STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0246

In the Matter of: Tessa Mortenson,
Respondent,

vs.

Action for East African People,
Employer,

Debra Hilstrom,
Relator,

Department of Employment and Economic Development,
Respondent.

Filed September 3, 2024
Affirmed
Johnson, Judge

Department of Employment and Economic Development
File No. 50011469

Jason Steck, St. Paul, Minnesota (for relator)

Keith Ellison, Attorney General, Rachel Bell-Munger, Jennifer Moreau, Assistant Attorneys General, St. Paul, Minnesota (for respondent department)

Catherine Boruff, Southern Minnesota Regional Legal Services, St. Paul, Minnesota (for respondent Tessa Mortenson)

Considered and decided by Johnson, Presiding Judge; Bratvold, Judge; and Jesson, Judge.*

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

NONPRECEDENTIAL OPINION

JOHNSON, Judge

This appeal arises from a request to disqualify an attorney in an administrative appeal concerning an application for unemployment benefits. We conclude that the chief unemployment law judge did not err by granting the request on the ground that the attorney previously had represented the opposing party in a substantially related matter. Therefore, we affirm.

FACTS

The employer in the unemployment proceeding underlying this appeal is Action for East African People (AFEAP), a non-profit corporation that operates a dental clinic in the city of Bloomington known as Action Care Community Clinic. The former employee is Tessa Mortenson, who was hired by AFEAP in January 2021. Mortenson was promoted to the position of executive director of the dental clinic in March 2023. The previous executive director of the clinic, Ayan Abukar (who apparently also was the executive director of the non-profit corporation), had resigned her employment after being indicted by federal prosecutors for allegedly misappropriating federal program funds that were intended to be reimbursements of the costs of meals served to children. The indictment alleged, among other things, that Abukar used AFEAP to commit fraud.

Between March and September 2023, Mortenson had numerous interactions with AFEAP board members and with an attorney representing AFEAP, Jason Steck, related to various issues arising from or complicated by Abukar's departure. In September 2023, Mortenson became aware that, despite Abukar's apparent resignation, Abukar was

continuing to act as executive director. In addition, the office of the state attorney general was investigating AFEAP pursuant to its authority to regulate charitable organizations. Steck represented AFEAP in connection with that investigation and sometimes asked Mortenson to provide him with information and documents. Mortenson became concerned that the information and documents she was asked to provide might be shared with Abukar or with Debra Hilstrom, an attorney who was representing Abukar in the federal criminal case. On one occasion, Steck warned Mortenson that she would be terminated if she did not fully comply with his requests for information and documents. Mortenson sought guidance from the AFEAP board as to whether she should provide information and documents to Steck. On September 26, 2023, the AFEAP board chair discussed Mortenson's concerns with her in an oral conversation (which was recorded by Mortenson) and stated that he would raise the issue at a board meeting. On September 28, 2023, Mortenson complied with a civil investigative demand served on her by the attorney general's office, which required her to give oral testimony. The AFEAP board held a special meeting and decided to terminate Mortenson's employment. Steck communicated the board's decision to Mortenson on September 29, 2023.

In October 2023, Mortenson applied to the department of employment and economic development for unemployment benefits. In her application, she asserted that her termination was retaliatory. AFEAP, which initially was represented by Steck, asserted in response that Mortenson was terminated for gross insubordination, theft of company assets, exceeding her authority, and obstructing company operations. In November 2023, the department made an initial determination that Mortenson is eligible for benefits on the

ground that she was discharged "because of unsatisfactory work performance [that] was not intentional or caused by negligence or indifference," which is "not employment misconduct."

AFEAP, represented by Steck, requested an administrative appeal of the initial determination. Ten days before a scheduled hearing on AFEAP's administrative appeal, the attorney representing Mortenson in the unemployment proceeding sent an e-mail message to the chief unemployment law judge (ULJ), with a copy to Steck, requesting that the hearing be conducted in person instead of telephonically due to the complexity of the issues and the fact that the hearing was scheduled as a full-day hearing. Steck responded by writing that he would be withdrawing as counsel for AFEAP and that Hilstrom would represent AFEAP going forward, and he copied Hilstrom on the message.

Two days later, Mortenson's attorney sent a nine-paragraph e-mail message to the chief ULJ, with a copy to Hilstrom, to inform the chief ULJ that Hilstrom previously had represented Mortenson and that Mortenson objected to her representation of AFEAP in the unemployment proceeding. Specifically, Mortenson's attorney stated that, only one year earlier, Hilstrom had represented Mortenson in a civil lawsuit in district court, which was described with sufficient detail, which we refrain from repeating here. Mortenson's attorney stated that Mortenson had shared sensitive confidential information with Hilstrom and that such information could be relevant to AFEAP's termination of Mortenson's employment. Hilstrom sent a responsive e-mail to the chief ULJ, and she and Mortenson's attorney thereafter sent a total of six additional e-mail messages to the chief ULJ concerning whether Hilstrom should be disqualified.

The chief ULJ acknowledged the correspondence, gave the participants an opportunity to file formal written arguments, and stated her intention to review the submissions and issue an order. Hilstrom filed a memorandum. Two days later, the chief ULJ issued a five-paragraph order disqualifying Hilstrom from representing AFEAP in the unemployment proceeding.

Hilstrom requested reconsideration of the disqualification order. Meanwhile, AFEAP, represented again by Steck, requested a stay of the disqualification order and the unemployment proceeding while Hilstrom pursued an appeal to this court. Both requests were denied.

In March 2024, a ULJ conducted an evidentiary hearing on AFEAP's appeal from the initial determination of eligibility. One week later, the ULJ issued a written decision. The ULJ specifically found that the testimony of AFEAP's board chair was not credible and that Mortenson was not terminated for the reasons asserted by AFEAP. The ULJ found that "AFEAP discharged Mortenson because she communicated opposition to Steck's plans and did not immediately give him all the information he asked for." The ULJ stated that "AFEAP had the right to reasonably expect that Mortenson, in her leadership role at the dental clinic, would make decisions in the best interest of AFEAP and seek guidance from the Board if needed" and further stated that Mortenson acted "out of concern for AFEAP." The ULJ concluded that Mortenson was discharged for reasons other than employment misconduct and, thus, is eligible to receive unemployment benefits.

Hilstrom appeals by way of a writ of certiorari from the chief ULJ's order disqualifying her from representing AFEAP in the unemployment proceeding. Mortenson's entitlement to unemployment benefits is not at issue in this appeal.

DECISION

Hilstrom argues that the chief ULJ erred by disqualifying her from representing AFEAP in the unemployment proceeding. Only the department has filed a responsive brief. We note that a special term panel of this court previously determined that Hilstrom's appeal is not moot despite a final agency decision on Mortenson's application for unemployment benefits. *Mortenson v. Action for East African People*, No. A24-0246, 2024 WL1006284, at *3 (Minn. App. Mar. 5, 2024) (order).

Hilstrom's primary argument is that the chief ULJ misapplied an administrative rule in granting Mortenson's request for disqualification. The applicable rule provides, "An unemployment law judge may refuse to allow a person to represent others in a hearing if that person acts in an unethical manner." Minn. R. 3310.2916 (2023). In applying this administrative rule, the chief ULJ referred to the rules of professional conduct, which govern practicing attorneys and contain provisions specifically relating to the situation that prompted Mortenson's request for disqualification. *See* Minn. R. Prof. Conduct, preamble. Hilstrom does not challenge the premise that the rules of professional conduct may inform the chief ULJ's decision.

The applicable rule of professional conduct provides, in part, "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse

to the interests of the former client unless the former client gives informed consent, confirmed in writing." Minn. R. Prof. Conduct 1.9(a). Another paragraph of the rule contains an additional prohibition:

> A lawyer who has formerly represented a client in a matter . . . shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Minn. R. Prof. Conduct 1.9(c).

Hilstrom contends that the chief ULJ erred by determining that Mortenson's prior lawsuit and Mortenson's application for unemployment benefits are substantially related matters. The term "substantially related matter," as used in rule 1.9(a), has two meanings. It could mean either that two matters "involve the same transaction or legal dispute" or that "there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Minn. R. Prof. Conduct 1.9, cmt. 3; *see also State ex rel. Swanson v. 3M Co.*, 845 N.W.2d 808, 816 (Minn. 2014). If disqualification is sought based on the second meaning, the decisionmaker may presume that confidential information was disclosed to the attorney "based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services." Minn. R. Prof. Conduct 1.9, cmt. 3. In other words, the

concept of "substantially related matter" is broad enough to encompass any matter in which an attorney may be presumed to have acquired confidential information from a client that the attorney is prohibited from using to the former client's disadvantage. *See Niemi v. Girl Scouts of Minnesota & Wisconsin Lakes & Pines*, 768 N.W.2d 385, 392 (Minn. App. 2009).

In this case, Mortenson's attorney informed the chief ULJ of Hilstrom's prior representation of Mortenson and stated that Mortenson had shared confidential information with Hilstrom in the course of that representation. Mortenson's attorney also informed the chief ULJ that Mortenson might introduce evidence in the unemployment proceeding that consists of or refers to the confidential information that Mortenson shared with Hilstrom during the prior representation. That possibility created a substantial risk that Hilstrom's possession of confidential information obtained in the prior representation could be used to materially advance AFEAP's position in this matter, in which AFEAP was adverse to Mortenson. *See* Minn. R. Prof. Conduct 1.9, cmt. 3. For that reason, the chief ULJ did not err by reasoning that the two matters—Mortenson's prior lawsuit and this unemployment proceeding—are substantially related matters.

Hilstrom also contends that the chief ULJ's decision is not supported by the factual record, which consists primarily of the statements of Mortenson's attorney in e-mail messages to the chief ULJ. But the required factual showing is subject to a low threshold: "A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter." Minn. R. Prof. Conduct 1.9, cmt. 3. Also, Mortenson was not pressed by Hilstrom to disclose additional information because Hilstrom did not deny that

Mortenson had shared confidential information with her. Mortenson's request was adequately supported by her attorney's representation that Mortenson might introduce evidence implicating the confidential information that she had disclosed to Hilstrom to establish a statutory exception to employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(b) (2022). In conducting certiorari review, this court seeks to determine only whether the agency's decision "was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Anderson v. Commissioner of Health*, 811 N.W.2d 162, 165 (Minn. App. 2012) (quotation omitted); *see also Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992). The chief ULJ's disqualification decision is supported by evidence in the agency record.

Hilstrom also contends that the chief ULJ erred by disqualifying her "based on speculative future conduct rather than misconduct that had already occurred." Hilstrom relies on language in the administrative rule providing that a person may be prevented from representing a party if the person "acts in an unethical manner." Minn. R. 3310.2916. Hilstrom contends that this language did not authorize the chief ULJ to disqualify her *before* she acts in an unethical manner. But Hilstrom had commenced her representation of AFEAP before she was disqualified. Steck sent an e-mail to the chief ULJ and Mortenson's attorney, stating, "Hilstrom is the new attorney for AFEAP on this matter and will address AFEAP's position on this request." Hilstrom proceeded to communicate directly with the chief ULJ, both by e-mail and by submitting a memorandum. The chief ULJ's ruling is consistent with the customary practice in district courts, in which it is common for a party to move to disqualify opposing counsel soon after opposing counsel

enter an appearance. For example, in *Niemi*, the plaintiff moved to disqualify the defendant's attorney soon after the defendant served its answer, for reasons similar to the reasons that motivated Mortenson's request in this case. 768 N.W.2d at 386. This court stated that the rule of professional conduct on which the request is based—the same rule as in this case—"is essentially a prophylactic measure that prevents a violation of rules 1.6(a) and 1.9(c) when such a violation is either so likely to occur or so likely to be damaging to the former client that the risk of the violation cannot be tolerated." *Id.* at 392; *see also National Texture Corp. v. Hymes*, 282 N.W.2d 890, 894 (Minn. 1979) (stating that "purpose for disqualification of [a former] attorney . . . is to ensure the attorney's absolute fidelity and to guard against inadvertent use of confidential information"). Thus, Hilstrom's conduct was within the scope of the administrative rule.

Hilstrom also contends that the chief ULJ erred on the ground that the disqualification decision is contrary to an advisory opinion that she received before entering her appearance. Hilstrom contends that the chief ULJ is not "empowered to overrule the Board of Professional Responsibility in its interpretation of the rules of professional conduct" and not "qualified to differ from the conclusions of the Board of Professional Responsibility." Hilstrom mentioned the advisory opinion in her e-mail messages to the chief ULJ, but she did not submit a written advisory opinion, so there was no way for the chief ULJ to know the facts on which the opinion was based and to confirm the substance of the opinion. At oral argument in this court, Hilstrom's attorney clarified that Hilstrom sought and received an advisory opinion by telephone from the office of lawyers professional responsibility (OLPR), not an advisory opinion from the board of

professional responsibility. The OLPR's website states that opinions provided via its "ethics hotline" are based on the facts provided by the person requesting an opinion and that such opinions "are not intended to bind or influence any court or other adjudicatory body."[1] Thus, the chief ULJ was not bound by the oral advisory opinion that Hilstrom obtained from OLPR.

Hilstrom also contends that the chief ULJ did not make adequate findings of fact and did not engage in adequate legal analysis. The chief ULJ's analysis of Mortenson's request consists of five paragraphs, which succinctly summarize the relevant facts and cite the applicable rules. Because the relevant facts are essentially undisputed, there was no need for additional fact-finding, and the legal basis of the chief ULJ's decision is sufficiently clear.

We last consider Hilstrom's argument that the ULJ erred by violating her constitutional right to due process in three ways. The department argues in its responsive brief that Hilstrom has not cited any authority for the proposition that she has a constitutionally protected liberty interest in representing AFEAP in one particular administrative proceeding. We are unaware of any such authority. Accordingly, we conclude that Hilstrom cannot prove a due-process claim because she does not have a constitutionally protected liberty interest. *See Werlich v. Schnell*, 958 N.W.2d 354, 371-73 (Minn. 2021).

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[1]*See* Lawyers Professional Responsibility Board, *Advisory Opinions (Ethics Hotline)*, https://lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinions.aspx [https://perma.cc/23Y6-9C4L].

Even if Hilstrom had a constitutionally protected liberty interest, she would not be able to prove that she was denied due process in the three ways she has identified. She first contends that the chief ULJ denied her due process by allowing Mortenson to make her request by e-mail. Hilstrom cites no authority for the proposition that e-mail communications are inconsistent with due process in this context. In any event, Hilstrom was included in the e-mail correspondence, and she sent as many e-mail messages to the chief ULJ as Mortenson's attorney sent. Also, the ULJ gave both Mortenson and Hilstrom an opportunity to file formal memoranda, and Hilstrom filed such a memorandum, which ensured that she was heard.

Hilstrom next contends that the chief ULJ denied her due process by ruling on Mortenson's request without requiring Mortenson to submit evidence in the form of an affidavit. Again, Hilstrom cites no authority for the proposition that a sworn statement is constitutionally required in connection with a request to disqualify an attorney in an administrative proceeding. The chief ULJ considered Mortenson's request in a manner that is consistent with the department's general practice in unemployment proceedings, in which a ULJ "may receive any evidence that possesses probative value, including hearsay," and "is not bound by statutory and common law rules of evidence." *See* Minn. R. 3310.2922 (2023).

Hilstrom last contends that the chief ULJ denied her due process by not conducting an evidentiary hearing. Once again, Hilstrom cites no authority for the proposition that an evidentiary hearing is constitutionally required upon a request to disqualify an attorney in a single administrative proceeding. Furthermore, Hilstrom did not request an evidentiary

hearing, and she has made no proffer on appeal to describe the evidence that she would have introduced at an evidentiary hearing. It is difficult to imagine what additional facts might have been introduced or elicited at an evidentiary hearing because Mortenson was not obligated to reveal the confidential information that she shared with Hilstrom in the prior representation. *See* Minn. R. Prof. Conduct 1.9, cmt. 3.

In sum, the chief ULJ did not err by disqualifying Hilstrom from representing AFEAP in the unemployment proceeding.

Affirmed.