STATE OF MINNESOTA
IN COURT OF APPEALS
A09-736

Margaret Krueger,
Relator,

vs.

White Earth Reservation,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed January 26, 2010
Affirmed
Johnson, Judge

Department of Employment and Economic Development
File No. 21520145-3

Margaret Krueger, Twin Valley, Minnesota (pro se relator)

Joseph Plumer, White Earth Legal Department, White Earth, Minnesota (for respondent White Earth Reservation)

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

Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and Stoneburner, Judge.

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

JOHNSON, Judge

The White Earth Reservation terminated Margaret L. Krueger's employment because she was absent or tardy eight times within a six-month period. Krueger sought unemployment benefits but was deemed ineligible on the ground that she was terminated for employment misconduct. We affirm.

FACTS

Krueger began working for the White Earth Reservation in its Shooting Star Casino on May 8, 1993. She was a blackjack supervisor on the evening shift. Shooting Star terminated Krueger's employment on November 18, 2008, because of excessive absenteeism and tardiness.

Shooting Star has a progressive discipline policy for violations of its attendance requirements. Its policy provides that employees will be terminated after eight "occurrences" within six months. An "occurrence" includes an unexcused absence or instance of tardiness. The policy defines an unexcused absence or tardy as one that is "without official leave notice or approval from supervisory personnel" or that is a failure "to provide proper notification to supervisory personnel prior to scheduled start time." The policy provides for oral or written warnings upon the first six occurrences. Upon a seventh occurrence, Shooting Star will place an employee on a leave of absence and take other corrective action, which may include termination. Upon an eighth occurrence, the result "will be dismissal" of the employee. In addition, the policy states, "Shooting Star

may, at its sole discretion, depart from this progressive discipline policy and dismiss an Associate at-will."

Krueger's termination arose from eight occurrences between May and November of 2008. First, on May 17, 2008, Krueger was absent from work because she was sick. Second, on July 18, 2008, Krueger again was absent from work because she was sick. Third, on August 2, 2008, Krueger was absent from work because she attended a family reunion. She had requested a leave for this occasion, but the request was denied. Fourth, on September 19, 2008, Krueger was absent from work because cattle escaped from her property, and she needed to have them returned to her property and to fix a fence. Fifth, on October 3, 2008, Krueger was absent from work because she attended an auction of exotic animals. She had requested a leave for this occasion, but the request was denied. Sixth, on October 18, 2008, Krueger was absent from work because she was taking care of a granddaughter. Seventh, on October 30, 2008, Krueger was seven minutes late arriving to work because of a long delay at a train crossing. Eighth, on November 7, 2008, Krueger was absent from work because she attended a memorial service for a granddaughter. She had requested this day off to go deer hunting, but that request was denied. On November 18, 2008, Krueger's employment was terminated.

Krueger sought unemployment benefits, and the Department of Employment and Economic Development (DEED) determined that she was ineligible. Krueger appealed from the initial determination, and an unemployment law judge (ULJ) held a telephonic hearing. The ULJ concluded that Krueger was discharged for employment misconduct and, thus, was ineligible for unemployment benefits. After Krueger sought

reconsideration of the decision, the ULJ affirmed her previous decision. Krueger appeals by way of a writ of certiorari.

D E C I S I O N

Krueger argues that the ULJ erred by concluding that she is ineligible for unemployment benefits. This court reviews a ULJ's decision denying benefits to determine whether the findings, inferences, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (2008). The evidentiary hearing is an evidence-gathering inquiry, not an adversarial contest, and is conducted without regard to any particular burden of proof. *Id*., subd. 1(b) (2008); *Vargas v. Northwest Area Found.*, 673 N.W.2d 200, 205 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004). The ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination whether an employee is ineligible for unemployment benefits based on employment misconduct is a question of law, which is subject to a *de novo* standard of review. *Id*.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2008). Employment misconduct includes "any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a)

(2008). As a general rule, refusing to follow an employer's reasonable policies and requests is misconduct because it shows a substantial lack of concern for the employer's interest. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). "This is particularly true when there are multiple violations of the same rule involving warnings or progressive discipline." *Id.* at 806-07. More specifically, "[a]n employer has the right to establish and enforce reasonable rules governing absences from work." *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007).

Krueger does not dispute the evidence that she was absent or tardy with respect to each of the eight occurrences. Rather, she argues that Shooting Star did not follow the procedures of the progressive discipline policy. *See Hoemberg v. Watco Publishers, Inc.*, 343 N.W.2d 676, 678-79 (Minn. App. 1984) (holding that employee did not engage in misconduct because employee was not on notice of possible termination due to employer's failure to follow disciplinary policy), *review denied* (Minn. May 15, 1984). More specifically, Krueger contends that Shooting Star did not promptly inform her of her sixth and seventh occurrences. She contends that if Shooting Star had given her timely notice of her sixth and seventh occurrences, she would have been on notice that being absent on November 7 would cause her termination and, thus, would not have been absent that day.

Krueger's argument fails for three reasons. First, the agency record does not conclusively show that Shooting Star failed to follow its own procedures. Krueger testified that Shooting Star's handbook requires a written warning to be given to an employee before the next bi-weekly schedule is issued. That part of the handbook was

not made an exhibit at the agency hearing. Shooting Star's human resources generalist testified that some departments issue schedules less frequently than bi-weekly, thus suggesting that the notices of Krueger's sixth and seventh occurrences were not untimely. The record on this issue is simply inconclusive.

Second, even though Shooting Star did not inform Krueger of her sixth and seventh occurrences until November 18, the date of her termination, she had other means of obtaining information about her disciplinary status. The ULJ specifically found that Krueger could have called Shooting Star's human resources department to inquire whether she would receive written warnings for occurrences on October 18 and October 30. This finding is based in part on Krueger's concession that she could have called the human resources department. On appeal, Krueger argues for the first time that such an inquiry would have been ineffective because the human resources department would not have known the answer to her question because the paperwork was in the possession of her supervisor. Even if we were to consider this new argument, it is unpersuasive because she has not explained why she could not also call her supervisor. The ULJ addressed this issue in detail, finding that Krueger was aware of Shooting Star's attendance policy, knew based on prior warnings "that she could be discharged if she continued to receive unexcused absences," "knew she had an unexcused absence on October 18, 2008 and she knew she was late to work on October 30, 2008," and, thus, "was on notice that any further unexcused absences could result in her discharge." The ULJ concluded that Krueger's conduct "violates a standard of behavior that Shooting Star reasonably expected of her." The evidence in the agency record supports the ULJ's

conclusion. Furthermore, the ULJ's conclusion is consistent with the caselaw. *See, e.g.*, *McLean v. Plastics, Inc.*, 378 N.W.2d 104, 107 (Minn. App. 1985) (holding that excessive tardiness may constitute misconduct); *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985) (holding that chronic absenteeism may "demonstrate a lack of concern" for one's employment); *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 814-15 (Minn. App. 1984) (holding that employee committed employment misconduct by being absent despite being denied requested leave), *superseded by statute on other grounds*, Minn. Stat. § 268.095, subd. 6(e) (2008).

Third, Shooting Star's attendance policy, which appears to be consistent with the employee handbook, permits termination of employment even without eight occurrences. The policy states that Shooting Star may terminate an employee upon a seventh occurrence. In addition, the policy also states, "Shooting Star may, at its sole discretion, depart from this progressive discipline policy and dismiss an Associate at-will." Thus, Krueger also was on notice that her employment could be terminated for poor attendance even if she had not accrued seven occurrences. *See Thurner v. Philip Clinic, Ltd.*, 413 N.W.2d 537, 541 (Minn. App. 1987) (distinguishing *Hoemberg* because employee manual provided for discretion in application of progressive-discipline policy).

We note that Krueger does not place special emphasis on the fact that her absence on November 7 was due to the importance of attending a memorial service for her granddaughter. At first blush, a memorial service for a grandchild might appear to be a valid reason to be absent from work. But on closer inspection, it appears that the memorial service did not play a central role in Krueger's absence from work on Friday,

November 7. Two months earlier, Krueger requested a day off on Saturday, November 8, 2008, because she wanted to go deer hunting. For deer hunters using firearms in 2008, the hunting season opened on November 8. *Minnesota 2008 Firearms Deer Season* (2008), http://files.dnr.state.mn.us/fish_wildlife/regs/hunting/2008/zonemap.pdf. On October 20, 2008, Krueger also requested the day off on Friday, November 7, because, as her supervisor explained, "the hunting party that hunted next to [Krueger's hunting party] always had a big party the night before the opener and she said she didn't want to miss it." Krueger's request for a day off on Friday, November 7, was denied. Krueger did not submit another request based on the memorial service; she simply called Shooting Star on November 7 to say that she would be absent from work that day. The agency record lacks details concerning the memorial service except that it was to occur at a grave site. It appears that the granddaughter's death occurred at an earlier time, not in the time period immediately preceding November 7. The agency record indicates that Krueger was aware of the memorial service approximately two weeks earlier. In her appellate brief, Krueger states that she would have reported to work on November 7 despite the memorial service if she had known that one more violation of Shooting Star's attendance policy would lead to the termination of her employment. But that argument clashes with the ULJ's findings that Krueger knew that she had either six or seven occurrences and could have called Shooting Star's human resources department to determine her precise status. As stated above, the ULJ's findings on that issue are supported by substantial evidence.

For that reason and other reasons, this case must be distinguished from *Hanson v. Crestliner Inc.*, 772 N.W.2d 539 (Minn. App. 2009), in which the employee was terminated for absenteeism because he was attending to his elderly mother, who was being hospitalized due to injuries received in a fall. *Id.* at 541-42. The ULJ found the employee ineligible for unemployment benefits because he "committed employment misconduct in failing to return to work when scheduled without giving notice of the absence." *Id*. at 542. We reversed on the ground that the employee's absence "was caused by the need to care for an immediate family member" and, therefore, "did not display clearly a serious violation of the standards of behavior the employer has the right to reasonably expect or display clearly a substantial lack of concern for employment." *Id.* at 543-44. We relied in part on caselaw holding that absences due to the need to care for family members may not be misconduct if the circumstances are "beyond the employee's control" and do not display a disregard for the employment. *Id.* at 543. We also relied in part on a statute providing that misconduct does not include "conduct the average reasonable employee would have engaged in under the circumstances." *Id.* at 544 (citing Minn. Stat. § 268.095, subd. 6(a)). The facts of this case, however, are different. The record does not indicate that the scheduling of the memorial service was beyond Krueger's control. Krueger did not request time off because of the memorial service. It appears that Krueger skipped work for the purpose of attending a social gathering with fellow hunters. And Krueger had an extensive history of absences in the six-month period preceding her termination. Thus, *Hanson* does not require that we reverse the ULJ's determination in this case.

In sum, the ULJ's findings are supported by substantial evidence and are consistent with the law. Therefore, the ULJ did not err by concluding that Krueger was terminated for employment misconduct and, thus, ineligible for unemployment benefits.

Affirmed.