STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0241

Victoria Trongard,
Relator,

vs.

Loren E. Novak and Associates, Inc.,
Respondent,

Department of Employment and
Economic Development,
Respondent.

Filed September 17, 2012
Affirmed
Hudson, Judge

Department of Employment and
Economic Development
File No. 28781302-3

Jasper Berg, IAJ Law, LLC, Woodbury, Minnesota (for relator)

Loren E. Novak and Associates, Inc., Prior Lake, Minnesota (respondent employer)

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

Considered and decided by Halbrooks, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

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

HUDSON, Judge

Relator challenges a determination by an unemployment-law judge (ULJ) that she is ineligible for unemployment benefits because she was discharged from her employment as a chemical-dependency counselor for misconduct, arguing that: (1) the ULJ clearly erred by discrediting her testimony; (2) the ULJ erred by determining that she engaged in employment misconduct; and (3) she was deprived of a fair evidentiary hearing. We affirm.

FACTS

Relator Victoria Trongard was employed full-time at Loren E. Novak and Associates, Inc. as a chemical-dependency counselor from July 2008, until November 2, 2011.

On October 3, 2011, Kimberley Edens, the clinical supervisor at Novak and Associates, gave Trongard a final written warning for not meeting job expectations. Edens also gave her a written description of her job expectations, which provided that, on days when Trongard was scheduled to facilitate one group counseling session, she was also required to be available for two individual appointments. On days when she was scheduled to facilitate two group sessions, she was expected to be available for one individual appointment.

On November 1, Trongard was scheduled to conduct two group sessions and an individual appointment at 3:00 p.m. That morning, Trongard assigned the individual appointment to an intern, Tamala Erichson, at Erichson's request. At about 1:00 p.m.,

Trongard received a phone call from a patient who requested to schedule an appointment. Trongard asked Erichson to make the appointment. After speaking to the patient, Erichson asked Trongard if she could take the appointment that afternoon. Trongard stated that she was unavailable because she "was overseeing" the 3:00 p.m. appointment. The patient was never scheduled for an appointment. As a result, Novak and Associates lost $150 by not taking the appointment.

Erichson testified that, while Edens and Trongard were in the building when she facilitated the 3:00 p.m. appointment, neither one was in the room with her during the appointment. Trongard testified that, although she was not in the room with Erichson, she "supervised" the appointment by going "through the paperwork to make sure the ROI's, everything's signed and done correctly."

On November 2, Edens and the executive director of Novak and Associates discharged Trongard, primarily because of her failure to take the appointment the previous day.

Trongard applied for unemployment benefits. The Minnesota Department of Employment and Economic Development (DEED) determined that she was ineligible for benefits. On appeal, a ULJ concluded that Trongard had been discharged for employment misconduct. The ULJ affirmed its decision upon reconsideration. This certiorari appeal follows.

D E C I S I O N

When reviewing a ULJ's eligibility decision, this court may affirm, remand for further proceedings, or reverse or modify the decision if the substantial rights of the

relator have been prejudiced because the findings, inferences, conclusion, or decision are affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2010). "Questions of law are reviewed de novo, while findings that are supported by substantial evidence will not be disturbed." *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). 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).

I

Trongard argues that the ULJ erred by finding that her testimony was not credible. A ULJ must explain its reasons for crediting or discrediting a witness's testimony if the credibility of that witness "has a significant effect on the outcome of a decision." Minn. Stat. § 268.105, subd. 1(c) (2010). "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Bangtson v. Allina Med. Group*, 766 N.W.2d 328, 332 (Minn. App. 2009) (quotation omitted).

The ULJ found that "Trongard's testimony was not credible because she lied under oath about having another counselor supervise [Erichson]. [Erichson] contradicted her testimony. [Erichson's] testimony was more credible than Trongard's self-serving statements because she did not appear to have a motive to lie, and she appeared more genuine." Trongard interprets the ULJ's finding to reference the following testimony:

> [ULJ]: Ms. Trongard, Ms. Edens testified that Dan supervised the intern, is that correct.
> [TRONGARD]: Yes.
> [ULJ]: So Dan on November 1, Dan is the one who supervised the intern.

> [TRONGARD]: That's not true.
> [ULJ]: Well you said yes, now you're saying it's not true.
> [TRONGARD]: Oh I'm sorry. I misunderstood the first question. I thought you said, okay . . . on November 1, I don't know what Dan did, I know I supervised the eval at three o'clock.
> [ULJ]: And why should I believe you over Ms. Edens.
> [TRONGARD]: That's a good question because I did.

We agree with Trongard that this testimony indicates that Trongard was confused by the ULJ's question, not that she intentionally lied under oath. But the ULJ's credibility finding must be read in its entirety. The ULJ's reference to Trongard's "self-serving statements" likely refers to a different aspect of Trongard's testimony because it would not be self-serving for her to testify that another person supervised Erichson's appointment. Instead, it was self-serving of Trongard to testify that she "supervised" the appointment when she was not actually present during the appointment.

The confusion regarding who supervised the appointment that Erichson facilitated appears to be based on different interpretations of the word "supervise." Both Erichson and Trongard testified that Trongard "supervised" the appointment. But Erichson testified that, while Trongard and Edens were in the building during the appointment, neither one was in the room with her as she conducted the appointment. Trongard admitted that she was not in the room with Erichson, but she testified that she "supervised" the appointment by going through the paperwork with her. The ULJ appears to credit Erichson's testimony that Trongard did not "supervise" the appointment because Trongard was not in the room with her, and discredit Trongard's assertion that

she "supervised" the appointment. The ULJ adequately set forth a statutorily required reason for crediting Erichson's testimony, which we will not disturb.

II

Trongard contends that the district court erred by determining that she engaged in employment misconduct. An employee who was discharged is eligible for employment benefits unless the discharge was for employment misconduct. Minn. Stat. § 268.095, subd. 4 (2010). "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." *Id.*, subd. 6(a) (2010). "Whether an employee committed employment misconduct is a mixed question of fact and law." *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether the employee committed the act is a fact question. *Skarhus*, 721 N.W.2d at 344. But whether the employee's act constitutes employment misconduct is a question of law, which is reviewed de novo. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

The ULJ determined that Trongard was discharged for misconduct "for not being a team player, causing discord among co-workers, her attitude, for her passive aggressive behavior, and not taking appointments when she had the availability." The ULJ found that the employer "clearly stated" in the October 3 written warning that Trongard was expected to be available for one individual appointment on a day when she had two group

sessions scheduled and that Trongard violated this expectation when she refused to take an appointment on November 1.

In general, refusing to comply with an employer's reasonable policy constitutes misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). An employee's failure to comply with an employer's policy is particularly likely to constitute employment misconduct if the employee has committed "multiple violations of the same rule involving warnings or progressive discipline." *Id.* at 806–07. It was reasonable for Novak and Associates to expect Trongard to be available for an individual appointment on days when she had two groups scheduled. And Novak and Associates provided Trongard with written notice of this policy. Yet, approximately a month later, Trongard refused to schedule an appointment on a day when she was scheduled for two group sessions. While Trongard argues that she was not available for an additional appointment because she was already supervising an appointment, she admitted that she was not in the room with Erichson during that appointment. The record establishes that Trongard was available for another appointment on November 1, yet she refused to accept one. Trongard's violation of Novak and Associates' reasonable policy was a serious violation of the standards of behavior the employer has the right to reasonably expect.

Trongard argues that her conduct falls within several statutory exceptions to employment misconduct. She first contends that her conduct was a consequence of her inefficiency or inadvertence because she misunderstood the October 3 written warning to mean that she would be re-evaluated if there were further concerns about her job performance. *See* Minn. Stat. § 268.095, subd. 6(b)(2) (2010) (stating that conduct

resulting from inadvertence or inefficiency is not employment misconduct). We disagree. The October 3 written warning was titled "FINAL WRITTEN WARNING" and provided: "I further understand if there are any further issues or complaints regarding my job duties and the expectations of the company expected of me that my position with Loren E. Novak and Associates, Inc. will be re-evaluated." The language of the warning clearly indicates that Trongard could receive additional discipline, including discharge, if she failed to comply with her job duties.

Trongard next argues that her conduct was not employment misconduct because it was simple unsatisfactory conduct resulting from her employer's failure to provide feedback and directions. *See id.*, subd. 6(b)(3) (2010) (stating that "simple unsatisfactory conduct" is not employment misconduct). But Edens provided Trongard with a clearly stated written warning and a description of her job duties, which Trongard violated. Trongard also contends that her conduct was not employment misconduct because it was conduct that an average reasonable employee would have engaged in under the same circumstances. *See id.*, subd. 6(b)(4) (2010) (stating that if an average reasonable employee would have engaged in the conduct under the circumstances, it is not employment misconduct). But an average reasonable employee would have complied with the employer's reasonable policy; Trongard failed to do so.

Trongard next argues that her conduct was not employment misconduct because it was the result of her inability or incapacity due to her large work load. *See id.*, subd. 6(b)(5) (2010) (stating that conduct resulting from incapacity or inability is not employment misconduct). However, this argument fails because the record establishes

that Trongard was available for an appointment on November 1. Finally, Trongard argues that her conduct was not employment misconduct because it was a good-faith error in judgment. *See id.*, subd. 6(b)(6) (2010) (stating that good-faith errors in judgment, where judgment is required, do not amount to employment misconduct). We disagree. An employee's action that is not consistent with training or is the subject of past warnings does not constitute a good-faith error in judgment. *Ress v. Abbott Nw. Hosp., Inc.* 448 N.W.2d 519, 525 (Minn. 1989). Trongard received a warning that clearly defined her job duties shortly before she refused an appointment when she was available.

Accordingly, we conclude that the ULJ's determination that Trongard engaged in employment misconduct is supported by substantial evidence.

III

Trongard contends that she did not receive a fair hearing. A ULJ must conduct the evidentiary hearing as an "evidence gathering inquiry." Minn. Stat. § 268.105, subd. 1(b) (2010). The ULJ should "assist unrepresented parties in the presentation of evidence" and "must exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2011). A hearing is fair if both parties are afforded the opportunity to give statements, cross-examine witnesses, and offer and object to exhibits. *Id.*; *see Ywswf*, 726 N.W.2d at 529-30.

Trongard contends that the ULJ erred by taking testimony from Erichson and failing to require Erichson to submit Novak and Associates' appointment book as evidence. The ULJ "must ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b). In doing so, the ULJ "may receive any evidence that

possesses probative value, including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely." Minn. R. 3310.2922 (2011). Erichson's version of the events that occurred on November 1 was relevant, and the ULJ properly exercised its discretion to solicit her testimony. The ULJ was not required to admit the appointment book into evidence.

Trongard further argues that the ULJ erred by failing to call two other employees at Novak and Associates. But the ULJ was not required to take testimony from additional employees. Trongard had the opportunity to call either of them as witnesses, yet she chose not to. We conclude that Trongard was not deprived of a fair hearing.

Affirmed.