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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2067**

Risper Nyaboga,
Relator,

vs.

Evangelical Lutheran Good Samaritan Society,
Respondent,

Department of Employment
and Economic Development,
Respondent.

**Filed August 27, 2012
Reversed
Hudson, Judge**

Department of Employment
and Economic Development
File No. 27752925-3

Risper Nyaboga, Coon Rapids, Minnesota (pro se relator)

Timothy D. Loudon (pro hac vice), Joseph S. Dreesen, Jackson Lewis LLP, Omaha,
Nebraska (for respondent employer)

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

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

UNPUBLISHED OPINION

HUDSON , Judge

Relator challenges the determination by an unemployment-law judge (ULJ) that she is ineligible for unemployment-insurance benefits. Because the denial of benefits violated the Free Exercise Clause, we reverse.

FACTS

Relator Risper Nyaboga began working at Evangelical Lutheran Good Samaritan Society (Good Samaritan) in November 2005 as a full-time registered nurse. Beginning in 2007, Nyaboga's schedule included a shift on alternating Saturdays and Sundays. In 2010, Nyaboga requested that she no longer be scheduled to work Saturdays for religious reasons because she is a practicing Seventh-Day Adventist. Nyaboga had previously worked Saturday shifts even though doing so did not comport with her religious beliefs. But, in 2010, she was rebaptised and wished to adhere to her religious beliefs by no longer working Saturdays. Good Samaritan declined to remove Nyaboga from her Saturday shift because doing so would be a "hardship to the facility" but provided Nyaboga multiple options that would permit Nyaboga to not work on Saturdays, including negotiating a permanent shift switch with another nurse or finding another nurse to cover her shift on a shift-by-shift basis. Nyaboga maintained her schedule and tried to locate nurses to cover her Saturday shifts.

Good Samaritan tracks instances of absenteeism and uses a five-step disciplinary process that ends in termination. One instance of absenteeism is defined as either one

missed day or five occurrences of tardiness. Once an employee acquires ten instances of absenteeism in a 12-month period, the employee may be terminated.

Most of Nyaboga's shifts began at 6:30 a.m. In May 2010, Nyaboga was issued a warning because she had been absent five times since August 2009 and tardy 23 times since June 2009. Two of the five absences were due to her inability to find a nurse to cover her Saturday shift. Most of the times she was tardy were due to childcare issues because her care provider did not allow her to drop off her child until 6 a.m., which did not always allow her enough time to travel from the childcare provider to work. In October 2010, Nyaboga was given another warning because she had been tardy 43 times in 2009–2010. In December 2010, Nyaboga was again issued a warning because she had been tardy 50 times in the previous calendar year. When she was issued the warning in December, Nyaboga asked for a later start time, and Good Samaritan agreed to adjust her start time to 6:40 a.m. However, between January 2011 and April 26, 2011, Nyaboga was tardy 13 times.

On April 28, 2011, Kim Stoltzman, Good Samaritan's director of nursing, told Nyaboga that any additional instances of tardiness or absences would result in Nyaboga's termination. Nyaboga then told Stoltzman that she had been unable to find anyone to cover her upcoming Saturday shift on April 30 and that she would not be working the shift for religious reasons. Stoltzman told Nyaboga that if she did not work her shift or find someone to cover it, she would be terminated. In a letter to Nyaboga, Stoltzman wrote that "[p]er the attendance policy, 1 more absence or 2 tardies" before May would result in termination. The letter noted that Nyaboga had been tardy 58 times and absent

one time in the past year. The letter also stated that it was Nyaboga's responsibility to find someone to work her Saturday shift and that a Good Samaritan staffing coordinator had assisted Nyaboga in getting the shift covered by posting the available shift internally, as well as providing names and phone numbers of people to contact to work the shift. Nyaboga did not report for her Saturday shift, and she was terminated for absenteeism.

Nyaboga applied for unemployment-insurance benefits, and the Minnesota Department of Employment and Economic Development (DEED) determined that she was eligible because she did not work Saturday based on her religious beliefs, which constituted a good reason for failing to follow the employer's attendance policy. The employer challenged the determination. The ULJ concluded that Nyaboga was not eligible for benefits. The ULJ determined that Nyaboga was discharged for employment misconduct because Nyaboga's continued tardiness demonstrated a substantial lack of concern for her employment. Additionally, the ULJ found the testimony of Good Samaritan's witnesses more credible because it was more plausible and supported by credible documentation. The ULJ found Nyaboga's testimony "more self-serving" and concluded that a preponderance of the evidence supported a conclusion that Nyaboga was discharged for poor attendance.

Nyaboga requested reconsideration. The ULJ denied Nyaboga's motion for reconsideration. This certiorari appeal follows.

DECISION

Nyaboga argues that the ULJ's factual findings and conclusion that she committed employment misconduct were not supported by the evidence and that the denial of

unemployment benefits is a violation of the Free Exercise Clause because she was discharged for her inability to work a Saturday shift due to her religious beliefs. Because Nyaboga's argument that the denial of benefits constitutes a free-exercise violation is dispositive, we need not reach Nyaboga's other argument.

A state cannot deny unemployment benefits to an applicant who is forced to choose between religious beliefs and employment; such a denial would violate the Free Exercise Clause of the First Amendment to the United States Constitution. U.S. Const. amend. I; *see, e.g., Frazee v. Ill. Dep't of Emp't Sec.*, 489 U.S. 829, 834–35, 109 S. Ct. 1514, 1517–18 (1989) (holding that applicant was not disqualified from receiving unemployment benefits when he refused position that would have required him to work on Sundays, which was contrary to his religious beliefs); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 139–41, 107 S. Ct. 1046, 1048–49 (1987) (holding that state's refusal to award unemployment benefits to Seventh-Day Adventist applicant discharged for refusing to work on Sabbath violated Free Exercise Clause).¹ Nyaboga argues that she was discharged not for misconduct but for exercising her religious beliefs as a Seventh-Day Adventist. Misconduct must be the cause of an employee's discharge. Minn. Stat. § 268.095, subd. 4(1) (2010); *Hansen v. C.W. Mears, Inc.*, 486 N.W.2d 776, 780 (Minn. App. 1992); *review denied* (Minn. July 16, 1992) (“To

¹ An unemployment-benefits applicant must demonstrate sincerely held religious beliefs to succeed on a free-exercise theory. *See Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 865 (Minn. 1992) (providing that a successful free-exercise challenge under the Minnesota constitution requires a party to establish, among other things, that state action violated sincerely held religious beliefs). The sincerity of Nyaboga's religious beliefs is not contested.

disqualify a person from receiving benefits, the misconduct must be the cause of the discharge.”).

The employer argues that Nyaboga was terminated for excessive absenteeism. Additionally, the ULJ determined that Nyaboga’s tardiness, not her refusal to work Saturdays, was “the biggest contributing factor” for Nyaboga’s discharge. As support, the ULJ found that Nyaboga’s 58 instances of tardiness in a one-year period, on their own, would have satisfied the employer’s termination policy and warranted Nyaboga’s discharge. But, as Nyaboga notes, the letter she received from Good Samaritan on April 28 stated that she would be terminated for one additional absence or two additional tardies. And when Nyaboga missed her Saturday shift for religious reasons, she was terminated. Although Nyaboga had a history of tardiness, the conduct that triggered her discharge was an absence for religious reasons.² To terminate Nyaboga for not working a Saturday shift for religious reasons, and to deny unemployment benefits on that basis, put Nyaboga in the position of choosing between her religion and employment, which is prohibited by the Free Exercise Clause. *See Sherbert v. Verner*, 374 U.S. 398, 404, 83 S. Ct. 1790, 1794 (1963) (stating that imposition of a choice between religion and forfeiting unemployment benefits burdens free exercise of religion). Because Nyaboga’s benefits

² We also note that Good Samaritan may have failed to reasonably accommodate Nyaboga’s religious beliefs. An employer must reasonably accommodate an employee’s religious needs unless the employer demonstrates the accommodation would create an undue hardship on the business. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 73–75, 97 S. Ct. 2264, 2271–72 (1977). Here, DEED acknowledges that Good Samaritan was unable to accommodate Nyaboga’s request to not work Saturday shifts. The ULJ found that the employer did not accommodate Nyaboga’s request to not work Saturdays because it was a “hardship to the facility.”

were denied based on her discharge for refusing to work a shift for religious reasons, the denial of benefits was a free-exercise violation. We reverse and reinstate Nyaboga's unemployment benefits.

Reversed.