

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0218**

Julie Costello,
Relator,

vs.

Fond du Lac Reservation,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 15, 2022
Affirmed
Florey, Judge***

Department of Employment and Economic Development
File No. 47991497-3

Julie Costello, West St. Paul, Minnesota (pro se relator)

Fond du Lac Reservation, Cloquet, Minnesota (respondent employer)

Keri A. Phillips, Anne B. Froelich, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Ross, Presiding Judge; Frisch, Judge; and Florey, Judge.

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

NONPRECEDENTIAL OPINION

FLOREY, Judge

Pro se relator challenges the decision of an unemployment law judge (ULJ) that relator is ineligible for unemployment benefits because she was discharged for the employment misconduct of failing to comply with respondent-employer's COVID-19 vaccination policy. We affirm.

FACTS

In December 2018, relator Julie Costello began working full-time for respondent Fond Du Lac Reservation (Fond Du Lac) as a secretary in the front-desk area of Fond Du Lac's Minneapolis office. Later, in response to the COVID-19 pandemic, the Federal Drug Administration (FDA) authorized three COVID-19 vaccines, including Pfizer's vaccine, for emergency use. The FDA then formally approved the Pfizer COVID-19 vaccine on August 23, 2021.

On September 13, 2021, Fond Du Lac informed its employees in the human services division that, in order to maintain their employment, employees must receive their first dose of a COVID-19 vaccine by October 1, 2021, and be fully vaccinated by November 1, 2021. The policy had exemptions for employees who were unable to get the vaccine for medical or religious reasons.

Fond Du Lac terminated Costello's employment after she did not receive the first dose of the COVID-19 vaccine by October 1. Costello then applied for unemployment benefits and respondent Minnesota Department of Employment and Economic Development (department) determined that Costello was ineligible for benefits because she

was discharged for failing to comply with Fond Du Lac's vaccination policy. Costello appealed that decision, and a de novo hearing was conducted.

Costello testified that she chose not to get the vaccine because she believed the vaccine is unnecessary "if you're a healthy person and you don't get sick and you don't go to the doctor and you don't take medication." Costello also believed that, due to her "spiritual practices," and "healthy lifestyle," she would "have a 99.9 percent chance of recovering on [her] own" if she contracted COVID-19. But Costello acknowledged that she did not speak to a doctor about whether she should get the vaccine and did not request a medical or religious exemption. Fond Du Lac did not participate at the hearing.

A ULJ determined that Costello was ineligible for unemployment benefits because she quit her job without good reason caused by her employer. Costello requested reconsideration with the ULJ, who then affirmed the determination that Costello was ineligible for unemployment benefits. But the ULJ concluded that Costello did not quit her employment. Instead, the ULJ determined that Costello was discharged for employment misconduct due to Costello's failure to abide by Fond Du Lac's "reasonable" vaccination policy. This certiorari appeal follows.

DECISION

Costello challenges the ULJ's decision that she is ineligible for unemployment benefits because her refusal to abide by Fond Du Lac's vaccination policy constituted disqualifying employment misconduct. "Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job, that is a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee."

Minn. Stat. § 268.095, subd. 6(a) (2020). An employee who is discharged for employment misconduct is ineligible for unemployment benefits. *Id.*, subd. 4(1) (2020).

“As a general rule, refusing 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). When an employee knowingly violates an employer’s instructions and directives, such action amounts to employment misconduct because it is a willful disregard of the employer’s interests. *Id.* at 806.

Whether an employee committed employment misconduct is a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). This court reviews the ULJ’s factual findings in the light most favorable to the decision and will not disturb them if evidence in the record substantially supports them. Minn. Stat. § 268.105, subd. 7(d)(5) (2020); *Gonzalez Diaz v. Three Rivers Cmty. Action, Inc.*, 917 N.W.2d 813, 815-16 (Minn. App. 2018). But whether a particular act constitutes employment misconduct is a legal issue that is reviewed de novo. *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016).

On reconsideration, the ULJ modified the decision and determined that “[a] preponderance of the evidence shows that Costello was discharged” from her employment for refusing to abide by her employer’s vaccination policy. The ULJ then determined that Fond Du Lac’s “mandatory vaccination policy was reasonable” because it was “implemented to minimize the spread of COVID-19 and [to] protect employees and the public from preventable illness.” The ULJ also noted that the “policy was implemented after one of the available vaccines was approved by the FDA,” and Fond Du Lac “gave

employees the opportunity to seek exemptions for medical and religious reasons.” The ULJ concluded that Costello’s intentional refusal to abide by Fond Du Lac’s “important, reasonable policy” constituted employment misconduct because Costello “did not have a sincerely held religious belief not to take the COVID-19 vaccine,” and there is “no evidence in the record that Costello had medical reasons to be contraindicated to take the vaccine.”

As an initial matter, Costello argues that Fond Du Lac violated the Health Insurance Portability and Accountability Act (HIPAA) privacy rule by identifying her as unvaccinated in a department email and asking her on the phone if she had received a vaccination. But these arguments are not properly before us because they were not raised below. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court “must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it” (quotation omitted)). Moreover, the issue before us is whether Costello was discharged for employment misconduct, and these arguments are not related to that issue.

Costello argues that her refusal to get the mandatory COVID-19 vaccine does not constitute employment misconduct because Fond Du Lac’s mandatory vaccination policy is unreasonable. We disagree. In *Potter v. St. Joseph’s Med. Ctr.*, the relator was discharged from her position as a registered nurse after she refused to receive an influenza vaccination in violation of company policy. No. A18-0736, 2018 WL 6729836, at *1 (Minn. App. Dec. 24, 2018). On appeal, this court determined that “because it is a healthcare institution, [the employer] reasonably requires staff to get flu vaccinations for

the maximum protection of patient health.” *Id.* at *5 (quotation omitted). The court also noted that the employer’s “vaccination policy provided exemption for those employees unable to be vaccinated for religious or medical reasons.” *Id.* Thus, this court affirmed the ULJ’s decision that the relator was ineligible for unemployment benefits because her refusal to comply with the employer’s reasonable flu-vaccination mandate constituted disqualifying employment misconduct. *Id.*

We acknowledge that *Potter* is a nonprecedential case with no binding authority. *See* Minn. R. Civ. App. 136.01, subd. 1(c). But *Potter* has persuasive value due to its similarity to this case. *See City of St. Paul v. Eldredge*, 788 N.W.2d 522, 526-27 (Minn. App. 2010) (noting that nonprecedential opinions of the court of appeals are not binding authority but may have persuasive value), *aff’d*, 800 N.W.2d 643 (Minn. 2011). Similar to the employer in *Potter*, Fond Du Lac required its employees to get the COVID-19 vaccine to ensure “patient, community, and employee safety.” Although there is no indication that, as in *Potter*, Fond Du Lac is a health care institution, both employers mandated the vaccines for health and safety reasons. And, as a front-desk employee, Costello would have ample contact with the public and other Fond Du Lac employees. Moreover, as the ULJ found, the policy was not implemented until the vaccine was formally approved by the FDA.

Costello appears to argue that Fond Du Lac’s mandatory vaccination policy was unreasonable because she did not need the vaccine “due to [her] strong spiritual[ly] held beliefs and . . . healthy lifestyle.” But, like the vaccination policy in *Potter*, Fond Du Lac’s vaccination policy contained an exemption for religious and medical reasons. The ULJ found that “Costello did not seek a medical or religious exemption” to Fond Du Lac’s

vaccination requirement, and that finding is supported by substantial evidence in the record. Costello testified that she did not seek a medical or religious exemption. In fact, Costello admitted in her brief that she is “not a [r]eligious person,” and claimed that “[n]atural medicine is [her] way of life.” Costello also opined at the hearing that the vaccine was “an experimental thing,” and testified that she did not need the vaccine because of her “spiritual practices.” Costello’s opinions on the COVID-19 vaccine do not establish that Fond Du Lac’s policy was unreasonable. Therefore, as in *Potter*, Fond Du Lac’s vaccination policy was reasonable under the circumstances.¹

Costello further argues that the ULJ erred in concluding that she is ineligible for unemployment benefits because there was no “proof” of employment misconduct. But, as addressed above, Fond Du Lac’s vaccination policy is reasonable under the circumstances to help slow the spread of COVID-19. And Costello acknowledges that she chose not to receive the COVID-19 vaccine in violation of Fond Du Lac’s policy. Costello’s intentional violation of Fond Du Lac’s reasonable vaccination policy constitutes employment misconduct. *See Schmidgall*, 644 N.W.2d at 804. Accordingly, the ULJ did not err in concluding that Costello is ineligible for unemployment benefits.

Affirmed.

¹ We note that Costello makes no argument that Fond Du Lac could have offered other, potentially less intrusive measures, such as increased COVID-19 testing, as an alternative to getting the COVID-19 vaccine. *See Moore v. Hoff*, 821 N.W.2d 591, 595 n.2 (Minn. App. 2012) (stating that issues not briefed on appeal are waived).