STATE OF MINNESOTA
IN COURT OF APPEALS
A09-114

Shelly Wuorinen,
Relator,

vs.

St. Mary's/Duluth Clinic Health System (Corp),
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed November 3, 2009
Affirmed
Johnson, Judge

Department of Employment and Economic Development
File No. 21241542-4

Shelly Wuorinen, 5183 Rice Lake Road, Duluth, MN 55803-9405 (pro se relator)

St. Mary's/Duluth Clinic Health System, 407 East Third Street, Duluth, MN 55805-1950 (respondent)

Lee B. Nelson, Department of Employment and Economic Development, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351 (for respondent Department)

Considered and decided by Larkin, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

JOHNSON, Judge

St. Mary's/Duluth Clinic Health System terminated the employment of Shelly Wuorinen after she twice fell asleep while sitting with a patient who was on suicide watch. Wuorinen sought unemployment benefits but was deemed ineligible on the ground that she had been terminated for employment misconduct. We affirm.

FACTS

Wuorinen worked as a nurse's aide at St. Mary's from June 23, 2006, to September 5, 2008. She worked approximately 30 hours per week, usually on the overnight shift. One of her primary job responsibilities was to sit with patients who were on suicide watch.

In September 2007, while Wuorinen was sitting with a patient on suicide watch, a nurse entered the patient's room and discovered that Wuorinen was sleeping. Wuorinen admits that she fell asleep. Wuorinen was suspended for one day and given a written warning, which stated that another similar incident would result in further disciplinary action, "up to and including termination."

Approximately one year later, in August 2008, Wuorinen again was discovered sleeping while sitting with a patient on suicide watch. According to the testimony of St. Mary's internal investigator, a nurse, upon entering the patient's room, saw Wuorinen sleeping and then saw her jerk her head up when she awoke. The nurse's aide who sat with the patient during the next shift told the investigator that the patient said, "[I]f I wanted to commit suicide, I would have done it last night. When Shelly wasn't snoring,

she was on the phone." Wuorinen initially stated that she did not remember whether she had fallen asleep but later denied it. After an internal investigation, St. Mary's terminated Wuorinen's employment.

Wuorinen applied for unemployment benefits. The Minnesota Department of Employment and Economic Development (DEED) initially determined that she was ineligible for benefits. Wuorinen appealed that decision, and a ULJ held an evidentiary hearing in October 2008. The ULJ issued a written decision concluding that Wuorinen is ineligible for unemployment benefits because she was terminated for employment misconduct. The ULJ affirmed that decision upon Wuorinen's request for reconsideration. Wuorinen appeals by way of a writ of certiorari.

D E C I S I O N

Wuorinen argues that the ULJ erred by concluding that she is ineligible for unemployment compensation. This court reviews a ULJ's decision denying benefits to determine whether the findings, inferences, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. *See* Minn. Stat. § 268.105, subd. 7(d) (2008). The ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination whether an employee is ineligible for unemployment benefits is a question of law, to which we apply a *de novo* standard of review. *Id.*

The ULJ concluded that Wuorinen is ineligible for unemployment benefits because she was discharged for employment misconduct. 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 defined as "intentional, negligent, or indifferent conduct" that clearly displays either "a serious violation of the standards of behavior the employer has the right to reasonably expect" or "a substantial lack of concern for the employment." *Id.*, subd. 6(a) (2008). The ULJ concluded that "Wuorinen's sleeping while patient sitting displayed clearly a serious violation of the standards of behavior that an employer has the right to reasonably expect of its employees."

Wuorinen does not dispute that the alleged conduct, if proven, would constitute employment misconduct. Instead, Wuorinen makes four arguments in which she challenges St. Mary's evidence and the procedures employed by the ULJ.

First, Wuorinen contends that the ULJ improperly relied on hearsay testimony. An evidentiary hearing is "not an adversarial proceeding," but the ULJ "must ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2008). DEED promulgates its own rules for evidentiary hearings, and those rules "need not conform to common law or statutory rules of evidence and other technical rules of procedure." *Id*. The relevant rule provides, "All competent, relevant, and material evidence" may be considered part of the record, and a ULJ may receive hearsay into evidence if it has probative value that may be relied on by "reasonable, prudent persons . . . in the conduct of their serious affairs." Minn. R. 3310.2922 (2007). The hearsay evidence on which St. Mary's relied when terminating Wuorinen easily satisfies this standard. *See Skarhus*, 721 N.W.2d at 345.

Second, Wuorinen contends that the ULJ improperly relied on the statement of the patient, whose mental state, according to Wuorinen, makes her version of events unreliable. This argument overlooks the fact that St. Mary's also relied on the statement of the nurse who saw Wuorinen sleeping. The ULJ found, "The evidence presented by St. Mary's Medical Center is more credible than Wuorinen's self-serving denial." We must "view the ULJ's factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ." *Id.* at 344 (citation omitted).

Third, Wuorinen contends that she did not receive any written statements from St. Mary's at the time of her termination. Wuorinen does not explain why St. Mary's might have been required to provide her with written statements at the time of her termination. At the agency hearing, Wuorinen testified that she had previously received all the documents that were offered into the agency record as exhibits, and there is no indication that additional documents exist. Wuorinen did not request that the ULJ issue a subpoena to obtain additional documents.

Fourth and finally, Wuorinen contends that St. Mary's did not provide her with a "reasonable accommodation" in the form of a reassignment. Wuorinen states that, after being disciplined in 2007, she asked to be reassigned to a position that did not include responsibility for suicide watch. Wuorinen states that St. Mary's was aware of her busy schedule, which included attending school and caring for her family as well as working the night shift. Wuorinen has not established that she was entitled to an accommodation in the form of a reassignment. Furthermore, Wuorinen's desire to work in a different

position is not a mitigating factor that compels a finding that she did not engage in misconduct. The statutory exceptions to misconduct based on mitigating factors are few and limited in scope. *See* Minn. Stat. § 268.095, subd. 6(a)(2) (enumerating exceptions to misconduct, including "single incident that does not have a significant adverse impact on the employer").

In sum, the ULJ's finding that Wuorinen was terminated for employment misconduct is supported by substantial evidence.

Affirmed.