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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-985**

Laurene Buckmiller,  
Relator,

vs.

Resources for Child Caring, Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed March 19, 2012  
Affirmed  
Ross, Judge**

Department of Employment and Economic Development  
File No. 26535775-3

Paul Onkka, Southern Minnesota Regional Legal Services, Inc., Shakopee, Minnesota  
(for relator)

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

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

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

## UNPUBLISHED OPINION

**ROSS**, Judge

Laurene Buckmiller missed work for multiple reasons while employed as a case worker for Resources for Child Caring, Inc. Child Caring discharged her and she applied to receive unemployment benefits. Buckmiller now appeals from an unemployment law judge's decision that Child Caring discharged her for employment misconduct. Because the unemployment law judge's finding that Buckmiller's unexcused absence is supported by the record and the absence constitutes employment misconduct, we affirm.

### FACTS

Laurene Buckmiller began working for Resources for Child Caring, Inc., in September 2002 as a full-time case manager. Child Caring is a nonprofit agency that contracts with Ramsey County to manage a child-care assistance program. In October 2008 Child Caring gave Buckmiller a performance review and complained about her job performance. It noted that she was not completing her case notes correctly, had poor attendance, and was not working during scheduled hours. Buckmiller received another performance review in February 2010 and Child Caring again raised the same issues. Then in the six-month period between April and October 2010, Buckmiller missed work nine times due to illness, and she was absent or late an additional eight times for personal reasons, appointments, and claimed house emergencies.

In October 2010 Child Caring conducted another performance review and found that Buckmiller's job performance had not improved since the February review. Child Caring met with Buckmiller and placed her on a performance improvement plan directing

her to address four issues: her failure to work full scheduled shifts due to late arrivals and unplanned absences; her time management problems from frequent use of the internet for nonwork purposes; her failure to follow Child Caring's practices for informing managers of late arrivals or working a flexible schedule; and her case management errors. The plan outlined four expectations for Buckmiller: (1) work scheduled hours and eliminate late arrivals, requests to leave early, and reduce unplanned absences; (2) perform 7.5 hours of work-related duties daily and eliminate nonwork internet use; (3) follow all of Child Caring's practices outlined in the company handbook; and (4) perform case management duties accurately. The plan implied that it would be in place until November 15, when another evaluative meeting would occur. Buckmiller signed the plan and acknowledged that failure to meet its expectations could result in her termination from employment.

The week after Child Caring implemented Buckmiller's performance improvement plan she missed an entire work day on October 22. She claimed that her absence was due to her furnace malfunctioning and that she had to wait home all day until an Xcel Energy furnace repairman arrived at about 5:15 p.m. Child Caring asked Buckmiller for documentation to verify her claim, but Buckmiller replied that Xcel Energy could not provide her any documents because, as it turned out, she only needed to change the batteries in her thermostat.

On November 15 Child Caring terminated Buckmiller's employment after it determined that she had failed to meet her job performance standards as clarified in the expectations of the performance improvement plan in the areas of attendance and case management.

Buckmiller applied to the Minnesota Department of Employment and Economic Development for unemployment benefits. A department adjudicator determined that she was ineligible for benefits because she had been discharged for employment misconduct. Buckmiller appealed the determination, and after a hearing an unemployment law judge (ULJ) determined that Child Caring discharged Buckmiller for employment misconduct as a result of her unexcused October 22 absence. The ULJ therefore found that Buckmiller was ineligible for unemployment benefits and later affirmed the decision. This certiorari appeal follows.

## **D E C I S I O N**

Buckmiller challenges the ULJ's determination that Child Caring discharged her for employment misconduct based on her October 22 absence. An employee is disqualified from receiving unemployment benefits if she is discharged for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct is intentional, negligent, or indifferent conduct that displays either "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee" or "a substantial lack of concern for the employment." *Id.*, subd. 6(a). Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee's particular act constitutes misconduct is a question of law, which we review de novo. *Id.* But we review the "ULJ's factual findings in the light most favorable to the decision," *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted), and we defer to the ULJ's credibility determinations. *Skarhus v.*

*Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). We will affirm a ULJ's decision unless it derives from unlawful procedure, relies on an error of law, or is unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2010).

Buckmiller argues unpersuasively that the evidence in the record is not sufficient to establish that her October 22 unexcused absence was the basis for her discharge. In the six months before October 2010 Buckmiller missed work nine times due to illness, and she was absent or late eight times for personal issues, appointments, and house emergencies. It is clear that Child Caring was concerned with Buckmiller's frequent absences and tardiness because the first goal in the performance improvement plan was for her to work scheduled hours and reduce unplanned absences. And she was on notice that failure to meet the goals "could result in further action, up to and including termination." An employer has the right to create and enforce reasonable attendance policies, and an employee's refusal to abide by these policies is generally considered employment misconduct. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). A week after the performance improvement plan was implemented, Buckmiller had another unexcused absence. This absence constituted employment misconduct, particularly because of Buckmiller's chronic absenteeism and related warnings.

We recognize from the performance improvement plan that Child Caring was also concerned with Buckmiller's errors in case-note management. But it also identified her poor attendance. And Child Caring's representative testified that she considered Buckmiller's attendance to be one of the reasons for terminating her. That Buckmiller

was terminated 24 days after the October 22 absence does not mean that the absence was not the reason for Child Caring's decision; the performance improvement plan included attendance goals and the plan was set for review on November 15, the day Child Caring determined that she failed to meet the goals of the plan.

Buckmiller also challenges the ULJ's conclusion that her excuse for the October 22 absence was not credible. The ULJ found that it was implausible that "a home service company in conjunction with a public utility company would not provide a record of having been at the location of service and a record of work that was done." The ULJ's ultimate objective was not to decide precisely what occurred, but instead whether Child Caring based its termination decision on employment misconduct that it reasonably believed occurred. We cannot say that the ULJ's conclusion is erroneous. It was not unreasonable for Child Caring to disbelieve Buckmiller's excuse for being absent on October 22, particularly after she could not produce proof. The absence took place in the context of Buckmiller's numerous other absences for similar claimed home emergencies and immediately after she was warned against them in the performance improvement plan. Child Caring had a reasonable basis to doubt Buckmiller's credibility. It decided to terminate Buckmiller's employment after it reasonably determined that she had no excuse for being absent, and the unexcused absence constitutes employment misconduct.

**Affirmed.**