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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-939**

Maria Schimming,  
Relator,

vs.

Equity Services of St. Paul Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent

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

Minnesota Department of Employment and Economic Development  
File No. 21727324-3

Maria M. Schimming, St. Paul, Minnesota (pro se relator)

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Equity Services of St. Paul)

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Considered and decided by Wright, Presiding Judge; Worke, Judge; and Larkin,  
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## **UNPUBLISHED OPINION**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 (1) failing to address her wrongful-discharge claims, (2) concluding that relator had been discharged for employment misconduct, and (3) failing to conduct a fair and impartial hearing. We affirm.

### **FACTS**

Relator Maria Schimming worked as a licensed practical nurse for respondent Equity Services of St. Paul, Inc. (Equity) between December 18, 2005, and December 19, 2008. Equity pays up to \$650 each month toward an employee's health-insurance premiums. On April 24, 2008, Schimming applied for health insurance from Blue Cross Blue Shield (BCBS), and Equity sent a check for the application directly to BCBS. BCBS rejected the application and returned the check because it did not accept third-party payments. Schimming filed another application with BCBS on July 15, 2008. Because of a pre-existing condition, BCBS denied coverage with a low deductible, which Schimming sought. Instead, BCBS offered coverage with a higher deductible, which Schimming declined. BCBS subsequently closed her insurance-application file and returned her application payment. Schimming appealed the coverage decision in November 2008. On December 3, 2008, Schimming applied again for insurance and was advised that BCBS would offer coverage only with the higher deductible. Schimming accepted the offer on December 16, 2008, and BCBS bound the coverage effective December 5, 2008.

Although she was not insured, on six occasions between May and November 2008, Schimming submitted to Equity copies of her personal checks made payable to BCBS as requests for monthly health-insurance reimbursement. In response to each submission, Equity reimbursed Schimming in the amount of \$505. In November 2008, a new director of nursing asked Schimming for additional proof of insurance. Schimming submitted a receipt for an insurance application, but she did not submit a statement. When BCBS advised Equity that Schimming did not have an insurance policy with BCBS until December 5, 2008, Equity determined that Schimming was not insured during the months in which she sought and received reimbursement. Equity discharged Schimming shortly thereafter for defrauding Equity in the amount of \$3,030.

Schimming applied for unemployment benefits, which were denied because she had been discharged for aggravated employment misconduct. Schimming appealed. After a hearing, the ULJ determined that Schimming was ineligible to receive unemployment benefits and concluded that Schimming committed aggravated employment misconduct. Following Schimming's request for reconsideration, the ULJ affirmed the determination of ineligibility, finding that the undisputed facts establish that Schimming was discharged for seeking and accepting reimbursement for insurance premiums that she had not paid. This certiorari appeal followed.

## **DECISION**

### **I.**

Schimming first contends that the ULJ erred by failing to conclude that her termination of employment was unlawful. Schimming's challenge to the legality of the

termination of her employment is misplaced. The scope of the proceedings at issue here is limited to whether Schimming committed employment misconduct, which renders her ineligible for unemployment benefits. *See Windsperger v. Broadway Liquor Outlet*, 346 N.W.2d 142, 143 (Minn. 1984) (“The issue in this case is not whether Windsperger should have been terminated, but whether, now that she is unemployed, she should be denied unemployment compensation benefits as well.”)

## II.

Schimming next challenges the ULJ’s determination that she committed employment misconduct. 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.* 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).

The ULJ found that Schimming’s wrongful requests for and receipt of reimbursements from Equity were a “serious violation of the standards of behavior Equity Services had a right to reasonably expect from her, and . . . clearly displayed a substantial lack of concern for the employment.” The undisputed facts support the ULJ’s findings. Equity’s Premium Conversion Plan, Summary Plan Description, which authorizes reimbursement for health-insurance premiums, states that “[b]efore you can join the Plan, you must provide proof that you are covered under an eligible insurance plan[.]” Correspondence from BCBS to Schimming plainly states that Schimming’s applications for insurance had not been approved until Schimming accepted BCBS’s offer on December 16, 2008. But on six occasions between May and November 2008, Schimming submitted health-insurance reimbursement requests. And she does not dispute that she was not insured during the period in which she requested and received the funds from Equity.

Notwithstanding these undisputed facts, Schimming argues that she did not *knowingly* commit theft or fraud because she understood Equity's benefits policy to mean that she could obtain the money she received from Equity and return whatever remained at the end of the year after paying her medical expenses.<sup>1</sup> Schimming relies on the policy provision regarding the "cash benefit" option to advance this argument. Contrary to Schimming's contention, the provision does not authorize Schimming's conduct. The policy lists only three options that may be chosen by the employee for use of the employer contribution: health insurance, dental insurance, or other insurance. And it repeatedly states that the benefits are to pay for *insurance premiums*. Moreover, her explanation does not authorize reimbursement requests for health-insurance premiums that she did not pay or submission of those requests in the form of copies of checks made payable to BCBS that were never sent to the insurance company. Indeed, the ULJ discredited Schimming's explanations for the reimbursement requests and properly concluded that the evidence establishes that Schimming committed theft.

Schimming next argues that the evidence is insufficient to establish that she knowingly committed theft or fraud because she was not arrested, charged, or convicted of this alleged crime. But a finding of employment misconduct does not require the employee to have been convicted of a crime regarding the alleged misconduct. *See Risk v. Eastside Beverage*, 664 N.W.2d 16, 22 (Minn. App. 2003) (holding that the fact that the employee was not convicted of a crime did not entitle him to unemployment

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<sup>1</sup> Schimming also argues that there are discrepancies in the testimony of Equity's witnesses. But this argument challenges credibility determinations, which will not be disturbed on appeal. *Skarhus*, 721 N.W.2d at 344.

benefits). Rather, the employee's conduct must be a "violation of the standards of behavior the employer has the right to reasonably expect," or "display[ ] clearly a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a). The ULJ did not err by concluding that Schimming's actions meet the legal standard for employment misconduct.

The ULJ also found that Schimming's actions constitute aggravated employment misconduct, which results in cancelation of wage credits from that employment for purposes of a benefits account. This determination also is legally sound.

Aggravated employment misconduct is defined as "the commission of any act . . . 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." *Id.*, subd. 6a(a)(1) (2008). Here, too, the employee need not be charged with or convicted of a crime. Rather, the employee need only commit an act that would "*amount to* a gross misdemeanor or felony." *Id.* (emphasis added). A person commits theft by obtaining another's property by intentional deception "with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made." Minn. Stat. § 609.52, subd. 2(3) (2008). If the value of the property obtained is greater than \$1,000 but not greater than \$5,000, the theft is a felony. *Id.*, subd. 3(3)(a) (2008). The evidence establishes that Schimming requested and received reimbursements for health-insurance premiums to which she was not entitled and that she wrongfully obtained \$3,030. Finding her explanations lacking credibility, the ULJ found that Schimming intentionally deceived Equity by submitting requests for reimbursement

in the form of copies of checks made payable to BCBS. The record before us establishes that the ULJ did not err by concluding that Schimming's conduct constitutes aggravated employment misconduct.

### **III.**

Schimming argues that the ULJ failed to conduct the hearing in a fair and impartial manner.<sup>2</sup> The hearing is to be conducted as an evidence-gathering, nonadversarial proceeding, without regard to common-law burdens of proof. Minn. Stat. § 268.105, subd. 1(b) (2008). As such, the ULJ is required to assist unrepresented parties in the presentation of evidence, to control the hearing in a way that protects the parties' right to a fair hearing, and to ensure that relevant facts are clearly and fully developed. Minn. R. 3310.2921 (2007).

Schimming contends that the ULJ improperly influenced the office manager's testimony by suggesting the terms "defrauding the company" rather than "insurance fraud." We disagree. The ULJ asked appropriate clarifying questions. Moreover, any distinction between characterizing Schimming's actions as "insurance fraud" or "defrauding the company" is not dispositive of whether Schimming committed employment misconduct.

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<sup>2</sup> Schimming also appears to assert in her reply brief that there is a conflict of interest for the Minnesota Department of Employment and Economic Development (DEED) because its arguments benefit Equity. But DEED is the primary responding party because unemployment benefits are paid from state funds; an unemployment claim is not a claim against the employer. Minn. Stat. § 268.069, subd. 2 (2008). DEED does not have a conflict of interest here.



Schimming also argues that the ULJ unfairly denied her request to postpone the hearing so that documentation that she had requested from Equity could be submitted. Because the evidence presented to the ULJ, all of which Schimming received prior to the hearing, includes documentation addressing each of Schimming's requests from Equity, and because Schimming fails to identify additional documentation that Equity withheld from the hearing, Schimming's argument is unavailing.

Finally, Schimming argues that the ULJ erred by declining to postpone the hearing upon her request to subpoena additional Equity employees. "Subpoenas may be obtained by calling or writing the appeals office sufficiently in advance of the scheduled hearing to allow for the service of the subpoenas." Minn. R. 3310.2914, subp. 1 (2007). And the ULJ may issue subpoenas to compel the attendance of witnesses to provide necessary evidence in connection with the subject matter of an evidentiary hearing. Minn. Stat. § 268.105, subd. 4 (2008). But the ULJ may deny a subpoena request "if the testimony or documents sought would be irrelevant, immaterial, or unduly cumulative or repetitious." Minn. R. 3310.2914, subp. 1.

Schimming failed to request subpoenas in advance of the hearing. Twice during the hearing, however, she requested witness subpoenas. In response to her initial request to subpoena Equity's Chief Executive Officer (CEO), the ULJ stated that he would subpoena the CEO only if the Equity witnesses who were present were unable to provide the necessary evidence. At the conclusion of the hearing, the ULJ denied Schimming's request to subpoena a BCBS employee, the Equity CEO, and an Equity accountant because the ULJ found that their testimony would not be necessary. The record supports

this determination. The Equity witnesses who testified were able to fully explain the termination decision and the applicable policies. Schimming has not proffered any additional relevant evidence that would have been presented by the proposed witnesses, if subpoenaed. Consequently, the ULJ's decision not to postpone the hearing or to issue subpoenas was well within the ULJ's sound discretion and did not result in an unfair hearing.

**Affirmed.**