STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1432

Hawa Tolbert,
Relator,

vs.

Angelicare, LLC,
Respondent,

Department of Employment
and Economic Development,
Respondent.

Filed May 14, 2012
Affirmed
Cleary, Judge

Department of Employment
and Economic Development
File No. 27626835-3

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Angelicare, LLC, St. Louis Park, Minnesota (respondent employer)

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Considered and decided by Cleary, Presiding Judge; Klaphake, Judge; and Harten, 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

CLEARY, Judge

Relator appeals the decision issued by an unemployment-law judge (ULJ) determining that she is ineligible for unemployment benefits. Relator argues that the ULJ erred by determining that relator's behavior constituted employee misconduct. Relator argues that one incident of taking a nap during her lunch break, when she did not know it was prohibited, when she had not been previously warned against such behavior, and when it did not affect any coworkers' morale, did not constitute employee misconduct. Because we hold that relator's behavior violated the standards of behavior that her employer had a right to reasonably expect, and her behavior therefore constituted employee misconduct, we affirm.

FACTS

Relator Hawa Tolbert worked for respondent Angelicare, LLC, an in-home senior home care assistance agency, as a home health aide from October 2003 until April 2011. During her first day on the job, relator participated in new-employee orientation. Respondent's orientation materials included information about inappropriate behavior during a shift. The materials indicated that napping and sleeping are prohibited, as well as any type of lounging "that would even lend itself to possibly falling asleep." This policy was communicated to relator during both an initial orientation and a refresher

orientation. Additionally, relator signed a document acknowledging that she understood this policy.[1]

On April 10, 2011, relator admitted that she took a five- to ten-minute nap during her lunch break in the living room while the client she was assisting was in bed in another room. Although relator believed that the client, a stroke victim, was not at risk while she slept because he was already in bed, respondent's human resources manager testified that employees are required to take their lunch break on-site and must stay alert and watch the client, even throughout their lunch break. The client's wife reported to respondent that relator had been napping.

Relator was discharged on April 11, 2011, for sleeping during her shift. This single incident was the only reason for relator's discharge. Respondent considered the incident to be very serious misconduct because relator was responsible for the client's safety, and if she was asleep, she could not guarantee the client's safety.

Relator applied for unemployment benefits, and the Department of Employment and Economic Development (DEED) determined that she was ineligible to receive benefits. Relator appealed the determination of ineligibility and the ULJ conducted a telephone hearing with relator, respondent's co-owner, and respondent's human resources manager. The ULJ issued findings of fact and a decision that respondent discharged

[1] The Department of Health regulations are different for live-in jobs and hourly jobs. Respondent's co-owner testified that live-in jobs require a health aide to be with a client for consecutive 24-hour periods, and the regulations for sleep during a shift are clear. It is expected that during a 24-hour shift, a health aide will sleep for at least eight hours between 10:00 p.m. and 9:00 a.m. Conversely, sleeping is not allowed at all during an hourly shift. On the day in question, relator was working an hourly shift.

relator for sleeping during her shift, which constituted employee misconduct. Relator requested reconsideration by the ULJ. After reconsideration, the ULJ issued an order that her original decision was factually and legally correct. This appeal followed.

D E C I S I O N

This court may reverse or modify the decision of a ULJ if the substantial rights of a petitioner are prejudiced because the findings, conclusions, or decision are affected by an error of law, unsupported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2010). "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 an employee committed the specific act or acts alleged to be misconduct is a question of fact. . . ." *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). "Whether a particular act constitutes disqualifying misconduct is a question of law, which this court reviews de novo." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). "We view the ULJ's factual findings in the light most favorable to the decision. . . ." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Id.* at 345.

Employment misconduct is defined as "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 ULJ found that relator took a ten-minute nap during her lunch break while working as a home health aide for respondent. Relator had been informed during orientation that sleeping was prohibited, even during breaks, while working on an hourly shift. Relator signed a document acknowledging that she understood this policy. The ULJ found that relator was obligated to watch her client, a stroke victim, "during her entire shift, in case of a health or safety concern." Because relator was aware of the policy against sleeping on the job and chose to take a nap while the client was in her care, the ULJ determined that her behavior violated the standards of behavior respondent had a right to reasonably expect of her, and therefore constituted misconduct under Minn. Stat. § 268.095, subd. 6(a).

In a similar case, an employee was discharged for misconduct for violating her employer's same-shift injury-reporting policy. *Schmidgall*, 644 N.W.2d at 803. In *Schmidgall*, the injury-reporting policy was detailed in the employee handbook that Schmidgall received during orientation. *Id.* Schmidgall failed to follow the policy on multiple occasions and was eventually discharged for those violations. *Id.* at 803–04. The Minnesota Supreme Court held that "an employee's decision to violate knowingly a reasonable policy of the employer is misconduct." *Id.* at 806.

Similarly, relator here failed to abide by respondent's reasonable policy of which she was informed during orientation. The ULJ found that relator was aware of the policy that forbade her from sleeping, napping, or resting while on the job, and even signed a

document acknowledging that she understood the policy. Relator argues that she did not know about the policy prohibiting her from sleeping during her lunch break. The ULJ made a determination that respondent's version of the events was more credible than relator's and that it was "more plausible that [relator] was trained in the policy than not trained. . . ." This court defers to the ULJ's credibility determinations. Based on the ULJ's findings, relator knew about the policy and violated it.

The Minnesota Supreme Court has determined that one incident of sleeping on the job constitutes misconduct. *Auger v. Gillette Co.*, 303 N.W.2d 255 (Minn. 1981). In *Auger*, a supervisor discovered two janitors sleeping during the night shift, when they usually had little or no supervision. *Id.* at 256–57. The janitors had pillows, a blanket, and an alarm clock set up in the area where they were sleeping. *Id.* at 257. The test for determining whether such behavior constituted misconduct was slightly different at the time *Auger* was determined. At that time, the test for whether behavior constituted misconduct was whether the behavior was "in willful disregard of an employer's interest" or disregarded the "standards of behavior which the employer has a right to expect of his employee."[2] *Id.* The court determined that "the employer had a clear and substantial interest in maintaining a responsible, self-disciplined work environment. Employees' sleeping on the job was in willful disregard of this interest." *Id.*

[2] *See* Minn. Stat. § 268.09, subd. 1(2) (1980). The current statute on this issue, Minn. Stat. § 268.095, subd. 6(a)(1) (2010), defines misconduct as "intentional, negligent, or indifferent conduct" that displays "a serious violation of the standards of behavior the employer has a right to reasonably expect of the employee."

Like the employees' conduct in *Schmidgall* and *Auger*, relator's conduct here violated the standards of behavior that respondent had the right to reasonably expect of its employees. As DEED argues, once relator made the decision to nap, she could not be sure how long that nap would last and whether she would wake up in the event of an emergency involving her vulnerable client. Relator was responsible for the care of the client while she was on the job.

Relator argues that her behavior did not constitute misconduct because it was a one-time incident and she had never been warned against napping previously. Relator had received two warnings from respondent, but neither related to sleeping while at work. "If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct under paragraph (a)." Minn. Stat. § 268.095, subd. 6(d) (2010). This statute required the ULJ to seriously consider the fact that relator's conduct was a one-time incident. The Minnesota Supreme Court has found that one incident of sleeping on the job can constitute misconduct. *See Auger*, 303 N.W.2d at 256. Because relator's conduct here was a violation of the standards of behavior that respondent had a right to reasonably expect, one incident appears to be sufficient to constitute misconduct.

Relator suggests that napping during her lunch break did not constitute misconduct because it did not affect the morale of coworkers, distinguishing this case from *Auger*. *See id.* at 257. Relator points out that, since she works by herself, it is impossible for her conduct to cause dissension among fellow employees. Whether an employee's behavior

affected other employees' morale is not the only factor analyzed when determining whether the employee committed misconduct. It is merely one factor that can contribute to a violation of the standards of behavior an employer has a right to expect. The standards of behavior respondent had a right to expect from relator here included complying with the stated policy against napping, resting, or sleeping, and delivering proper care to ensure the health and safety of the client. Because relator had no coworkers, the effect her behavior had on coworkers is not a factor to consider when determining whether her napping constituted misconduct.

The ULJ concluded that relator knew about the no-sleeping policy, and that respondent had a right to reasonably expect that she would comply with the policy. One violation of the policy was sufficient to constitute employee misconduct. Given relator's job responsibilities, her behavior was serious and rises to the level of employment misconduct under Minn. Stat. § 268.095, subd. 6(a)(1).

Affirmed.