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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1997**

Cynthia Peterson,
Relator,

vs.

Minn. Dept. of Human Services,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 27, 2012
Affirmed
Wright, Judge**

Minnesota Department of Employment and Economic Development
File No. 27937847-3

Gwen Updegraff, Legal Aid Service of Northeastern Minnesota, Duluth, Minnesota (for relator)

Minnesota Department of Human Services Community Addiction Recovery Enterprise, Carlton, Minnesota (respondent)

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Considered and decided by Wright, Presiding Judge; Worke, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Relator challenges the decision of the unemployment law judge (ULJ) that relator was discharged for employment misconduct and, therefore, is ineligible to receive unemployment benefits. We affirm.

FACTS

Relator Cynthia Peterson was employed by the Minnesota Department of Human Services (DHS) from January 6, 1987, to June 3, 2011. At the time of her termination, Peterson worked as a licensed alcohol and drug counselor. This position required Peterson to possess a valid Minnesota driver's license.

From May 2006 to October 2010, Peterson received several reprimands and suspensions because she violated DHS policies and procedures. She received written reprimands in May 2006 and April 2007, a one-day suspension in October 2008, a letter of expectation regarding her work performance in January 2010, a five-day suspension in April 2010, and a ten-day suspension in October 2010. In connection with the ten-day suspension, DHS gave Peterson a "last chance warning," advising her that "[f]ailure to follow established procedures, policies and/or protocols will result in discipline, up to and including discharge. **Please know this is your last chance warning.**"

In August 2010, Peterson received a traffic citation for failing to provide proof of insurance. The following month, she went on medical leave for mental-health reasons. In November 2010, her driver's license was suspended because she failed to pay the fine associated with the traffic citation.

Peterson returned to work on April 13, 2011. Before doing so, the human resources office conducted a background check on Peterson as part of its evaluation of whether she was fit to return to work. During the background check, Peterson told human resources representative Paula Skaalrud that her driver's license was suspended. Skaalrud directed Peterson to tell her supervisor, Kelly Barton, about the loss of her driving privileges.

In May 2011, Barton scheduled Peterson to drive clients to an upcoming event in Cloquet. After Peterson's name was put on the schedule, another supervisor, Lisa Johnson, informed Barton that Peterson could not drive because her driver's license was suspended. Shortly thereafter, Peterson's employment was terminated for, among other reasons, her failure to inform Barton that her driver's license was suspended.

When Peterson applied for unemployment benefits, the Minnesota Department of Employment and Economic Development determined that Peterson is ineligible to receive unemployment benefits because she was discharged for employment misconduct. Peterson appealed this determination. After a telephonic hearing, the ULJ also concluded that Peterson is ineligible to receive unemployment benefits because she was discharged for employment misconduct. Following Peterson's request for reconsideration, the ULJ affirmed his decision. This certiorari appeal followed.

DECISION

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the decision is "(1) in violation of constitutional

provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2010).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct is “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). As a general rule, an employee’s refusal to abide by an employer’s reasonable policies and requests constitutes employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Whether an employee engaged in employment misconduct presents a mixed question of fact and law. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether an employee committed a particular act is a question of fact. *Id.* We view the ULJ’s findings of fact in the light most favorable to the decision and will not disturb them when they are substantially sustained by the evidence. *Id.* But whether a particular act constitutes employment misconduct is a question of law, which we review *de novo*. *Id.*

Peterson challenges the ULJ’s credibility determination regarding whether Peterson told Barton that her driver’s license was suspended. At the hearing, Peterson testified that she advised Barton of the suspension within a week of returning to work, but

Barton testified that Peterson never informed her of the suspension. In his decision, the ULJ credited Barton's testimony and explained his reasons for doing so. Because credibility determinations, including the resolution of conflicting testimony, are the exclusive province of the ULJ, we will not disturb them on appeal. *Id.* at 345; *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). Therefore, Peterson's challenge to the ULJ's credibility determination is unavailing.

Peterson also challenges the ULJ's determination that her failure to inform Barton of her driver's license suspension is employment misconduct. But Peterson's argument is without merit. DHS has the right to reasonably expect its employees to abide by policies and procedures and to follow instructions. *See Schmidgall*, 644 N.W.2d at 804 (noting that employer has right to expect employees to follow "reasonable policies and requests"). Peterson not only knew that she was required to inform her supervisor if she lost her driving privileges, Peterson also was told directly by a DHS human resources representative to tell Barton that she lost her driving privileges. Peterson failed to do so. Both Peterson's disregard of DHS policies and procedures and her failure to comply with the express directions of a DHS human resources representative are serious violations of the standards of behavior DHS has a right to reasonably expect of its employees. *See* Minn. Stat. § 268.095, subd. 6(a)(1); *Schmidgall*, 644 N.W.2d at 804.

Moreover, Peterson also displayed a substantial lack of concern for the employment, which constitutes employment misconduct. Peterson was given multiple warnings and suspensions because she failed to abide by DHS policies and procedures, and she ultimately received a "last chance warning" in October 2010. That warning

specifically advised Peterson that her continued failure to “follow established procedures, policies and/or protocols will result in discipline, up to and including discharge.” Peterson knew that DHS policies and procedures required her to inform her supervisor regarding her driver’s license suspension, she was told to inform her supervisor of the driver’s license suspension, and she knew another violation of established policies and procedures would result in her being disciplined or discharged. Thus, Peterson’s failure to inform Barton of the driver’s license suspension after repeated failure to abide by DHS policies and procedures clearly demonstrates “a substantial lack of concern for the employment.” See Minn. Stat. § 268.095, subd. 6(a)(2); *Gilkeson v. Indus. Parts & Serv., Inc.*, 383 N.W.2d 448, 452 (Minn. App. 1986) (holding that pattern of failing to follow policies and procedures and ignoring directions and requests constituted employment misconduct).

Peterson argues that her conduct should not be considered employment misconduct for three reasons. First, she argues that her conduct was the result of mental illness. Although “conduct that was a consequence of the applicant’s mental illness or impairment” is not considered employment misconduct, Minn. Stat. § 268.095, subd. 6(b)(1) (2010), Peterson’s argument that this statutory provision applies to her is without support in the record. Peterson’s mental illness did not prevent her from informing Skaalrud about the driver’s license suspension, nor did Peterson’s mental illness prevent her from informing Johnson, and no evidence in the record suggests that Peterson’s mental illness prevented her from informing Barton.

Second, Peterson argues that her conduct was the result of inadvertence or “absent mindedness.” “[C]onduct that was a consequence of the applicant’s inefficiency or inadvertence” is not considered employment misconduct. Minn. Stat. § 268.095, subd. 6(b)(2) (2010). But, like her mental-illness claim, there also is no evidence in the record to support Peterson’s argument that her failure to tell Barton that her driver’s license was suspended was inadvertent. We agree with the ULJ’s finding on reconsideration that “Peterson never testified that she forgot to tell Barton and there is no evidence in the record to support a finding of inadvertence.”

Third, Peterson argues for the first time on appeal that the failure to advise her employer of the driver’s license suspension was merely a single incident that did not adversely affect the employer. “If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct.” Minn. Stat. § 268.095, subd. 6(d) (2010). But because Peterson did not present this argument to the ULJ, she may not present it to us. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (declining to consider issues not presented to or decided by lower court). Moreover, Peterson’s conduct was not a single incident resulting in discharge. She was cited for repeated violations of DHS policies and procedures. Her failure to inform Barton about her driver’s license suspension was part of a pattern of such violations.

Because an employer has the right to expect an employee to abide by the employer’s reasonable policies, procedures, and requests, Peterson’s failure to inform her supervisor of her driver’s license suspension constitutes a serious violation of the

standards of behavior that DHS has the right to reasonably expect of its employees. *See* Minn. Stat. § 268.095, subd. 6(a)(1). In light of Peterson receiving repeated warnings from her supervisor that she must abide by DHS’s policies and procedures and receiving a “last chance warning” that continued violations of DHS policies and procedures could lead to the termination of her employment, when Peterson failed to disclose her driver’s license suspension, she also displayed a substantial lack of concern for the employment. *See id.*, subd. 6(a)(2). Accordingly, the ULJ correctly concluded that Peterson is ineligible to receive unemployment benefits because she was discharged for employment misconduct.¹

Affirmed.

¹ In light of our decision, we need not address Peterson’s argument that the loss of her driver’s license is not employment misconduct.