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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2119**

Kawanda Staples,
Relator,

vs.

Memorial Blood Centers,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 15, 2011
Affirmed
Schellhas, Judge**

Department of Employment and Economic Development
File No. 26010163-3

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Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and
Minge, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

In this certiorari appeal from an unemployment-law judge's determination that relator is ineligible for unemployment benefits, relator argues that the unemployment-law judge (ULJ) denied her a fair evidentiary hearing and challenges the determination that she engaged in employment misconduct. We affirm.

FACTS

Respondent Memorial Blood Centers employed relator Kawanda Staples as a phlebotomist from April 17, 2006, to August 26, 2010. Although Staples's work locations and start times varied, Memorial Blood Centers regularly provided Staples two to three weeks' advance notice of her schedule. Staples's start times normally ranged from 6:00 a.m. to 1:00 p.m.

Memorial Blood Centers has an attendance policy that requires employees to timely report to work. According to the policy, if an employee is absent 10 times or tardy 12 times during a rolling 12-month period, the employee may be discharged. Staples received a copy of the attendance policy and understood the employer's expectations.

During the 12-month period from August 24, 2009, to August 24, 2010, Staples was tardy 14 times and absent 10 times. Staples's absenteeism is not at issue on appeal. Memorial Blood Centers discharged Staples on August 26, 2010, for excessive absenteeism and tardiness. Staples applied for unemployment benefits, and the Minnesota Department of Employment and Economic Development (DEED) determined

that she was ineligible. Staples appealed the determination and participated in an evidentiary hearing before a ULJ.

At the hearing, testimony established that from September 10, 2009, to December 1, 2009, Staples was tardy on six occasions. Staples testified that she did not remember why she was late on any of those six occasions. On December 11, Staples was tardy because she misread her work schedule. On December 17, Memorial Blood Centers gave Staples a letter of concern about her tardiness, and her supervisor provided a coaching session. From January 13, 2010, to May 16, 2010, Staples was tardy on four occasions: January 13, January 21, March 17, and May 16. Staples testified that she did not remember why she was late on three out of four of the occasions. She testified that one tardy occurred because a police officer stopped her for speeding. On January 15, Memorial Blood Centers gave Staples a verbal warning, on January 27, a written warning, and on March 30, a second written warning.

On June 29, Staples punched in late after taking her lunch break. In August, she was tardy on four occasions for four different reasons: she misread her schedule; she got lost on the way to a work location; she had difficulty finding the coworkers with whom she was riding to work; and the punch-card machine was on a different floor from which she reported to work.

The ULJ concluded that Staples's tardiness on 14 occasions during a rolling 12-month period constituted employment misconduct. The ULJ concluded that Staples's tardiness was a serious violation of the standards of behavior the employer has the right to reasonably expect and that Staples was ineligible for unemployment benefits. Staples

filed a request for reconsideration, and the ULJ affirmed the decision. Staples appeals by writ of certiorari.

D E C I S I O N

We review a ULJ's decision on unemployment benefits to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (2010). Based on that review, we may affirm, reverse, or modify the ULJ's decision, or remand the case for further proceedings. *Id.* “Questions of law are reviewed de novo, while findings that are supported by substantial evidence will not be disturbed.” *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

Fair Evidentiary Hearing

Staples argues that she did not receive a fair hearing because the ULJ did not fully develop all relevant facts concerning her tardiness. An evidentiary hearing by a ULJ is “a de novo due process evidentiary hearing.” Minn. Stat. § 268.105, subd. 1(a) (2010). A fair hearing is one in which a ULJ fully develops the record, reasonably assists an unrepresented applicant in presenting a case, and explains the procedure of and the terms used throughout the hearing. *Id.*, subd. 1(b); Minn. R. 3310.2921 (2009). Generally, a hearing is considered fair if the parties are afforded an opportunity to give statements, cross-examine witnesses, and offer and object to evidence. *See Ywswf*, 726 N.W.2d at 529–30 (considering identified factors in determining relator had fair hearing). A ULJ must give “both parties ample opportunity to offer testimony.” *Lawrence v. Ratzlaff*

Motor Express Inc., 785 N.W.2d 819, 824 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010).

Staples asserts that when it was her opportunity to question Memorial Blood Centers' representative, the ULJ "rush[ed]" her. But the record shows that at the point Staples identifies in the hearing transcript, the ULJ told Staples that her statement sounded like testimony rather than a question to the representative. The ULJ said, "if you have a question you wanted to ask, you can go ahead and ask it. Otherwise, that's something you can just tell me about in your testimony portion." The ULJ did not rush Staples's questioning of Memorial Blood Centers' representative.

Staples also asserts that the ULJ "inhibited" her testimony. We disagree. Our review of the hearing transcript shows that the ULJ systematically asked Staples the reason for her absenteeism or tardiness on each of the dates reported by Memorial Blood Centers and pursued clear answers from Staples as to each date. At times, the ULJ guided Staples's testimony in order to develop the record concerning her reasons for absenteeism or tardiness on a particular date. The ULJ asked Staples several specific questions to ensure that the record reflected her reasons for absenteeism or tardiness. A thorough review of the transcript shows that the ULJ asked pertinent questions concerning the absenteeism and tardiness and provided Staples with ample opportunity to submit evidence and testimony and to ask questions of the Memorial Blood Centers' representative. We therefore conclude that Staples received a fair evidentiary hearing.

Employment Misconduct

We next address Staples's challenge to the ULJ's determination that she was discharged for employment misconduct on the basis of her tardiness.

An applicant discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct is defined as "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) (2010). Employment misconduct does not include "inadvertence," "good-faith errors in judgment if judgment was required" or "simple unsatisfactory conduct." *Id.*, subd. 6(b) (2010).

"Whether an employee's absenteeism and tardiness amounts to a serious violation of the standards of behavior an employer has a right to expect depends on the circumstances of each case." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 316 (Minn. 2011). Whether an employee performed the act alleged to be employment misconduct is a question of fact. *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19–20 (Minn. App. 2003). Factual findings are reviewed in the light most favorable to the ULJ's decision and will be sustained if substantial evidence supports the decision. Minn. Stat. § 268.105, subd. 7(d); *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether an act amounts to employment misconduct is a question of law, which we review de novo. *Stagg*, 796 N.W.2d at 315.

“[R]efusing to abide by an employer’s reasonable policies” generally constitutes employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). “This is particularly true when there are multiple violations of the same rule involving warnings or progressive discipline.” *Id.* at 806–07. Memorial Blood Centers had an attendance policy that required employees to report to work on time and subjected employees to discharge if they were tardy 12 or more times within a 12-month rolling period. The ULJ also found that Staples was tardy 14 times during a 12-month rolling period. The record substantially supports this finding and reflects that Memorial Blood Centers gave Staples multiple warnings about her tardiness.

Staples argues that her tardiness does not constitute employment misconduct because it was inadvertent. *See* Minn. Stat. § 268.095, subd. 6(b)(2). She argues that “*many* of her tardies were the product of her confusing work schedule.” (Emphasis added.) But she emphasized during her testimony that she had misread her schedule *only twice* in her four-and-one-half years of employment at Memorial Blood Centers. Staples’s “confusing work schedule” therefore does not appear to have significantly contributed to her tardiness. The ULJ found that Staples was aware that her position had rotating start times and work locations, yet, she was tardy on multiple occasions. The record does not support Staples’s argument that her persistent tardiness was inadvertent and therefore not employment misconduct. *Cf. Dourney v. CMAK Corp.*, 796 N.W.2d 537, 540 (Minn. App. 2011) (determining that employee’s failure to ask for identification from a customer was inadvertent because employee had never before forgotten to ask for

identification and employer had not given employee any previous warning concerning a failure to ask for identification).

Specifically, as to her tardiness on December 11, 2009, Staples argues that her tardiness was an “inadvertent good-faith error in judgment.” *See* Minn. Stat. § 268.095, subd. 6(b)(6) (stating that good-faith error in judgment requires situations when judgment is required). The ULJ found that Staples was tardy on December 11 because she misread her schedule. Staples’s testimony supports this finding. Staples’s argument that her tardiness on December 11 constituted an “inadvertent good-faith error in judgment” is misplaced. Properly reading her work schedule did not require any judgment, and Staples’s tardiness on December 11 therefore was not the result of an inadvertent good-faith error in judgment.

Staples unpersuasively argues that a majority of her tardiness involved arriving less than 10 minutes late. But Memorial Blood Centers’ attendance policy did not differentiate between degrees of tardiness. The employer’s representative testified that arriving at work any amount of time beyond an employee’s start time constituted tardiness. Regardless of the degree of Staples’s tardiness, she violated her employer’s attendance policy.

Staples also unpersuasively argues that her tardiness constituted “simple unsatisfactory conduct” because it was conduct an average reasonable person would have engaged in under the circumstances of a similarly challenging and confusing work schedule. *See* Minn. Stat. § 268.095, subd. 6(b)(4). The record shows that Staples knew that her work locations and start times varied and that it was her responsibility to

carefully read her schedule. Under similar circumstances, an average reasonable person would have avoided being tardy by carefully reading her work schedule and making proper plans to arrive at the correct work location on time. Staples's tardiness was not simple unsatisfactory conduct.

The ULJ's conclusion that Staples's tardiness was a serious violation of the standards of behavior the employer has the right to reasonably expect is supported by substantial evidence in the record.

Affirmed.