**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-1091**

Ruth Sandy,
Relator,

vs.

Comfort Home Health Care Group Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 11, 2010**
**Affirmed**
**Schellhas, Judge**

Department of Employment and Economic Development
Agency File No. 21771094

Marcus Jarvis, Jarvis & Associates LLC, Burnsville, Minnesota (for relator)

Comfort Home Health Care Group Inc., Rochester, Minnesota (respondent)

Lee B. Nelson, Amy R. Lawler, Department of Employment and Economic Development, St. Paul, Minnesota (for Department of Employment and Economic Development)

Considered and decided by Schellhas, 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

**SCHELLHAS**, Judge

In this certiorari appeal from a decision of an unemployment-law judge (ULJ), relator challenges the ULJ's decision that she is ineligible for unemployment benefits because she was discharged for employment misconduct. We affirm.

## FACTS

Relator Ruth Sandy worked for respondent-employer Comfort Home Health Care Group Inc. as a home health aide from October 22, 2002, until her termination on September 5, 2008. Respondent Department of Employment and Economic Development (DEED) determined relator to be eligible for unemployment benefits because she was terminated for a reason other than employment misconduct, and Comfort Home appealed. On March 24, 2009, a hearing was held to determine relator's eligibility for benefits, and relator participated in the hearing pro se. Human-resources manager Lynette Oehlke and executive director and director of nursing Teresa Pawlina participated on behalf of Comfort Home.

Oehlke testified that, on August 20 and September 2, 2008, she was informed by relator's supervisor, Meilan Chen, of three instances of misconduct by relator. The first instance occurred on August 19, 2008, when relator failed to provide a reassurance check to a client, which means entering the client's apartment every couple of hours to make sure that the client is safe and that nothing adverse has happened. Relator testified that she completed all of her reassurance checks and did not know why there would be a complaint that she did not perform a reassurance check.

The second instance of misconduct reported by Chen was that relator "failed to chart a toileting at 2:45 a.m." for a different client. The date of this incident is not in the record. Oehlke and Pawlina testified that, when asked about the incident, relator admitted that she did not help the client back to bed. Oehlke testified that Comfort Home's care plan requires the aide to help the client safely back to bed. Pawlina testified that the client reported that the aide had helped her to the restroom, but said, "oh, you can get yourself back to bed," as she was leaving. Pawlina testified that when she questioned relator about the incident, relator said that she left the client on the toilet because the client told her she would be fine getting back to bed by herself. According to Pawlina, relator did not complete the task in accordance with the standards of nursing practice.

Relator disagreed with the testimony of Oehlke and Pawlina. Relator testified that the client said that she could not use the toilet with relator standing there, so relator left the bathroom to give the client privacy. According to relator, this is normal. Relator said that when the client finished using the toilet, instead of using the call button to signal relator, the client got up from the toilet and moved toward her walker. Relator told the client that she was right there, but the client said, "oh, that's okay." The client then washed her hands, and relator walked behind the client while she returned to her bed. The client thanked relator and asked her to turn out the light, which relator did, and asked relator to shut the door, so relator left the room. Relator testified that she did not know why the client would complain that relator left her on the toilet without assistance.

The third instance of misconduct reported by Chen to Oehlke involved relator failing to appropriately document the care she had provided. On August 4, 2008, relator

documented on the daily assignment sheet that she had spent time providing care to client H.B. Specifically, relator wrote that she spent 15 minutes checking the client's blood-sugar level; 30 minutes setting up the client's meal and feeding her; 55 minutes doing safety/reassurance checks, performing a "Sundowner's Prevention Activity," providing supper to the client, and administering hydration; another 15 minutes checking the client's blood-sugar level; 10 minutes on laundry; 10 minutes on "med assistance"; and 15 minutes helping the client get ready for bed. Relator signed the last page of the daily assignment sheet, certifying "that the above services were delivered as noted above." But Oehlke testified that it "would be impossible" for relator to have provided this care because the client was in the hospital and was not present in the building that day.

Relator agreed that H.B. was in the hospital that day and acknowledged that it was her handwriting on the assignment sheet, but she claimed that the times she marked down were mistakes. Relator testified that after her shift, she had to transcribe the information on the daily assignment sheet to the "charting book" and that the charting book was accurate. Oehlke confirmed that in addition to filling out the daily assignment sheet, aides enter the information onto clients' individual charts. But Oehlke stated that she reviewed H.B.'s chart and that relator had transferred the inaccurate information to the chart as well.

When the ULJ asked Pawlina why the client was listed on the daily assignment sheet if she was not present in the building, Pawlina explained that sometimes "for the weekends or over holiday periods, the assignment sheets may be actually printed for two days in a row. And at that point, . . . if a person is not there or if a person leaves the

building, [staff] are to document zero minutes and document the person is not in the building." Relator pointed out that the "scheduler" was supposed to cross off any resident who had gone to the hospital, and the ULJ then asked Pawlina to explain the scheduler's role in terms of the daily assignment sheets. Pawlina responded that because assignment sheets may be printed several days in advance, "it is ultimately still the responsibility of the person adhering to that assignment sheet and the accuracy and why they still continue to sign and certify that they're the ones who have completed[,] and accurately[,] the documentation piece."

Pawlina testified that aides are not given the opportunity to correct mistakes logged on assignment sheets. She explained,

> [W]e are adhering to the same standards as within a hospital, nursing home. All documentation needs to be accurate. One does not forget. If there [are] issues, it is the expectation of every home health aide to look at the assignment, read the assignment, perform the task, and if there [are] any issues or concerns are to report and contact the registered nurse for further clarification.

Relator disagreed with this testimony, stating that when an aide makes a mistake on an assignment sheet, the employer informs the aide that he or she needs to make the record clear. Relator stated that she does not know why she was not given this opportunity in this case, though she had been given that opportunity in the past. Oehlke explained that Comfort Home will allow aides to correct errors of omission, as in a case where the aide is rushed at the end of the day and forgets to document care, but that relator did not omit information; she entered information that she completed care that she did not in fact

complete. Comfort Home considers that "fraudulent documentation," and aides are not given an opportunity to correct that type of error.

Based on the reports of the three incidents, Chen, Oehlke, and Pawlina reviewed relator's personnel file and discovered that she had a previous write-up from January 27, 2008, for a "serious medication error." According to Oehlke, relator "was to be providing eardrops to the client when she, in fact, put the eardrops into the client's eyes," which caused the client significant pain. Relator testified that when she was trying to open the client's ear, the drop "slipped and went to her eye" because the client moved her head. Relator said she "tried to wash it off," and when the client complained that her eyes were burning, relator took her to the office and told the nurse. Relator described the incident as "a genuine mistake" and said that the nurse told her at the time that she did not have to worry about it. But relator received a disciplinary notice as a result of this incident, was suspended from medication administration, and received retraining on medications.

Relator received another warning in May 2008 for failing to provide medication to a client. According to Oehlke, another aide discovered that medication was still in its box even though relator documented that she had provided the medication. Relator at first testified that she did not recall what happened but later stated that she was sure that she gave the medication. After this incident, relator was suspended from medication administration for three months. Relator's only other disciplinary incident during her eight years of employment by Comfort Home was a warning for tardiness in November 2007. Oehlke testified nevertheless that the gravity of the fraudulent-documentation,

toileting, and reassurance-check incidents in quick succession made termination necessary. Oehlke said that her focus was on the fraudulent documentation, which alone was a ground for termination and that the other two incidents "added weight."

Comfort Home's employee handbook, which relator acknowledged having had an opportunity to review, provides that "[f]alsification or alteration of agency records" is a "serious violation[] of conduct and [is] grounds for disciplinary action or may justify immediate termination." Pawlina characterized the reason for relator's discharge as "[h]er failure to perform the delegated nursing responsibility and maintaining the same standards of practice that were required by law."

Describing four past incidents, relator testified that there were problems between Chen and her. Relator explained that she felt Chen treated her unfairly; gave the impression that relator was a bad worker, though none of the other nurses ever said she was a bad worker; did not understand that relator needed rest; and always made problems for her. Relator had complained to Oehlke about her relationship with Chen and about Chen treating her differently than the other aides. Relator explained that since Chen became her only boss, relator had been under a lot of stress.

On March 25, 2009, the ULJ issued findings of fact and a decision that relator was discharged because of employment misconduct and therefore was not eligible for unemployment benefits. Relator moved the ULJ for reconsideration, and the ULJ affirmed her decision on May 21, 2009. This certiorari appeal follows.

## D E C I S I O N

Relator challenges the ULJ's conclusion that she is ineligible for unemployment benefits because she was discharged for employment misconduct. This court may reverse or modify the decision of a ULJ if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are, among other things, affected by an error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008). An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Whether an employee engaged in conduct that makes the employee ineligible for benefits is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed an act is a question of fact, but whether the act constitutes employment misconduct is a question of law. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court views a ULJ's factual findings in the light most favorable to the decision, defers to the ULJ's credibility determinations, and will not disturb a ULJ's factual findings if the evidence substantially sustains them. *Id.* We review legal questions de novo. *Id.*

***Burden of Proof***

Relator first argues that the ULJ misapplied the burden of proof in making her decision. Relying on the 1984 case of *Forsberg v. Depth of Field/Fabrics*, relator argues that the employer has the burden of proving ineligibility for unemployment benefits. 347 N.W.2d 284, 286 (Minn. App. 1984) (citing *Marz v. Dep't of Employment Servs.*, 256 N.W.2d 287, 289 (Minn. 1977)). But this was not the law in Minnesota at the time of

relator's termination and hearing. Under the 2008 Minnesota Statutes, evidentiary hearings in unemployment-insurance cases are conducted "without regard to any burden of proof." Minn. Stat. §§ 268.069, subd. 2, .105, subd. 1(b) (2008);[1] *see also Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 205 (Minn. App. 2004) (stating that employment misconduct is determined without regard to burden of proof), *review denied* (Minn. Mar. 30, 2004). Therefore, the ULJ was not required to hold the employer to a burden of proof.

***Hearsay***

Relator next argues that the ULJ incorrectly relied on hearsay evidence. But ULJs are permitted to receive hearsay evidence "if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 3310.2922 (2007). The evidence on which the ULJ relied in this case included reports among the employer's management. Reasonably prudent persons rely on this sort of information every day in the workplace. Therefore, the ULJ did not err in considering hearsay evidence.

[1] Because relator was terminated in September 2008, the 2008 version of the statute applies in this case. *See Bray v. Dogs & Cats Ltd. (1997)*, 679 N.W.2d 182, 186 (Minn. App. 2004) (stating that "[a]n employee's conduct should be judged against the law in effect at the time of the termination"). Effective August 2, 2009, applicable to all department determinations and ULJ decisions issued on or after that date, the legislature has removed the words "without regard to any burden of proof" from the statute. 2009 Minn. Laws ch. 78, art. 3, § 5, at 590, § 17, at 597 (effective date), art. 4, § 34, at 615, § 52, at 623 (effective date).

***Misconduct***

Relator's primary argument on appeal is that the alleged incidents do not constitute misconduct because they were "isolated in nature and there is no pattern of behavior that would amount to misconduct," and because: "All I can say is it is just an oversight." Minnesota law provides that "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." Minn. Stat. § 268.095, subd. 6(a) (2008). "Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, [or] good faith errors in judgment if judgment was required" do not constitute employment misconduct. *Id.*

Citing *Bray v. Dogs & Cats Ltd. (1997)*, 679 N.W.2d 182, 185 (Minn. App. 2004), relator argues that a "pattern of behavior" is required to constitute misconduct. *Bray* does not stand for this proposition. In *Bray*, this court held that a store manager who was terminated after failing to meet deadlines and follow store procedures and refusing to issue a written warning to a subordinate whom she felt was being targeted because of his race was eligible for benefits because her conduct amounted to "inefficiency, inadvertence, simple unsatisfactory conduct, or poor performance because of inability or incapacity." 679 N.W.2d at 185 (quotation marks and modification omitted). Contrary

to relator's contention, neither *Bray* nor any provision of the law requires that there be a "pattern of behavior" for misconduct to lie.

Here, relator was terminated primarily because she falsely stated that she had spent two and a half hours on August 4, 2008, caring for a client who was not present that day. The ULJ also found that relator put ear drops in a client's eye, documented that she had administered medication that was later found in its box, received a complaint from a client that relator failed to escort the client back to bed from the toilet, and received a complaint that relator missed a reassurance check. Although the ULJ found that relator's falsification of the daily assignment sheet was not intentional, these incidents displayed clearly a serious violation of the standard of care that the employer had the right to expect and demonstrated a substantial lack of concern for the employment. The ULJ did not err in determining that relator was terminated for employment misconduct.

***Credibility Determination***

Relator next argues that the ULJ failed to make statutorily required credibility findings. "When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2008). This requirement is met as long as the ULJ's reason for crediting one witness over another is apparent from the testimony. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 531–33 (Minn. App. 2007) (holding that statutory credibility-finding requirement was met where ULJ set forth conflicting versions and stated which version was more credible). Here, the ULJ noted

that Oehlke and Pawlina's version of events was supported by "contemporaneous documentation" before stating that she found their testimony to be more credible than relator's. This finding satisfies section 268.105, subdivision 1(c).

***Assistance to Pro Se Party***

Relator also argues that the ULJ failed to assist her as a pro se participant and failed to conduct the hearing as an evidence-gathering inquiry. The unemployment-insurance statutes are "remedial and humanitarian in nature." *Miller v. Int'l Express Corp.*, 495 N.W.2d 616, 618 (Minn. App. 1993). ULJs must conduct evidentiary hearings as evidence-gathering inquiries, rather than as adversarial proceedings. Minn. Stat. § 268.105, subd. 1(b). The ULJ is obligated to "recognize and interpret" unrepresented parties' claims, *Miller*, 495 N.W.2d at 618, and "should assist unrepresented parties in the presentation of evidence," Minn. R. 3310.2921 (2007).

According to relator, "[t]here were times that [she] raised important issues, but she could not quite get her ideas, and/or questions on the table." Relator points in particular to her testimony about her conflict with Chen and states that the "ULJ should have paid more attention to this fact and tr[ied] to help [relator] develop that portion of her testimony."

A review of the transcript belies relator's contention. Throughout the hearing, the ULJ consistently assisted relator in formulating her questions and in posing them directly to the employer's witnesses. When relator testified, the ULJ asked her open-ended questions about each of the incidents reported by the employer, giving relator an opportunity to present her side of the story. And with

respect to the issue of the conflict between relator and Chen, contrary to relator's assertion, the record reflects that the ULJ helped relator develop her testimony on the point.

While the ULJ controlled relator during the hearing, reminding her several times about the difference between testifying and asking questions, the ULJ treated the parties fairly. At one point during Oehlke's testimony, Pawlina said there was something to which she wanted to testify. The ULJ stated, "I'm going to tell you right now that I'm not going to allow you to prompt a witness. If you have something you want to say, make a note of it and when we get to you, you'll be allowed to testify. Until then, I don't want you interrupting Ms. Oehlke's testimony." Overall, the record demonstrates that the ULJ properly conducted the hearing as an evidence-gathering inquiry and assisted relator in formulating her questions and presenting evidence. Therefore, relator's contention that the ULJ did not conduct the hearing in the manner required by statute lacks merit.

**Affirmed.**