STATE OF MINNESOTA
IN COURT OF APPEALS
A10-872

Nanette Bingham,
Respondent,

vs.

Allina Health System,
Relator,

Department of Employment
and Economic Development,
Respondent.

Filed January 11, 2011
Reversed
Klaphake, Judge

Department of Employment and Economic Development
File No. 23827157-3

Nanette Bingham, Minneapolis, Minnesota (pro se respondent)

Jessica Molyneaux Marsh, Felhaber, Larson, Fenlon & Vogt, Minneapolis, Minnesota (for relator)

Lee B. Nelson, Amy R. Lawler, Kathryn Short (certified student attorney), Department of Employment and Economic Development, St. Paul, Minnesota (for respondent Department of Employment and Economic Development)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Connolly, Judge.

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

KLAPHAKE, Judge

Relator Allina Health System challenges the final decision by the unemployment law judge (ULJ) that respondent, former employee Nanette Bingham, did not engage in employment misconduct when she accessed a patient's records in violation of the "no tolerance" policy regarding the privacy of such records. Because the ULJ erroneously concluded that this conduct did not constitute employment misconduct for purposes of determining eligibility for unemployment compensation, we reverse.

D E C I S I O N

Among other reasons, this court will alter a ULJ decision "if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision" are affected by an "error of law." Minn. Stat. § 268.105, subd. 7(d) (2008). Whether an employee engaged in specific conduct is a fact question and, if supported by substantial evidence, this court defers to the ULJ's factual findings and credibility determinations. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But whether the employee's conduct constitutes employment misconduct is a question of law, which this court reviews de novo. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Respondent was employed by relator from June 3, 2008 to November 3, 2009, as an "EHIM specialist"; her duties primarily consisted of electronically scanning old medical records for electronic storage. On October 8, 2009, respondent was approached by a co-worker who asked her to access a minor daughter's lab test results; the co-worker

could not access the results herself because she had worked for relator only a short time. Respondent retrieved the lab test results; her conduct was discovered; she was dismissed by relator for misconduct; and she was initially determined to be ineligible to receive unemployment benefits by the Department of Employment and Economic Development (DEED). That decision was overturned by the ULJ, who concluded that respondent's conduct did not constitute employment misconduct for purposes of receiving unemployment compensation.

A person who is discharged because of employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). "Employment misconduct means 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) (Supp. 2009). Misconduct does not include "good faith errors in judgment if judgment was required." *Id.*, subd. 6(b)(6) (Supp. 2009).

If the misconduct involved a single incident, the ULJ must consider that factor in weighing whether the conduct constitutes employment misconduct. *Id.*, subd. 6(d) (Supp. 2009). In Minn. Stat. § 268.095, subd. 6(a) (2008), an exception to the definition of misconduct existed for "a single incident that does not have a significant adverse impact on the employer." This provision was amended in 2009, and was effective for unemployment determinations issued on or after August 2, 2009. 2009 Minn. Laws, ch. 15, § 9, at 47-48. The 2009 amendment states that conduct arising out of a single incident is "an important fact that must be considered in deciding whether the conduct

rises to the level of employment misconduct." *Id.*, subd. 6(d) (Supp. 2009). Because the determination of ineligibility was issued on December 7, 2009, the 2009 amendment applies in this case.[1]

We conclude that the ULJ's misconduct determination is contrary to both relator's policy and case law involving disclosure of medical information. Relator's confidentiality policy was worded in emphatic terms: it required respondent to keep confidential all patient information except her own medical information, and prohibited her from participating in unauthorized computer access to view confidential data or from accessing confidential information except for business purposes. The policy stated that there would be "***no tolerance'*** for inappropriate access or sharing of patient information." The policy also notified employees that failure to comply with the policy could result in termination of employment. As conceded by the parties, the purpose of this policy was to conform with requirements of the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. §§ 1320d-1 – 1320-9 (2010), which requires medical entities to maintain the privacy of patient medical information.

The ULJ excused respondent's conduct because respondent "reasonably believed that the [co-worker] was entitled to the information, and [respondent] did not otherwise make inappropriate use of the information obtained." This rationale directly violates the language of relator's confidentiality policy, which requires strict adherence to its terms and does not permit employees to apply discretion in its interpretation. The policy directs

[1] The ULJ's decision shows that it considered the fact that the dischargeable conduct consisted of a single incident, although it is unclear from the ULJ's decision whether it relied on or applied the 2009 amendment to the "single incident" exception.

an employee to "consult with an immediate leader/manager" if the employee is "uncertain about whether a disclosure of patient information is permitted." But no judgment was required here because relator's policy specifically prohibited respondent's conduct and did not permit respondent to apply discretion in determining whether to access or share confidential patient information. The ULJ committed an error of law by concluding that respondent's accessing patient information did not amount to misconduct.

The ULJ noted that relator "may have had valid business or policy reasons for taking action," but determined that those reasons did not make respondent ineligible to receive unemployment benefits. While no Minnesota case has addressed this issue since enactment of the amendment to the "single incident" exception, the logic of pre-amendment cases applies equally well under current law. Those cases generally hold that a medical entity has the right to expect its employees to keep patient health information confidential and that the failure to do so is employee misconduct. *See, e.g., Group Health Plan, Inc. v. Lopez*, 341 N.W.2d 294, 297 (Minn. App. 1983). We therefore reverse the ULJ's decision that respondent is eligible for unemployment benefits.[2]

Reversed.

[2] Respondent DEED suggests that this case may be moot, depending on issues of repayment of benefits and respondent's entitlement to other benefits. As those issues are admittedly not resolved, relator's appeal is not moot. Further, as argued by relator, the issue also appears to be capable of repetition but evasive of review under the circumstances presented, which is a classic basis for denying a claim of mootness. *See In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999).