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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1474**

Rachel Powell,
Relator,

vs.

United Healthcare Services,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 13, 2010
Affirmed
Wright, Judge**

Minnesota Department of Employment and Economic Development
File No. 22361566-3

Rachel Powell, St. Louis Park, Minnesota (pro se relator)

United Healthcare Services, Arvada, Colorado (respondent)

Lee B. Nelson, Britt K. Lindsay-Waterman, Minnesota Department of Employment and
Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

In this certiorari appeal from the denial of unemployment benefits, relator argues that the unemployment law judge (ULJ) erred by concluding that relator is ineligible to receive unemployment benefits because she was discharged for employment misconduct. We affirm.

FACTS

Relator Rachel Powell was employed by United Healthcare Services (UHS) as a full-time quality auditor from June 13, 2005, until her discharge on April 7, 2009. On five separate occasions between January 5, 2009 and February 9, 2009, Powell's supervisor or coworkers observed Powell sleeping at her desk. After the first incident on January 5, 2009, Powell informed her supervisor, Sherry Elsenpeter, that she was taking prescribed medication that was making her drowsy. When a second incident occurred three days later, Elsenpeter warned Powell that future occurrences would result in corrective action and discussed Powell's options, including going to a doctor or stepping outside for fresh air when she was feeling tired. Powell was observed sleeping at work on two other occasions in the final week of January, resulting in Elsenpeter placing her on "elevated corrective action" on February 3. This status is the middle of three warning levels provided for in UHS's personnel policies. On the same day, Elsenpeter and her supervisor, Francine Sartell, also recommended that Powell contact the human resources department (HR) to determine whether she was eligible for a leave of absence and to discuss other options for resolving the problem.

On February 4, Powell visited her doctor, who instructed her to stop taking the prescribed medication by decreasing the dosage over a period of two weeks. The doctor also directed Powell to stop drinking caffeine because it was exacerbating the problem. According to Powell, she stopped taking the medication by mid-February.

After Elsenpeter observed Powell sleeping at her desk on February 9, Elsenpeter and Sartell warned Powell that any further incidents would result in her discharge. The next day, Powell sought to remove this final warning from her record by filing an Internal Dispute Resolution Form with HR. On February 19, Elsenpeter denied Powell's request because Powell had been given ample opportunity to wean herself off the medication and to attempt other methods for staying awake at work.

On April 2, team lead Joanne Beyer observed Powell at her desk breathing heavily with her head down and her eyes closed. Beyer reported Powell's sleeping to Elsenpeter. But Powell was awake when Elsenpeter came to her cubicle. Powell denied sleeping on April 2.

On April 7, Powell attended a team meeting with approximately 12 people. Beyer, who was sitting across from Powell, observed Powell breathing heavily with her head down and eyes closed. Powell did not respond when Beyer called her name, and Beyer sent an instant message to Elsenpeter informing her about Powell's sleeping. Beyer believed Powell was asleep for approximately 20 minutes during the meeting. Another coworker reported to Elsenpeter that Powell had been sleeping "on-and-off throughout the meeting." When Elsenpeter came into the room near the end of the meeting, she found Powell sitting at the table with her head on her chest and her eyes closed.

Elsenpeter observed Powell for several minutes, during which Powell was unresponsive to others in the room. When the meeting adjourned and people began to leave the table, Powell's head "popped" up.

Elsenpeter and Sartell met with Powell after the meeting. Powell denied sleeping at the meeting and said that she was resting her eyes because of a glare on a projection screen. Powell subsequently testified at the unemployment-benefits hearing that she closed her eyes and leaned forward in order to better hear people attending the meeting via speakerphone. Powell maintained that she did not hear Elsenpeter enter the room because she was listening to the meeting.

Because Powell continued to fall asleep at work, Elsenpeter terminated Powell's employment on April 7, 2009. Powell subsequently applied for unemployment benefits. On April 24, a Minnesota Department of Employment and Economic Development adjudicator concluded that Powell was eligible for unemployment benefits, and UHS appealed. After a hearing, the ULJ concluded that Powell is ineligible for unemployment benefits because her conduct violated the standards of behavior the employer had the right to reasonably expect and displayed a substantial lack of concern for her employment. The ULJ denied Powell's request for reconsideration, and this certiorari appeal followed.

DECISION

When reviewing the decision of a ULJ, we may affirm the decision, remand the case 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 “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2008).

Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). A ULJ’s factual findings are reviewed in the light most favorable to the decision and will not be disturbed on appeal if there is evidence that reasonably tends to sustain those findings. *Schmidgall*, 644 N.W.2d at 804. But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Id.* Because credibility determinations are the exclusive province of the ULJ, we accord such determinations deference on appeal. *Skarhus*, 721 N.W.2d at 344.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat § 268.095, subd. 4(1) (2008). Employment misconduct is “any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2008). Employment misconduct is not inefficiency or inadvertence, “simple unsatisfactory conduct,” poor performance

“because of inability or incapacity,” or “good faith errors in judgment if judgment was required.” *Id.*

Sleeping on the job can be employment misconduct. *Jeane Thorne Temp. Serv., Inc. v. Elliot*, 351 N.W.2d 393, 395 (Minn. App. 1984) (citing *Auger v. Gillette Co.*, 303 N.W.2d 255 (Minn. 1981)). But not every incident of sleeping on the job is employment misconduct. “Because the nature of an employer’s interest will vary depending upon the job, what constitutes disregard of that interest, and therefore misconduct, will also vary.” *Auger*, 303 N.W.2d at 257.

In support of her conclusion that Powell committed employment misconduct, the ULJ found that Powell was observed sleeping at her desk seven times in a four-month period, during which she was given at least two warnings and had the opportunity to make necessary changes in order to stay awake at work. The ULJ also found that, although Powell had not been taking prescription medications since the end of February 2009, Powell fell asleep at her desk on April 2, and at a meeting on April 7.

Powell concedes that she was observed sleeping at work on multiple occasions in January and February 2009. She also concedes that, after February, she no longer had a medical reason for sleeping at work. But Powell challenges the ULJ’s findings that she was asleep at work on April 2 and April 7. As to the incident on April 2, Beyer testified that Powell was asleep at her desk, which is ample support for the ULJ’s finding that Powell fell asleep at work on that day. *See Schmidgall*, 644 N.W.2d at 804 (viewing factual findings in light most favorable to decision); *Skarhus*, 721 N.W.2d at 344 (stating that we defer to credibility determinations). There also is ample support in the record for

the ULJ's finding regarding the April 7 meeting. Both Beyer and Elsenpeter testified that they observed Powell sleeping at the meeting. They also testified that Powell was unresponsive to those around her. In addition, Elsenpeter testified that another employee reported observing Powell sleeping "on-and-off throughout the meeting." Powell's inconsistent explanations for sitting with her eyes closed at the meeting also support the ULJ's determination that Powell's testimony was less credible than Beyer's and Elsenpeter's. For example, Powell initially told Elsenpeter and Sartell that her eyes were closed because of a glare on a projection screen and later explained that she was attempting to concentrate on the speakerphone. In light of our deference to the ULJ's determination that Elsenpeter's and Beyer's testimony was more credible than Powell's and our requirement to view the evidence in the light most favorable to the ULJ's decision, the ULJ's factual finding that Powell was sleeping at work well after she stopped taking the prescription medication is substantially supported by the record.

We next consider whether Powell's conduct constitutes employment misconduct. Powell was warned on at least two occasions that sleeping on the job was inappropriate behavior and that additional incidents may result in discharge. Not only did sleeping on the job interfere with Powell's ability to perform her duties and her participation in a meeting, but also the complaints of her coworkers establish that her sleeping had an adverse effect on those around her. *See Auger*, 303 N.W.2d at 257 (stating that "complaints of other employees indicated morale was in danger of being adversely affected"). Under these circumstances, UHS's request that Powell remain awake during work hours was reasonable. *See Montgomery v. F & M Marquette Nat'l Bank*, 384

N.W.2d 602, 604 (Minn. App. 1986) (stating that when determining whether an employee has disregarded conduct employer has a right to expect, we review employer's policies, rules, or reasonable requests), *review denied* (Minn. June 13, 1986); *see also Auger*, 303 N.W.2d at 257 (concluding that employee sleeping on the job disregarded employer's interest in maintaining a responsible, self-disciplined work environment). By sleeping on the job without a medical reason for doing so, Powell violated the standards of behavior that UHS has the right to reasonably expect of its employees. Powell also demonstrated a substantial lack of concern for her employment by continuing to sleep at work after receiving multiple warnings that such conduct was unacceptable. Accordingly, the ULJ did not err by concluding that Powell is ineligible to receive unemployment benefits because she committed employment misconduct.

Affirmed.