**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-841**

Evelyn DeSmet,
Relator,

vs.

FMT Services, Inc.,
Respondent,

Department of Employment
and Economic Development,
Respondent.

**Filed February 13, 2012**
**Reversed**
**Collins, Judge**[*]

Department of Employment and Economic Development
File No. 26758624-3

Evelyn DeSmet, St. Joseph, Minnesota (pro se relator)

FMT Services, Inc., c/o ADP-UCS, San Dimas, California (respondent employer)

Lee B. Nelson, Amy R. Lawler, St. Paul, Minnesota (for respondent department)

Considered and decided by Wright, Presiding Judge; Bjorkman, 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

**COLLINS**, Judge

Pro se relator Evelyn DeSmet challenges the decision of the unemployment law judge (ULJ) denying her unemployment benefits based on a conclusion that she committed employment misconduct while on medical leave. Because DeSmet did not commit misconduct by declining the part-time job offered by her employer and accepting, while on medical leave, a part-time second job that included duties within the scope of accommodations for her medical restrictions offered by her employer, we reverse.

## FACTS

DeSmet worked at FMT Services Inc. (FMT) from February 15, 2010 to December 15, 2010 as a full-time debt collector. After her separation from employment, DeSmet applied for unemployment benefits and respondent Minnesota Department of Employment and Economic Development (DEED) determined she was ineligible. DeSmet appealed, and on February 8, 2011, a telephonic hearing was held before a ULJ.

Testimony was taken from DeSmet and FMT human resources director Mary Lewandowski. It is undisputed that on November 1, 2010, DeSmet provided FMT a doctor's note stating that she would be unable to sit for prolonged periods of time because of a knee injury. FMT approved a one-month medical leave of absence. On November 15, DeSmet and Lewandowski talked by telephone. Lewandowski testified that she offered DeSmet accommodations consisting of a two-hour work day and a desk where she could choose to stand, which DeSmet declined, stating that her knee injury

prevented her from standing long enough to bake or decorate for Christmas. DeSmet testified that Lewandowski did not offer her part-time work or a stand-up desk.

On December 2, 2010, Lewandowski and DeSmet talked again by telephone and Lewandowski told DeSmet that she would need to provide an additional doctor's note to excuse further absences. No deadline was set for submitting the updated doctor's note. Soon after this conversation, Lewandowski learned that DeSmet had taken a part-time job as a food demonstrator at Sam's Club. DeSmet was working one to three shifts weekly for up to six hours per shift to supplement lost income and pay for health insurance while on her medical leave of absence. DeSmet testified that the job was seasonal, lasting only until Christmas. She also testified that the food-demonstration job allowed her to stand, which accommodated her knee injury. On December 9, Lewandowski went to Sam's Club and saw DeSmet demonstrating food. The two had a brief conversation, and DeSmet offered Lewandowski a cookie sample. When DeSmet arrived at FMT on December 15 with an updated doctor's note, Lewandowski told DeSmet that she had been discharged.

After the hearing, the ULJ found Lewandowski's testimony credible and determined that DeSmet committed employment misconduct for a serious violation of the standards of behavior her employer had the right to reasonably expect, and that she was ineligible for benefits. DeSmet filed a request for reconsideration with the ULJ, who affirmed his previous decision. This certiorari appeal followed.

## D E C I S I O N

We review the decision of the ULJ to determine whether a party's substantial rights were prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence in view of the record as a whole or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2010). Whether an employee committed 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 question of fact." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether the employee's act constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

We first address DeSmet's argument that the ULJ erred in finding, based on the judge's witness-credibility determination, that FMT offered DeSmet a two-hour per day job and a stand-up desk to accommodate her medical restrictions. When the credibility of a witness has a significant effect on the ULJ's decision, the judge must state the reason for crediting the testimony. Minn. Stat. § 268.105, subd. 1(c) (2010). We defer "to the ULJ's credibility determinations, view the ULJ's findings in the light most favorable to the decision, and will not disturb those findings if the evidence substantially sustains them." *Vasseei v. Schmitty & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 749 (Minn. App. 2010).

Here, the ULJ heard conflicting testimony regarding whether FMT offered DeSmet the part-time job with accommodations for her medical condition while she was on a medical leave of absence—which was the initial accommodation FMT granted to

DeSmet. Lewandowski testified that on November 15, 2010, FMT offered to accommodate DeSmet's knee injury with a two-hour work day and a desk that would allow her to stand rather than sit. DeSmet denied that FMT offered these additional accommodations, contending that Lewandowski's testimony was untrue. The ULJ discounted DeSmet's testimony, and found Lewandowski's testimony to be credible "because it was specific, detailed, and followed a more logical chain of events." *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007) (affirming ULJ's credibility determination where witness's version of events "was very detailed and specific"). The ULJ further credited Lewandowski's testimony that DeSmet stated that she was upset because her knee injury prevented her from standing long enough to bake or decorate for Christmas when declining Lewandowski's offer of additional accommodations. Given the deference we afford a ULJ's credibility determinations, and the substantial evidence in the record, we accept the ULJ's finding that FMT offered DeSmet the additional accommodations to the initial accommodation of a medical leave of absence. *See Skarhus*, 721 N.W.2d at 344 (deferring to ULJ credibility determination).

Next, we must determine whether DeSmet committed employment misconduct by declining the additional accommodations offered by FMT in the form of a two-hour per day job for duties within her medical restrictions, and subsequently taking a seasonal, part-time job performing duties within the scope of the additional accommodations offered by FMT. Employment misconduct is "any intentional, negligent, or indifferent conduct, on the job or off that displays clearly . . . a serious violation of the standards of

behavior the employer has the right to reasonably expect of the employee." Minn. Stat. § 268.095, subd. 6(a)(1) (2010). "[T]he issue is not whether the employee[] should have been terminated," but whether, once terminated, the employee is eligible for unemployment benefits. *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981). Thus, we address whether DeSmet engaged in employment misconduct within the meaning of subdivision 6(a)(1).

Even accepting Lewandowski's testimony as true, the record does not support the ULJ's conclusion that DeSmet committed a serious violation of the standards of behavior an employer has the right to reasonably expect of an employee. There is no evidence of any FMT standard of behavior that DeSmet is alleged to have violated by taking a seasonal, part-time job while on a medical leave of absence from her primary job. *See Anderson v. Honeywell, Inc.*, 421 N.W.2d 740, 743 (Minn. App. 1988) (holding that employee, who was receiving workers' compensation benefits, did not engage in employment misconduct by taking a part-time job while on medical leave of absence, where only evidence of standard of behavior alleged violated was a leave-of-absence provision held to be inapplicable).

Lewandowski may have believed that DeSmet breached a duty of loyalty owed to FMT. A breach of loyalty may be grounds for ruling that an employee engaged in employment misconduct under subdivision 6(a)(1). *See, e.g.*, *Marn v. Fairview Pharm. Servcs. LLC*, 756 N.W.2d 117, 121 (Minn. App. 2008) (concluding employee committed misconduct by a serious violation of the standards of behavior the employer had a right to expect by breaching duty of loyalty in urging employer's customer to reevaluate its

contract with employer), *review denied* (Minn. Dec. 16, 2008). But caselaw does not support the proposition that merely taking a seasonal, part-time job while on medical leave constitutes a breach of the duty of loyalty to the primary employer.

Here, DeSmet took a seasonal, part-time job to supplement her income while on medical leave. *See* Minn. Stat. § 268.085, subd. 5(b) (2010) (providing that if an applicant has weekly earnings from employment that are less than the weekly benefit amount, 55% of those earnings will be deducted from the benefit amount). DeSmet did not display the behavior of an employee breaching the loyalty owed to her employer—FMT did not set a deadline by which the updated doctor's note was to be submitted, and there is no evidence that DeSmet competed with or undermined FMT by performing seasonal employment at Sam's Club in an unrelated industry. *Cf. Rehab. Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304 (Minn. App. 1987) (holding that "employee's duty of loyalty prohibits her from soliciting the employer's customers for herself, or from otherwise competing with her employer, while she is employed"). Therefore, there was no evidence that DeSmet breached her duty of loyalty to FMT.

Lewandowski may have believed that DeSmet was insubordinate in not accepting FMT's offer of the additional accomodations. Failure to accede to an employer's request is misconduct if the request is reasonable and does not impose an unreasonable burden on the employee. *Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985); s*ee Daniels v. Gnan Trucking*, 352 N.W.2d 815, 816 (Minn. App. 1984) (determining that refusal to unload a truck was "a deliberate act of insubordination" constituting employment misconduct). The reasonableness of a request depends on the

circumstances. *Christenson v. City of Albert Lea*, 409 N.W.2d 564, 566 (Minn. App. 1987) (remanding for findings on reasonableness). Here, FMT offered DeSmet an initial accommodation of a medical leave of absence on November 1, 2010, which DeSmet accepted. As found by the ULJ, while DeSmet was on the approved medical leave, FMT offered DeSmet additional accommodations of working reduced hours at a desk where she could choose to stand, which DeSmet declined. But it was not the act of declining the additional accomodations that was the reason for DeSmet's discharge; it was the fact that she subsequently took a part-time job elsewhere. The issue here is not whether FMT should have fired DeSmet but whether, having been fired, DeSmet is eligible for unemployment benefits. *Auger*, 303 N.W.2d at 257. We can find no caselaw to the effect that DeSmet was obligated to accept FMT's additional accommodation of part-time work at significantly reduced hours, and DEED did not provide any. And because FMT did not set a deadline for submitting the updated doctor's note, the fact that DeSmet did not supply it until the day of her discharge was not insubordination.

Finally, we note that the effect, if any, of DeSmet's decision not to accept the part-time job offered by FMT on her eligibility for benefits would presumably arise under Minn. Stat. § 268.085, subd. 13a (2010), which addresses eligibility for benefits when the separation from employment is due to a leave of absence. Because this issue was neither raised to nor decided by the ULJ, who ultimately ruled that DeSmet was ineligible for benefits on the ground of employment misconduct, we decline to consider it here. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (providing that generally, appellate

court cannot review issues not presented to, considered by, or decided by the decision maker).

**Reversed.**