejudiced because the decision of the ULJ violated the constitution, was based on an unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious.²⁵

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.²⁶ Whether the employee committed a particular act is a fact question.²⁷ Whether the employee's acts constitute employment misconduct is a question of law.²⁸ The Court of Appeals also held in *Skarhus* that it views the ULJ's factual findings "in the light most favorable to the decision,"²⁹ and gives deference to the

²⁴ T. 10, 15, 19, 21, 25.

²⁵ Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (2009).

²⁶ 721 N.W.2d 340, 344 (Minn. App. 2006).

²⁷ *Id.* (citing *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997)).

²⁸ *Id.*

²⁹ 721 N.W.2d 340, 344 (Minn. App. 2006) (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)).

ULJ's credibility determinations.³⁰ The Court also stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.³¹ The Supreme Court in *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency* defined substantial evidence as "such evidence as a reasonable mind might accept as adequate to support a conclusion."³² In *Ywswf v. Teleplan Wireless Services, Inc.*, the Court of Appeals reiterated the standard that the Court reviews de novo the legal question of whether the employee's acts constitute employment misconduct.³³

Argument for Ineligibility

An applicant who is discharged from employment is ineligible for benefits if the conduct for which the applicant was discharged amounts to employment misconduct or amounts to aggravated misconduct. Santillana's conduct, misrepresenting facts in her hiring interview, constitutes misconduct under the statute. Santillana also committed financial exploitation of a vulnerable adult in the amount of \$6,342, which is a felony.³⁴ Thus, Santillana's conduct does constitute aggravated employment misconduct under the statute. The statute provides:

³⁰ *Id.* (citing *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000)).

³¹ *Id.* (citing Minn. Stat. § 268.105, subd. 7(d)).

³² 644 N.W.2d 457, 466 (Minn. 2002).

³³ 726 N.W.2d 525 (Minn. App. 2007).

³⁴ Minn. Stat. § 609.2335; Minn. Stat. § 609.52, subd. 3.

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 in subdivision 6a.³⁵

The definition of “employment misconduct” is:

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.

* * *

(e) The definition of employment misconduct provided by this subdivision is exclusive and no other definition applies.³⁶

The definition of “aggravated employment misconduct” reads:

Subd. 6a. Aggravated employment misconduct defined.

(a) For the purpose of this section, “aggravated employment misconduct means:

- (1) the commission of any act, on or off the job, that would amount to a gross misdemeanor or felony if the act substantially interfered with the employment or had a significant adverse effect on the employment...

* * *

(c) The definition of aggravated employment misconduct provided by this subdivision is exclusive and no other definition applies.³⁷

³⁵ The penalty imposed for aggravated employment misconduct is an enhanced penalty over and above that imposed for employment misconduct.

³⁶ Minn. Stat. § 268.095, subd. 6 (2009).

³⁷ Minn. Stat. § 268.095, subd. 6a (2009).

1. Santillana committed aggravated employment misconduct.

Santillana was convicted of felony financial exploitation of a vulnerable adult. The commission of this act had a significant adverse effect on her employment with CMCOA, as it caused CMCOA to be unable to trust her with personal information on the vulnerable adults it served. Although Santillana committed the act during her previous employment with Good Shepherd, she was convicted while employed with CMCOA and thus, CMCOA was affected by Santillana's criminal conduct.

Santillana's conviction was public, which also adversely affected CMCOA. CMCOA provided advocacy and support to vulnerable adults. It is reasonable to expect that older adults may be hesitant to provide personal information to an organization that employs a person who has been convicted of defrauding a vulnerable adult. Santillana's criminal conviction is likely to impede CMCOA's mission of serving the local community of older adults. If CMCOA's reputation and credibility are damaged, it could affect its ability to secure grants and other types of funding, on which the organization depends for survival.

Santillana argues that her actions leading to her felony conviction were not related to her position at CMCOA.³⁸ Santillana is now a convicted felon; publicly known to have exploited an individual not unlike those CMCOA is charged with assisting. Her conduct is undoubtedly related to her position with CMCOA. CMCOA cannot trust Santillana with the sensitive information required for her

³⁸ Relator's brief, p. 5.

position, and CMCOA's lack of trust stems directly from Santillana's financial exploitation of a vulnerable adult. The conviction that resulted from Santillana's criminal actions is now a part of the public record, and accessible to anyone who may wish to learn more about CMCOA and its staff. Santillana's actions therefore expose CMCOA and its reputation to great risk. There is a significant connection between Santillana's criminal conduct and her position at CMCOA.

The Department relies on *Pechacek v. Minnesota State Lottery* in support of the notion that conduct committed prior to employment can constitute aggravated employment misconduct when the applicant is convicted during employment.³⁹ In *Pechacek*, the applicant was terminated after being convicted for a felony he had committed prior to his employment with the Minnesota State Lottery because his conviction negatively affected the integrity of and public confidence in the state lottery.⁴⁰ Although in *Pechacek*, the employer had a statutory obligation to discharge any employee convicted of a felony, and here, CMCOA was under no such obligation, the principle remains the same.⁴¹

The fact that Pechacek was required to be discharged does not go to the question of whether the acts constitute aggravated employment misconduct. As the Supreme Court made clear in *Auger v. Gillette*, the question in an

³⁹ 497 N.W.2d 243 (Minn. 1993). The court may note that *Pechacek* describes "gross misconduct" rather than "aggravated misconduct." These two terms share the same definition, though the name has been changed in recent amendments to the statute.

⁴⁰ *Id.*

⁴¹ *Id.*

unemployment insurance proceeding is not whether the applicant should be discharged but whether employment benefits are payable.⁴² Santillana's felony conviction negatively impacted her employer's reputation and ability to trust her. It does not matter that Santillana committed the criminal act prior to beginning her employment and was convicted after she had been hired. Her conviction had a significant adverse effect on her employer and thus, constituted aggravated misconduct.

Substantial evidence, including Santillana's own admission of a felony conviction, supports the ULJ's findings that Santillana financially exploited a vulnerable adult, which had a significant adverse effect on the employment and resulted in her discharge. The ULJ, therefore, correctly held Santillana ineligible for unemployment benefits.

2. Santillana committed employment misconduct.

If this Court finds that there is not substantial evidence to support the ULJ's finding that Santillana committed aggravated employment misconduct, it should still hold her ineligible. Substantial evidence shows Santillana was discharged for employment misconduct.

The effective difference between misconduct and aggravated misconduct under the statute is that an employee discharged for aggravated employment

⁴² 303 N.W.2d 255 (Minn. 1981).

misconduct has her wage credits from the employer cancelled.⁴³ This means that if she satisfies her ineligibility by finding employment after the ineligibility and earning eight times her weekly benefit amount, she cannot receive any unemployment benefits based upon her wages with the employer.⁴⁴ Or, if she tries to open a second benefit account based on subsequent earnings after the expiration of his benefit year, she cannot use wages from the employer to receive benefits on that second account.⁴⁵

CMCOA has the right to reasonably expect that employees will not lie or misrepresent facts when being interviewed for their positions. This Court has held that an employee who misrepresents facts in the employment application commits employment misconduct, provided the misrepresentation is material to the position sought.⁴⁶ In her interview, Santillana told Vrolson that she was leaving employment with Good Shepherd because she was currently on maternity leave and did not wish to resume full time work, and that she was instead seeking part time employment. This was a lie. Santillana knew that she had been discharged from Good Shepherd because of allegations that she had stolen from a resident, and that she was currently under investigation. The real reason for Santillana's separation from employment with Good Shepherd was certainly material to the position she sought with CMCOA. CMCOA sought to hire an employee to work

⁴³ Minn. Stat. §268.095, subd. 10(c).

⁴⁴ Minn. Stat. §268.095, subd. 10(a).

⁴⁵ Minn. Stat. §268.095, subd. 10(c).

⁴⁶ *Heitman v. Cronstroms Manufacturing, Inc.*, 401 N.W.2d 425 (Minn. App. 1987).

with a large amount of personal information about vulnerable adults. It was essential that CMCOA hire an employee who could be trusted not to abuse or exploit this information, and who would competently represent CMCOA's mission of support and advocacy for older adults. An individual who has been fired from a nursing home under suspicion of stealing from vulnerable adults does not meet these criteria.

Santillana had an obligation to not lie about the circumstances of her loss of employment from Good Shepherd when interviewing for employment with CMCOA. She knew that charges that she had harmed a vulnerable adult would be material to her position with an agency that supported and advocated for vulnerable adults. Any reasonable person would have known that such an employer would be deeply troubled by these charges when the employer found out. Santillana sought employment in the human services industry after financially exploiting a vulnerable adult and deliberately deceived CMCOA, knowing that they would not employ her if they knew about her past conduct.

Santillana argues in her brief that she did not misrepresent her reasons for separation from Good Shepherd.⁴⁷ However, the ULJ found that Santillana did not disclose in her interview with CMCOA the real reason for her separation from Good Shepherd. This finding is supported by the evidence, including the testimony of Santillana and Vrolson.

⁴⁷ Relator's brief, p. 4.

Santillana also claims that she had no duty to disclose any information about the investigation to CMCOA, as they did not have a policy on disclosing criminal charges and did not specifically require her to disclose any criminal charges.⁴⁸ This Court addressed a similar situation in the unpublished case of *Powell v. Continental Machinery*.⁴⁹ The Court found that Powell had committed employment misconduct when she failed to affirmatively disclose that she had been charged with forgery and burglary, even though she was not directly questioned about criminal charges, because Powell was applying for a position that allowed for access to the company's financial information.⁵⁰ The same result should follow here.

Conclusion

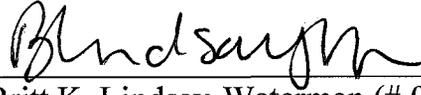
Unemployment Law Judge Sasha Mackin correctly concluded that Santillana was terminated for employment misconduct. The Department requests that the Court affirm the decision of the Unemployment Law Judge.

⁴⁸ Relator's brief, pp. 3, 5.

⁴⁹ 2006 WL 44339 (Minn. App. January 10, 2006), Appendix, A13-A16.

⁵⁰ *Id.* at *4.

Dated this 30th day of June, 2010.



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