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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1551**

Sandra L. Simenson,
Relator,

vs.

Wells Fargo Bank NA,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 22, 2013
Affirmed
Kirk, Judge**

Department of Employment and Economic Development
File No. 29488042-3

John M. Baker, Katherine M. Swenson, Greene Espel PLLP, Minneapolis, Minnesota
(for relator)

Wells Fargo Bank NA, Garden City, New York (respondent)

Lee B. Nelson, Christine E. Hinrichs, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Kirk, Presiding Judge; Johnson, Chief Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Relator challenges the determination of the unemployment-law judge (ULJ) that she is ineligible for unemployment benefits because she was discharged for misconduct. We affirm.

FACTS

Relator Sandra L. Simenson worked as a loan-document specialist at respondent Wells Fargo Bank NA from August 21, 1989, until March 14, 2012. Before 2010, Simenson had flexible work hours and unrestricted access to her office. However, in 2010, Wells Fargo altered Simenson's work schedule and no longer allowed her to have the same flexibility. Simenson had a difficult time adjusting to her new schedule. According to Wells Fargo's policy, nonexempt employees must accurately and honestly report the time they work in an online time-management system and receive approval from a manager before working overtime. Under federal law, Wells Fargo is required to pay nonexempt employees for overtime work. Simenson acknowledged that she was aware of these policies and had reviewed the employee handbook.

In September 2010, Simenson's manager noticed that Simenson had inaccurately reported the hours she worked in Wells Fargo's time-management system. On September 16, Simenson reported that she left work at 6:00 p.m., but she sent a work-related email at 7:06 p.m. On September 17, Simenson reported that she left work at 6:00 p.m., but she modified several records later that night, with the latest modification occurring at 9:46 p.m. When her manager confronted her, Simenson admitted that she

worked until 7:15 p.m. on September 16 and until 10:00 p.m. on September 17. Simenson's manager issued a formal written warning to Simenson, adjusted her hours to require her to leave the office at 5:00 p.m. unless she received approval for overtime, and instructed her that she was not permitted to work past 6:30 p.m. under any circumstances.

In June 2011, Simenson's manager noticed discrepancies on six occasions in April and June between the hours Simenson reported that she worked and the timestamps on documents that she had modified. When confronted, Simenson admitted that she had worked more hours than she reported. Simenson's manager reaffirmed to Simenson that she could not work later than 5:00 p.m. without permission, and that she was required to accurately report her time on a daily basis. Simenson's manager also adjusted her hours in the time-management system to ensure Simenson was paid for the time she actually worked. In December, Simenson received a written warning for attendance issues and failure to meet performance expectations.

In March 2012, Simenson's manager again discovered discrepancies between the hours Simenson reported and the timestamps on documents she modified on four occasions during January, February, and March. Simenson admitted that she worked more hours than she reported on those four occasions. Simenson's manager had Simenson adjust the hours she reported in the time-management system so that she was compensated for the time she actually worked. On March 14, Wells Fargo discharged Simenson.

Simenson applied for unemployment benefits and respondent Minnesota Department of Employment and Economic Development determined that she was

ineligible for benefits. Simenson appealed the determination. After an evidentiary hearing, the ULJ determined that Simenson was ineligible for unemployment benefits because she was discharged for employment misconduct. Simenson requested reconsideration, and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

When reviewing a ULJ's eligibility decision, this court may affirm, remand for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2012). Substantial evidence is “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

An employee who was discharged is eligible for employment benefits unless the discharge was for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2012). “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.” *Id.*, subd. 6(a) (2012). “Whether an employee committed employment misconduct is a mixed question of fact and law.” *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied*

(Minn. Oct. 1, 2008). Whether the employee committed the act is a fact question, which this court views in the light most favorable to the decision. *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 is reviewed de novo. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

Simenson argues that the ULJ erred by determining that her conduct rose to the level of a serious violation of the standards of behavior that Wells Fargo had the right to reasonably expect. She does not challenge the ULJ's finding that she intentionally violated Wells Fargo's policies, but she contends that her inaccurate reports of the hours she worked did not result in Wells Fargo paying her for time she did not work. In support of this argument, Simenson argues that this case is distinguishable from the typical unemployment-benefits case involving time-card violations where an employee was paid for time she did not work. *See, e.g., McKee v. Cub Foods, Inc.*, 380 N.W.2d 233, 234, 236 (Minn. App. 1986) (concluding that employee committed employment misconduct when she committed time-card violations by shopping without punching out and punching in after a break but failing to return to work); *Ruzynski v. Cub Foods, Inc.*, 378 N.W.2d 660, 662-63 (Minn. App. 1985) (concluding that employee committed misconduct when he violated employer's time-card policy by signing out at 10:00 p.m., but leaving by 9:50 p.m.).

In general, refusing to comply with an employer's reasonable policy constitutes misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). An employee's failure to comply with an employer's policy is particularly likely to constitute

employment misconduct if the employee has committed “multiple violations of the same rule involving warnings or progressive discipline.” *Id.* at 806–07. Falsifying a time card is employment misconduct. *Ruzynski*, 378 N.W.2d at 663. And “[d]ishonesty that is connected with employment may constitute misconduct.” *Baron v. Lens Crafters, Inc.*, 514 N.W.2d 305, 307-08 (Minn. App. 1994); *see also Skarhus*, 721 N.W.2d at 344 (concluding that employee’s theft constituted misconduct because it undermined the employer’s ability to assign essential job functions to her).

Here, it was reasonable for Wells Fargo to require Simenson to honestly record the hours she worked and to request permission to work beyond her approved hours. Wells Fargo’s policy was designed to comply with federal law requiring employers to pay nonexempt employees for overtime work. Simenson was notified about Wells Fargo’s policy on several occasions and she concedes that she was aware of it. And Simenson received two formal warnings for failing to comply with the policy. Yet Simenson repeatedly violated the policy by inaccurately reporting the hours she worked and working beyond her approved hours without permission. Regardless of whether Simenson benefited monetarily from her violations of Wells Fargo’s policy, her repeated violation of the policy and her dishonesty to her employer constitute serious violations of the standards of behavior Wells Fargo had the right to expect.

Simenson next argues that her conduct falls into a statutory exception to misconduct because the actions for which she was discharged were directly related to her failure to meet performance expectations. Conduct that results from the employee’s inadvertence or inefficiency is not misconduct. Minn. Stat. § 268.095, subd. 6(b)(2)

(2012). “[P]oor work performance is generally not considered disqualifying misconduct.” *Minn. Boxed Meats, Inc. v. Zadworny*, 404 N.W.2d 7, 9 (Minn. App. 1987); *see also Bray v. Dogs & Cats Ltd.*, 679 N.W.2d 182, 185 (Minn. App. 2004) (concluding that employee, whose performance as a store manager did not meet the employer’s expectations because she failed to meet deadlines and follow store procedures, did not commit misconduct because she “attempted to be a good employee but just wasn’t up to the job and was unable to perform her duties to the satisfaction of the employer”).

Here, the ULJ found that Simenson was discharged for failing to comply with Wells Fargo’s policy requiring employees to accurately and honestly report their work hours, not due to her poor work performance. The record reflects that Simenson’s manager issued a formal warning to Simenson in part due to her low work productivity, but her manager specifically testified that she was not discharged because of her work performance. While Simenson argues that her struggle to complete her work led her to remain at work longer than she was allowed, her inability to complete her work does not excuse her repeated false statements about the amount of time she worked. Despite understanding Wells Fargo’s policy, Simenson falsely reported her time on numerous occasions.

Accordingly, we conclude that the ULJ did not err by determining that Simenson is ineligible for unemployment benefits because she committed employment misconduct.

Affirmed.