

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0104**

Robb W. Jezierski,
Relator,

vs.

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

Department of Employment and
Economic Development,
Respondent.

**Filed October 1, 2018
Affirmed
Jesson, Judge**

Department of Employment and
Economic Development
File No. 35784011-3

Robb W. Jezierski, Duluth, Minnesota (pro se relator)

St. Mary's/Duluth Clinic Health System, Duluth, Minnesota (respondent employer)

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

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

JESSON, Judge

Relator Robb Jezierski was terminated from his nursing position with St. Mary's/Duluth Clinic after it came to light that he ordered controlled drugs from his employer's pharmacy without authorization. Jezierski filed for unemployment benefits but the unemployment law judge denied this request because Jezierski's behavior violated Minnesota law and amounted to misconduct—a legal ground for denying such benefits. Jezierski appeals, arguing the judge's decision was in error and that various facts mitigate the seriousness of his act. Because the improper acquisition of controlled substances in violation of state law is serious misconduct, we affirm.

FACTS

Relator Robb Jezierski worked as a registered nurse for St. Mary's/Duluth Clinic Health System (St. Mary's) since 2005. He was discharged from his employment with St. Mary's because of an incident that took place in May 2017 when a new nurse was having difficulties trying to place a nasal gastric tube for a patient. The nurse called Jezierski for help because he had experience with this procedure. Jezierski gave the nurse some instructions, told her he “didn't have time for this,” and if she wanted him to put in the tube, she needed to get an order for two drugs from St. Mary's pharmacy because administering these drugs induces light sedation and pain relief to counteract the discomfort from inserting the nasal gastric tube.

The drugs Jezierski had in mind were prescription drugs requiring a physician's approval before they could be ordered from the pharmacy. What happened next is

disputed. Jezierski claims that the nurse called him back about an hour later, informing him that the doctor authorized the drugs—something Jezierski conceded was “not the greatest protocol to go through” but that “this is the way nursing has been done since the beginning of time.” The other nurse disputes this, denying that she ever told Jezierski a doctor gave authorization for the drugs. Regardless, Jezierski admits that he ordered the drugs from the pharmacy.¹

The pharmacy refused to fill Jezierski’s order without a physician’s authorization. After St. Mary’s looked into the matter, it determined that Jezierski attempted to order controlled drugs without proper approval, and because of this, Jezierski’s employment with St. Mary’s was officially terminated on July 18, 2017.

Jezierski filed for unemployment benefits but was deemed ineligible by the respondent Minnesota Department of Employment and Economic Development. Jezierski initiated an administrative appeal, and a hearing was held in September 2017. A few days later, the unemployment-law judge issued a written decision concluding that Jezierski was ineligible for unemployment benefits due to misconduct. Specifically, the judge determined that ordering the drugs without the express authorization of a physician constituted a misdemeanor under Minnesota Statutes sections 151.37, subdivision 8 (2016) and 151.29 (2016). The unemployment-law judge wrote that “[T]his one incident does display clearly a serious violation of the standard of behavior that Saint Mary’s Duluth Clinic Health System has the right to reasonably expect of” Jezierski.

¹ Jezierski never maintained that the doctor gave him direct authorization to order the drugs, only that authorization came via the other nurse. The doctor, through hearsay, allegedly said that he never gave any authorization.

Jezierski requested that the unemployment-law judge reconsider and offered two additional pieces of evidence in support of his request. The first was a document allegedly showing that Jezierski and the physician were paged by the other nurse on the incident date. The second was a statement by someone who, the week after the incident, overheard the pharmacist comment that the physician in this case “did not intend for that medication to be given on the general floor.” The unemployment-law judge denied Jezierski’s request, concluding that this additional evidence “would not likely change the outcome of the decision” and that the original decision was “factually and legally correct.”

Jezierski petitioned for a writ of certiorari from this court.

DECISION

An unemployment-law judge determined that Jezierski’s behavior rose to the level of misconduct—rendering him ineligible for unemployment benefits. An applicant is ineligible for unemployment benefits if the applicant was discharged for “misconduct.” Minn. Stat. § 268.095, subd. 4(1) (2016). Misconduct is defined as “any intentional, negligent, or indifferent conduct” that clearly displays “a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee.” *Id.*, subd. 6(a), 6(a)(1) (Supp. 2017).

Analyzing whether Jezierski’s behavior qualifies as misconduct is a mixed question of law and fact. *Wilson v. Mortg. Res. Ctr.*, 888 N.W.2d 452, 460 (Minn. 2016). In this case, Jezierski does not dispute the underlying action—that is, he admits he placed the pharmacy order without the named-physician’s authorization. Because the facts are not in dispute, we focus on determining if Jezierski’s conduct falls under the definition of

misconduct—a question of law this court reviews de novo. *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008).

The unemployment-law judge based his conclusion that Jezierski committed misconduct on Minnesota Statutes section 151.37, subdivision 8. That statute states that, if a drug requires authorization from a licensed practitioner before it can be procured, attempting to procure that drug without authorization is a misdemeanor. Minn. Stat. § § 151.37, subd. 8; 29. Jezierski does not dispute that he placed an order for the drugs and testified that his behavior was “not the greatest protocol to go through.” He also acknowledged that his actions were not permitted “if you go by the rule book,” that rule book being—in Jezierski’s own words—the “Minnesota State Statutes.”

We agree with the unemployment-law judge that violating a statute regulating controlled substances qualifies as misconduct. Even though Jezierski’s behavior was only one incident in a long career, the Minnesota Supreme Court has held that “[a] single incident where an employee deliberately chooses a course of action adverse to the employer can constitute misconduct.” *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 524 (Minn. 1989). The supreme court has also stated that if there is “one unique area” where “strict compliance with protocol and militarylike discipline is required,” it is the medical realm. *Id.* at 525. Jezierski admitted to violating this “militarylike discipline” expected of him. He understood that attempting to obtain drugs from the hospital pharmacy was a violation of state law, yet he placed the order anyway. This behavior displayed “a serious violation of the standards of behavior” that St. Mary’s had the right “to reasonably expect” of Jezierski. Minn. Stat. § 268.095, subd. 6(a)(1). Because this behavior clearly violated state

law, we conclude that this single incident qualified as misconduct and the unemployment-law judge did not err in denying Jezierski benefits.

Jezierski makes various arguments that he claims mitigate the seriousness of his case, but we are not persuaded. For example, Jezierski claims that his behavior is standard practice amongst nurses, but we addressed a similar claim in *Dean v. Allied Aviation Fueling Co.*, holding that pointing out violations “of an employer’s rules by other employees is not a valid defense to a claim of misconduct.” 381 N.W.2d 80, 83 (Minn. App. 1986). Jezierski also claims that other employees engaged in the same behavior that he was discharged for, and these employees avoided negative repercussions. We rejected this argument in *Sivertson v. Sims Sec., Inc.*, where we determined that the “sole question” in any unemployment-benefits case is whether the specific employee in the case violated the employer’s rules. 390 N.W.2d 868, 871 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986).

Jezierski further claims that the evidence he attempted to introduce in his reconsideration request would show that the other nurse paged the physician before Jezierski ordered the drug. Essentially, Jezierski claims that this evidence demonstrates that the doctor gave authorization to the other nurse who in turn relayed that authorization to Jezierski. But this evidence would not change the underlying fact that he placed an order for a controlled drug without a physician’s authorization.

Jezierski also argues that St. Mary’s did not follow its own disciplinary rules and agreements in discharging him, but this is irrelevant to the current case. “[A]n employee’s expectation that the employer will follow its disciplinary procedures has no

bearing on whether the employee's conduct violated the standards the employer has a reasonable right to expect or whether any such violation is serious.” *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 316 (Minn. 2011).

Finally, Jezierski claims that the board of nursing and the department of health cleared him of wrongdoing in this matter and that their determinations should guide our decision here.² But there is nothing in the record to support these assertions. Appellate courts may not base their decisions “on matters outside the record on appeal,” and any matter not produced and received into evidence at the district court or administrative level “may not be considered.” *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977). Without evidence to support these claims, this argument is not properly before us.³

In sum, Jezierski attempted to procure controlled substances from his employer's pharmacy without authorization. This was a violation of Minnesota law and his employer's expectations. Because Jezierski's behavior was a serious violation of the standards his employer reasonably expected of him, his behavior amounted to misconduct. Jezierski is not entitled to unemployment benefits.

Affirmed.

² Specifically, Jezierski claims that the board of nursing investigated this incident and found no wrongdoing, and that the department of health offered him a job which—to Jezierski—means the department knew of this incident and deemed it inconsequential.

³ Further, any determinations by the board of nursing and the department of health have no weight in our de novo review of the record and application of relevant law.