STATE OF MINNESOTA
IN COURT OF APPEALS
A11-782

Antoinette E. LaValla,
Relator,

vs.

American Red Cross Blood Services,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 23, 2012
Affirmed
Halbrooks, Judge

Department of Employment and Economic Development
File No. 27007076-3

Antoinette LaValla, St. Paul, Minnesota (pro se relator)

American Red Cross Blood Services, c/o ADP-UCM/The Frick Co., St. Louis, Missouri (respondent)

Lee B. Nelson, Amy R. Lawler, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent Department of Employment and Economic Development)

Considered and decided by Hudson, Presiding Judge; Halbrooks, Judge; and Collins, Judge.*

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

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Relator challenges an unemployment-law judge's (ULJ) determination that she is ineligible for unemployment benefits because she was fired for employment misconduct. We affirm.

FACTS

Relator Antoinette LaValla worked as a clerical assistant for American Red Cross Blood Services from June 1997 to January 2011, when she was fired for violating Red Cross's attendance policy. Red Cross's attendance policy is to terminate an employee who acquires eight unscheduled absences in a rolling 12-month period. In addition, if the employee is going to be absent, she must speak directly to her supervisor prior to the start of her scheduled shift.

The first six of LaValla's unscheduled absences in the twelve-month period did not amount to employment misconduct. On March 2, 2010, she left work one hour early because her daughter had been in a car accident. Before leaving work, LaValla called her supervisor and was given permission to leave early. On April 6, June 7, September 13, and October 18, 2010, LaValla was absent due to illness. On August 11, 2010, she was absent because of flooding in her basement. On all six occasions, LaValla followed the proper call-in procedure and informed her supervisor prior to her absence.

After LaValla's sixth unscheduled absence, she received a written warning indicating that if she had any more unscheduled absences within the next 90 days, she would be suspended. Two months later, on December 15, 2010, LaValla was absent and

failed to properly call in. On that day, she overslept because she had been up all night caring for her father, who was ill. LaValla called a coworker, but did not call her supervisor. She explained that she would have called her supervisor but her supervisor's number was on her cell phone and its battery had died. She could not charge her cell phone because she did not have her charger. LaValla's coworker told her that she would inform her supervisor on her behalf.

LaValla was suspended and advised that any additional violations would result in termination. On January 12 and 13, 2011, she was again absent and failed to call in. LaValla was unable to work on those days because she was in jail after being arrested for driving while intoxicated. She was stopped and subsequently arrested by police at approximately 1:00 a.m. on January 12 and was jailed until 5:00 p.m. on January 13. LaValla attempted to call her supervisor from jail, but her supervisor did not accept her collect call. She then called her coworker, who again said that she would inform LaValla's supervisor of her absence. After LaValla was released from jail, she was fired.

LaValla applied for unemployment benefits, but respondent Minnesota Department of Employment and Economic Development (DEED) determined that she is ineligible for benefits because she was fired for employment misconduct. LaValla appealed the decision. The ULJ determined she is not eligible for benefits. The ULJ found that LaValla's first six absences were not employment misconduct because "they were the result of conduct that an average reasonable employee would have engaged in under the circumstances or because of illness, with proper notice to her employer." But the ULJ found that her absences on December 15, January 12, and January 13 constituted

employment misconduct because they reflected a serious violation of the standards of behavior her employer had a right to reasonably expect from her. The ULJ also determined that the exception for an individual whose conduct is the result of chemical dependency did not apply. LaValla requested reconsideration, and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

This court may affirm, remand, reverse, or modify the decision of the ULJ if it concludes that the substantial rights of the relator may have been prejudiced because of findings or a decision affected by error of law or lack of substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4)-(5) (2010).

I.

We first address the propriety of the ULJ's decision that LaValla is ineligible for unemployment benefits because she was discharged for employment misconduct. Employees discharged for employment misconduct are disqualified from receiving unemployment compensation benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Whether an employee engaged in employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee committed a particular act is a fact question. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court defers to the ULJ on fact questions, provided the ULJ's factual findings are supported by substantial evidence. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But

we review de novo the question of whether a particular act constitutes employment misconduct. *Schmidgall*, 644 N.W.2d at 804.

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." Minn. Stat. § 268.095, subd. 6(a) (2010). Whether an employee's absenteeism amounts to employment misconduct depends on the circumstances of the case. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 316 (Minn. 2011).

We first address LaValla's absence on December 15. The ULJ found that LaValla's absence on December 15 "was the result of oversleeping because she had been taking care of her father late the night before." The ULJ further found that LaValla violated Red Cross's call-in policy by not directly contacting her supervisor. Instead, LaValla contacted a coworker, who, in turn, agreed to contact LaValla's supervisor on her behalf. The ULJ found, "LaValla did not provide a reasonable explanation for why she did not contact her supervisor and her failure to contact her supervisor is more serious in light of the fact that she had just been given a written warning regarding her attendance a month before."

Although "absence, with proper notice to the employer, in order to provide necessary care because of the illness, injury, or disability of an immediate family member of the applicant" is not employment misconduct, Minn. Stat. § 268.095, subd. 6(b)(8) (2010), it is undisputed that this absence lacked proper notice to the employer. We agree

with the ULJ that LaValla's failure to call her supervisor in violation of Red Cross's call-in procedure, particularly when she was warned about her attendance only two months earlier, shows "a substantial lack of concern for the employment," and is therefore employment misconduct. Minn. Stat. § 268.095, subd. 6(a)(2).

While the December 15 conduct is sufficient to support the ULJ's finding of employment misconduct, we will also address LaValla's misconduct on January 12 and 13 because, "[i]f 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 under paragraph (a)." Minn. Stat. § 268.095, subd. 6(d) (2010). And it is clear that the ULJ considered both the December and January incidents when ultimately concluding that LaValla committed employment misconduct.

The ULJ found that LaValla's absences on January 12 and 13 constituted employment misconduct. The ULJ observed:

> It is undisputed that LaValla was incarcerated during her January 12, 2011 and January 13, 2011 shifts due to being pulled over by a police officer and being charged with driving while intoxicated. LaValla testified that she drank approximately four glasses of wine and then drove her vehicle while under the influence of alcohol. Based on LaValla's own believable testimony, it is more likely than not that LaValla was under the influence of alcohol while driving her motor vehicle.

Although the supreme court has repeatedly declined to adopt a per se rule that absenteeism due to incarceration is employment misconduct, *Jenkins v. Am. Exp. Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006); *Grushus v. Minn. Mining & Mfg. Co.*, 257

Minn. 171, 176, 100 N.W.2d 516, 520 (1960), it has observed that misconduct can be found in cases when an employee "simply fail[s] to show up at work" because of incarceration. *Jenkins*, 721 N.W.2d at 291. Here, LaValla was unavailable to work on January 12 and 13 solely because she was incarcerated. Her decision to drive while intoxicated reflects intentional or negligent conduct leading to the serious violation of the employer's reasonable expectation that its employees will be available to work during their scheduled shifts. *Cf. Luu v. Carley Foundry Co.*, 374 N.W.2d 582, 584 (Minn. App. 1985) (holding that absenteeism caused by incarceration is employment misconduct under common law); *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 44-45 (Minn. App. 1984) (same).

LaValla's attorney argued at the hearing that LaValla's conduct constitutes an exception from the definition of employment misconduct because her conduct was a result of her undiagnosed chemical dependency. *See* Minn. Stat. § 268.095, subd. 6(b)(9) (2010) (stating that "conduct that was a consequence of the applicant's chemical dependency" is not employment misconduct). LaValla testified that after her arrest, she underwent a chemical-dependency assessment but did not have the test results. Nevertheless, she stated, "I know that I'm chemically dependent but I needed to have an assessment done as well." Regardless of whether LaValla is chemically dependent, her conduct constitutes employment misconduct because, notwithstanding the chemical-dependency exception, "conduct in violation of sections 169A.20, 169A.31, or 169A.50 to 169A.53 that interferes with or adversely affects the employment is

employment misconduct."[1] Minn. Stat. § 268.095, subd. 6(c) (2010). As the ULJ found, LaValla's incarceration on January 12 and 13 was a result of her driving while impaired in violation of that statute. Accordingly, even if LaValla is chemically dependent, she does not qualify for the exception to employment misconduct.

II.

LaValla disagrees with the ULJ's finding that she had eight unscheduled absences, arguing that (1) the Red Cross's records regarding the dates of her absences cannot be trusted, (2) her pre-approved decision to leave one hour early did not constitute an unscheduled absence, and (3) the Red Cross's destruction of her personal employment records hindered her ability to effectively challenge the dates of the absences.

While LaValla persuasively explains how many of her eight unscheduled absences do not amount to employment misconduct, her arguments do not compel reversal because the ULJ based its determination of employment misconduct only on her absences on December 15, January 12, and January 13. With respect to those absences, LaValla admits that she was scheduled to work and did not.

Affirmed.

[1] Minn. Stat. § 169A.20 (2010) is the driving-while-impaired statute.