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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1829**

Sharon Olsen,
Relator,

vs.

Lindberg Chiropractic,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 17, 2018
Affirmed
Halbrooks, Judge**

Department of Employment and Economic Development
File No. 35723904-3

Sharon Olsen, Bloomington, Minnesota (pro se relator)

Lindberg Chiropractic, Bloomington, Minnesota (respondent employer)

Lee B. Nelson, Minnesota Department of Employment and Economic Development,
St. Paul, Minnesota (for respondent department)

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that she is ineligible for unemployment benefits because she was discharged for employment misconduct. We affirm.

FACTS

Relator Sharon Olsen was hired on May 22, 2017, to work as an assistant at respondent Lindberg Chiropractic for approximately 30 to 34 hours per week. On June 9, 2017, Bruce Lindberg, D.C., the owner and sole chiropractor at Lindberg Chiropractic, terminated Olsen's employment.

Olsen applied for and began receiving unemployment benefits. Dr. Lindberg appealed the department's decision on the ground that Olsen was discharged for employment misconduct. The ULJ held a hearing and determined that Olsen is ineligible for unemployment benefits because her employment was terminated for her misconduct in offering a competing product to a client.

Olsen filed a request for reconsideration. The ULJ affirmed the decision, reasoning that Olsen relied on evidence in her request for reconsideration that she did not introduce at the evidentiary hearing and that (1) she had not demonstrated good cause for failing to introduce the evidence at the initial hearing and (2) the evidence would not have likely changed the outcome. This certiorari appeal follows.

DECISION

On review, we may affirm or we may reverse or modify the decision of the ULJ or remand the case for further proceedings if the substantial rights of the relator may have been prejudiced because the findings, inferences, conclusion, or decision are affected by an error of law, are unsupported by substantial evidence in the record, or are arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(4)-(6) (2016).

Whether an employee engaged in misconduct is a mixed question of fact and law. *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). Whether the employee committed the alleged act is a question of fact. *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We review the ULJ's factual findings in the light most favorable to the decision and will not disturb those findings if there is evidence in the record that reasonably tends to sustain them. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). We give deference to the ULJ's credibility determinations. *Icenhower v. Total Auto., Inc.*, 845 N.W.2d 849, 855 (Minn. App. 2014), *review denied* (Minn. July 15, 2014). "Whether a particular act constitutes disqualifying conduct is a question of law we review de novo." *Wilson*, 888 N.W.2d at 460.

An employee discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016). "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. 2017). Employment misconduct is not "simple

unsatisfactory conduct” or “good faith errors in judgment if judgment is required.” *Id.*, subd. 6(b)(3), (6). Generally, an employee’s refusal “to abide by an employer’s reasonable policies and requests amounts to disqualifying misconduct.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

An employee may commit misconduct by breaching her duty of loyalty to the company. *Marn v. Fairview Pharmacy Servs.*, 756 N.W.2d 117, 121 (Minn. App. 2008), *review denied* (Minn. Dec. 16, 2008). An employee violates her duty of loyalty by soliciting her employer’s customers for herself or by otherwise competing with her employer while employed. *Rehab. Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304 (Minn. App. 1987). An employer has a legitimate interest in protecting itself against “the deflection of trade or customers by the employee by means of the opportunity which the employment has given him.” *Webb Publ’g Co. v. Fosshage*, 426 N.W.2d 445, 450 (Minn. App. 1988) (quotation omitted).

Olsen asserts that she was discharged because she had an allergic reaction to chemicals in the carpet cleaner. Olsen testified at the hearing that she thought that it was a coincidence that Dr. Lindberg fired her on the same day that she had an allergic reaction to the carpet cleaner. She testified that Dr. Lindberg was not empathetic to her reaction and that she was thinking of leaving her job because she “didn’t think it was a good fit.” Dr. Lindberg, in contrast, never testified about Olsen’s allergic reaction to the carpet cleaner. He testified that he found Olsen’s work problematic from the very beginning because she posted an advertisement without being asked to, did not follow the office script

when answering the phone, changed office procedures, spoke to a patient about a competing product, and spoke negatively about him to patients.

The ULJ's determination of misconduct was based on the following factual finding: "Olsen brought a topical product that her friend makes to the office with her. This product competes with a product sold by [Dr. Lindberg]. Olsen offered the product to a . . . client in the waiting room. The client reported the offer to Lindberg."

Olsen disputes this factual finding. Olsen acknowledged that she brought the product to work but testified that she did so in order for Dr. Lindberg to review the ingredients due to her allergies. Olsen claimed that she never discussed the product with a client.

At the hearing, Dr. Lindberg testified that a patient informed him that, while she waited for her appointment, Olsen told her that Olsen's friend had a much better product than the topical analgesic sold by Dr. Lindberg. Dr. Lindberg stated that it was "not beneficial for [his] business to have somebody . . . talking about some other product."

The ULJ found Dr. Lindberg's testimony more credible than Olsen's because Olsen was unable to explain why Dr. Lindberg's opinion of the product was important to her and because it was more logical that Olsen brought the product to the office for the purpose of trying to sell it to clients for her own gain or for the gain of her friend. Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal. *Skarhus*, 721 N.W.2d at 345. The ULJ's factual finding that Olsen offered the competing product to a client is well-supported by Dr. Lindberg's testimony, which the ULJ credited. On this record, we conclude that the ULJ did not err by determining that Olsen is ineligible

to receive unemployment benefits because she was discharged for employment misconduct.

Affirmed.