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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1493**

Rebecca Greenstein,
Relator,

vs.

Allina Health System,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 20, 2019
Affirmed
Kalitowski, Judge***

Department of Employment and Economic Development
File No. 36235671-3

Rebecca Greenstein, Blaine, Minnesota (pro se relator)

Allina Health System, c/o TALX UCM Services Inc., St. Louis, Missouri (for respondent-employer)

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

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Kalitowski, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Relator Rebecca Greenstein challenges the decision of an unemployment-law judge (ULJ) that she is ineligible for unemployment benefits because she was discharged for employment misconduct due to improper billing practices. Because substantial evidence supports the ULJ's determination that relator committed employment misconduct, we affirm.

FACTS

Rebecca Greenstein worked as a physical therapy assistant at respondent Allina Health System (Allina) from October 27, 2014, until her discharge on January 19, 2018. For a physical therapy session, clients are charged based on 15-minute units and the therapist must perform at least eight minutes of treatment in order to bill for a unit. Allina discovered a total of seven instances when Greenstein was "billing for more time than would be possible given her arrival time at work and the check in time for the patient." Greenstein was terminated because she over-billed her clients on multiple occasions and was occasionally late to work.

Greenstein was diagnosed with generalized anxiety. The ULJ found that her "anxiety symptoms caused her to be late for work several times," which occurred "particularly when she was scheduled for an 8:00 a.m. start time." Greenstein's late arrivals were thus not employment misconduct. See Minn. Stat. § 268.095, subd. 6(b)(1) (2018). And Greenstein did not argue before the ULJ or on appeal that the alleged improper billing was caused by her anxiety.

Respondent Department of Employment and Economic Development (DEED) issued a determination of eligibility on February 2, 2018. Allina appealed, and an evidentiary hearing took place on April 11, 2018. During the hearing, the ULJ focused on several incidents when Greenstein was late to work, which caused her first appointment scheduled at 8:00 a.m. to begin late. Greenstein still billed for 54 to 60 minutes of therapy time, but did not explain how she reached that time. She did not include any indication in her notes that the therapy appointments ran long to make up for the time lost due to her tardiness.

After the hearing, the ULJ determined that Greenstein's actions constituted misconduct and she was ineligible for unemployment benefits. After Greenstein filed a request for reconsideration, the ULJ issued an order affirming the decision.

D E C I S I O N

Unemployment benefits are intended to assist those who are discharged through no fault of their own. Minn. Stat. § 268.03, subd. 1 (2018). A person who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2018). Whether an employee engaged in employment misconduct is a mixed question of law and fact. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Determining whether an employee committed a particular act is a question of fact and whether that 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 reviews the ULJ's factual findings in the light most favorable to the decision and those findings will not be disturbed if the evidence substantially sustains them. *Id.* We apply a de novo standard

when reviewing questions of law. *Superior Glass, Inc. v. Johnson*, 896 N.W.2d 137, 142 (Minn. App. 2017).

I. The ULJ’s factual findings are supported by substantial evidence.

Greenstein argues that the ULJ’s finding that she improperly billed her clients is unsupported by substantial evidence. We disagree.

The ULJ found that on at least five occasions, Greenstein started a therapy session late, then billed for more therapy time than she actually provided. Substantial evidence supports this finding. Documents submitted by Allina show that Greenstein arrived late to work on January 8, 2018; October 12, 2017; October 5, 2017; September 19, 2017; and September 8, 2017. Each of these days she arrived past 8:00 a.m., which was when her first therapy session with a client was scheduled to begin. The therapy sessions lasted one hour each. Allina’s documents additionally show when a client checked in before their appointment. Greenstein billed for 54 to 60 minutes for each of these five appointments. But given when Greenstein arrived to work and the time her clients arrived for their session, the record indicates that Greenstein billed for more therapy time than actually provided. Based on the record, the ULJ’s factual findings are supported by substantial evidence.

II. The ULJ’s credibility determinations are supported by substantial evidence.

Greenstein argues that the ULJ erred in its credibility determinations. When the credibility of the involved parties testifying had a “significant effect on the outcome of [the] decision,” the ULJ must “set out the reason for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1a(a) (2018). This court defers to the ULJ’s

credibility determinations when they are supported by substantial evidence. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007). Here, in denying relator's request for reconsideration, the ULJ found:

Greenstein's testimony was not credible because it was less plausible and not supported by the employer's records. Specifically, Greenstein asserted that the only incident where she billed for more therapy time than had been provided was on January 8, 2018. This was not credible, as the employer's review of her records revealed several other similar instances where she had been late to work and had not explained in her documentation how the therapy time billed for those sessions that started late was actually achieved. If Greenstein had gone past the scheduled end times for those sessions that she started late due to being late for work, Greenstein was expected to have documented that she had done so. Further, the fact that the only reason the overbilling incident on January 8, 2018, was corrected was because another therapist noticed the issue supports a conclusion that Greenstein had more likely than not overbilled in the past on days when she was late for work.

The reasoning behind the ULJ's credibility determinations fulfill the statutory requirement of Minn. Stat. § 268.105, subd. 1a(a). *See id.* (considering reasonableness of testimony as compared to other evidence when making credibility determinations). And our review of the record indicates that there is substantial evidence to support the ULJ's credibility determination.

III. Greenstein's actions constitute employment misconduct.

Greenstein argues that she did not commit employment misconduct because she did not violate Allina's policies. Employment misconduct is "any intentional, negligent, or indifferent conduct" that clearly displays "(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.” Minn. Stat. § 268.095, subd. 6 (2018).

The ULJ determined that Greenstein committed employment misconduct by overbilling for her therapy sessions and failing to make accurate records of work performed. Greenstein argues that because there was no policy mandating that she keep accurate notes regarding the start and end time of her sessions, she did not commit employment misconduct. We disagree.

A specific policy prohibiting certain behavior is not necessary for that behavior to be considered employment misconduct. *See Brisson v. City of Hewitt*, 789 N.W.2d 694, 697 (Minn. App. 2010) (holding that relator committed employment misconduct by seriously violating a standard of behavior instead of a policy). Although Allina may not have a policy mandating that physical therapists indicate when a therapy session started late or ended late, Greenstein testified that she usually tries to include that in her notes and that preventing improper billing is a “very important thing in our industry.”

Moreover, fraudulent billing “may be presumed always to have a significant adverse impact on the employer.” *Frank v. Heartland Auto. Servs., Inc.*, 743 N.W.2d 626, 630 (Minn. App. 2008). Greenstein’s conduct prevents Allina from entrusting her with important responsibilities, such as accurately billing her clients, and constitutes employment misconduct. *See Skarhus*, 721 N.W.2d at 344 (holding that relator’s act was employment misconduct because employer could no longer entrust relator with essential functions of the job). Allina had the right to reasonably expect that Greenstein would keep

accurate records and bill her clients correctly. The ULJ did not err in determining that Greenstein's actions constituted employment misconduct.

We affirm the ULJ's decision that Greenstein was discharged for employment misconduct and is therefore not eligible to receive unemployment benefits.

Affirmed.