STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2084

Amy Walsh,
Relator,

vs.

TLC Nursing Services of Roseville, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 22, 2013
Affirmed
Rodenberg, Judge

Minnesota Department of Employment and Economic Development
File No. 29793067-3

David H. Redden, Fabian, May & Anderson, PLLP, Minneapolis, Minnesota (for relator)

Jessica M. White, JW Legal Services, PA, Bloomington, Minnesota (for respondent TLC Nursing Services of Roseville, Inc.)

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

Considered and decided by Connolly, Presiding Judge; Rodenberg, Judge; and Huspeni, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving 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

RODENBERG, Judge

Relator appeals from the determination of an unemployment law judge (ULJ) that she is ineligible for unemployment benefits because she was discharged for employment misconduct based on her failure to properly report an absence to her employer. We affirm.

FACTS

Relator Amy Walsh worked for respondent-employer TLC Nursing Services of Roseville Inc. from March 15, 2011, until she was discharged from employment on May 21, 2012. Following her discharge, relator applied for unemployment benefits. Relator's application was denied, and she sought review by a ULJ. A telephonic hearing was held on August 13–14, 2012, after which the ULJ decided that relator had been discharged for employment misconduct and is therefore ineligible for unemployment benefits. Relator filed a request for reconsideration. The ULJ affirmed the decision, but amended some of his factual findings.

The ULJ determined that much of the evidence presented at the hearing was not credible. The evidence that the ULJ determined was credible established that on May 17, relator's supervisor informed relator that certain critical work had to be completed before relator went home for the day. The supervisor stated that overtime had been approved, and explained that the task needed to be completed by midnight or the employer would be unable to make payroll. The supervisor and relator also discussed whether relator was suffering from work-related anxiety.

Later that day, relator told her supervisor that she was sick and needed to go home. The supervisor permitted relator to leave but instructed relator to hand-deliver a doctor's note to the office the following day justifying her departure.

Relator was scheduled to work on May 18. She did not call in or report for her shift. The employer's attendance policy states that, to notify the employer of an absence, employees must call the supervisor at home or by cellular phone at least one hour before the start of the shift. The policy provides that emails and texting are not allowed for reporting absences from work.

At 2:26 a.m. on May 18, relator sent an email to the supervisor's account stating that relator had tried to call the office telephone line but that the office voicemail did not pick up. Relator's email stated that she was still very sick and unable to work and that she would try calling the office later. Relator did not speak to anyone or leave any phone messages on May 18. The ULJ found that relator did not call her supervisor's home or cell phone as required by the employer's policy.

The following week, relator sent an email informing her supervisor that relator had a doctor's note clearing her to return to work as of May 29. The supervisor informed relator that she considered relator to have self-terminated her employment by walking off the job on May 17.

The ULJ determined that relator was discharged for employment misconduct when she failed to appear for work as scheduled on May 18, without providing the proper notice of her absence. The ULJ determined that, because of relator's misconduct, the employer was no longer able to trust relator. This appeal by writ of certiorari followed.

D E C I S I O N

An employee who is discharged for employment misconduct is not eligible for unemployment benefits. 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" 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) (2012).

Whether an employee committed misconduct sufficient to disqualify her from receipt of unemployment benefits is a mixed question of law and fact. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). "Whether [an] employee committed a particular act is a question of fact." *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). However, "[d]etermining whether a particular act constitutes disqualifying misconduct is a question of law," which we review de novo. *Stagg*, 796 N.W.2d at 315.

When reviewing the decision of the ULJ, we defer to the ULJ's credibility determinations if they are supported by substantial evidence. *Compare Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006) (stating that credibility determinations are "the exclusive province of the ULJ and will not be disturbed on appeal") *with Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (stating that the ULJ's credibility determinations will be upheld if supported by substantial evidence) (citing *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532–33 (Minn. 2007) (upholding a ULJ's credibility determination after subjecting it to

substantial evidence review)). In conducting this review, we may reverse or modify the ULJ's factual findings if they are "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5) (2012).

"Substantial evidence" is defined as "1. [s]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2. [m]ore than a scintilla of evidence; 3. [m]ore than some evidence; 4. [m]ore than any evidence; and 5. [e]vidence considered in its entirety." *Cable Commc'ns. Bd. v. Nor–West Cable Commc'ns. P'ship.*, 356 N.W.2d 658, 668 (Minn. 1984) (addressing the standard of review for administrative agency decisions); *see also* Minn. Stat. §§ 14.69 (establishing the standards of review for administrative agency actions, and containing language that is identical to that in section 268.105, subdivision 7(d)), 645.17(4) ("[W]hen a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.") (2012).

"An employer has the right to establish and enforce reasonable rules governing absences from work." *Wichmann*, 729 N.W.2d at 28. "As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). In particular, "an employee's decision to violate *knowingly* a reasonable policy of the employer is misconduct." *Id.* at 806 (emphasis added). A single absence may amount to employment misconduct. *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986). But if the discharge is for a single incident, "that is an important fact that must be considered in deciding whether the conduct rises to the level of employment

misconduct." Minn. Stat. § 268.095, subd. 6(d) (2012). The ULJ is not required to state on the record that this fact has been considered. *Id.*

Here, respondent-employer's policy required that employees who were to be absent must call the supervisor at home or by cell phone at least one hour before the employee's scheduled start time. The policy explicitly stated that employees are not permitted to text or email the supervisor to report that they would be absent. In bolded text, the policy states that there are "[n]o exceptions" to the procedure. The policy reasonably seeks to ensure that a supervisor receives actual advance notice of an employee's absence and can seek alternative coverage for the employee's shift if needed. An email or text message does not ensure that the supervisor receives actual advance notice of the absence.

Appellant violated the policy by sending an email about her absence rather than calling her supervisor. The ULJ did not credit relator's testimony that she had called the office line because relator did not leave a voicemail and because other staff members reported that they were not having issues with the office voicemail. Even if relator had called the office phone line, such a call would not have complied with the employer's policy on reporting absences. The ULJ did not err in finding that relator committed employment misconduct by failing to appear for her scheduled shift without first providing proper notice of her absence. *See Wichmann*, 729 N.W.2d at 28; *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d at 417.

Relator also argues that she did not call her supervisor directly because of work-related anxiety and because relator felt that the supervisor was retaliating against her

based on a complaint to Occupational Safety and Health Administration. These are factual assertions which the ULJ found were not credible and not supported by the evidence. This court must defer to the ULJ's findings of fact and credibility determinations. *See* Minn. Stat. § 268.105, subd. 7(d)(5); *Wichmann*, 729 N.W.2d at 29; *Skarhus*, 721 N.W.2d at 345. Because the ULJ's findings on this issue are supported by substantial evidence in view of the entire record and because the ULJ considered the evidence submitted by both parties, we discern no error in the ULJ's findings or conclusions.

Affirmed.