STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1857

Dawn Johnson,
Relator,

vs.

Dakota County Receiving Center,
Respondent,

Department of Employment
and Economic Development,
Respondent.

Filed August 27, 2018
Affirmed
Johnson, Judge

Department of Employment
and Economic Development
File No. 35674590-3

Dawn Johnson, Hudson, Wisconsin (*pro se* relator)

Dakota County Receiving Center, Hastings, Minnesota (respondent employer)

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

Considered and decided by Connolly, Presiding Judge; Johnson, Judge; and Kalitowski, 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

JOHNSON, Judge

Dawn Johnson sought unemployment benefits after she was terminated from her employment. The department of employment and economic development concluded that she is ineligible for benefits because she was terminated for employment misconduct. We affirm.

FACTS

Dakota County Receiving Center (DCRC) (also known as Cochran Recovery Services, Inc.) is a non-profit organization that provides comprehensive behavioral-health services to persons with chemical dependencies. Dawn Johnson, a registered nurse, was employed as DCRC's full-time director of nursing from March 2014 to May 2017. Her primary responsibility was to coordinate health care and medical management for DCRC's clients, which required her to supervise nurses, technicians, and other medical staff; provide consultation for any medical emergencies; and make patient-care decisions for the detoxification unit. She was required to be on call 24 hours a day, 7 days a week. Her annual salary at the end of her employment was $70,512.

Johnson was given a positive performance evaluation in March 2017, but her attendance and performance thereafter declined. In May 2017, DCRC terminated Johnson's employment. Johnson applied for unemployment benefits with the department of employment and economic development. The department made an initial determination that Johnson is ineligible for unemployment benefits because she was discharged for employment misconduct. Johnson filed an administrative appeal.

In July 2017, an unemployment law judge (ULJ) conducted an evidentiary hearing. Amy Freiermuth, a human-resources manager for DCRC, testified on behalf of the employer that "the final triggering event" that led to Johnson's termination "was her unavailability by phone." She stated that, on three occasions, Johnson was unavailable by telephone for on-call services, which was one of her primary job duties. Specifically, Freiermuth testified that, on May 7, 2017, Johnson could not be reached by telephone for approximately 12 hours because her cell phone was disconnected by her cell service provider. Freiermuth testified that, on May 11, 2017, Johnson again could not be reached by telephone for several hours after her cell phone again was disconnected by her cell service provider. Freiermuth testified that, on May 19, 2017, the nurses from the detoxification unit attempted to contact Johnson about a medical issue, but Johnson did not answer and did not return the call until the next day. Freiermuth testified that Johnson was given warnings and that her "unavailability by phone" was the sole reason for her termination.

Johnson testified on her own behalf. She testified that DCRC told her that she was terminated solely for "not answering the phone." She admitted that she was not available by phone on May 19, 2017, but explained that she inadvertently left her phone on "silent" mode after she left work. She denied being unavailable on May 7, 2017, and explained that she provided the executive director with her significant other's cell phone number because she had a new cell service provider and was having technical difficulties with her cell phone. She also denied being unavailable on May 11, 2017, and explained that she

was on campus and was available. Johnson also testified that she was not given any warnings about being unavailable by phone until after the May 19 incident.

After the hearing, the ULJ issued a written decision in which she determined that Johnson engaged in employment misconduct because she failed to report for work on several occasions, failed to punch in and out of work, and failed to be accessible by telephone when she was on call. Johnson requested reconsideration and asked the ULJ to grant her an additional hearing so that she could present new evidence. The ULJ denied Johnson's request for reconsideration and affirmed her prior ruling. Johnson appeals by way of a petition for a writ of certiorari.

D E C I S I O N

Johnson argues that the ULJ erred by concluding that she was terminated for employment misconduct.

Unemployment benefits are intended to provide financial assistance to persons who have been discharged from employment "through no fault of their own." *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). Accordingly, a person who has been discharged from employment based on "employment misconduct" is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2016); *Stagg*, 796 N.W.2d at 314. "Employment misconduct" is defined by statute to mean

> 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.

Minn. Stat. § 268.095, subd. 6 (Supp. 2017). There are several exceptions to the statutory definition of misconduct, including "inefficiency or inadvertence." *Id.* § 268.095, subd. 6(b)(2). The statutory definition of misconduct is exclusive such that "no other definition applies" to an application for unemployment benefits. *Id.* § 268.095, subd. 6(e); *see also Wilson v. Mortgage Resource Ctr., Inc.*, 888 N.W.2d 452, 456-60 (Minn. 2016).

This court reviews a ULJ's decision denying unemployment benefits to determine whether an applicant for benefits has been prejudiced because the ULJ's findings, inferences, conclusion, or decision is erroneous. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2017). We review a ULJ's findings of fact "in the light most favorable to the decision" to determine whether "there is evidence in the record that reasonably tends to sustain them." *Stagg*, 796 N.W.2d at 315 (quotation omitted). We apply a *de novo* standard of review to mixed questions of fact and law, such as whether an employee's conduct "disqualifies the employee from unemployment benefits." *Id.* (quotation omitted).

Johnson makes four arguments, which we consider in turn. First, she argues that the ULJ erred by finding that she was terminated for three reasons instead of only one reason. She asserts that the ULJ should have relied on Freiermuth's testimony that DCRC terminated her employment for only one reason: her failure to be available by telephone while on call. Johnson is correct on this point. Freiermuth testified that "unavailability by phone" was the sole reason for Johnson's termination. Accordingly, we limit our review to the question whether Johnson was unavailable by telephone and whether such conduct is misconduct.

Second, Johnson argues that the ULJ erred by describing her testimony as "evasive." It appears that the ULJ's description pertains only to Johnson's testimony concerning the issues of absences, tardiness, and failure to punch in and out on the time clock. As stated above, the sole issue on appeal is whether Johnson engaged in misconduct by not being available by telephone while on call. Thus, it is immaterial that the ULJ described Johnson's testimony as "evasive."

Third, Johnson argues that the ULJ erred by finding that she engaged in misconduct. Johnson contends that she was unavailable by telephone on only one occasion, on May 19, 2017, and that her unavailability on that occasion was due to mere inadvertence. The ULJ, however, found otherwise. The ULJ found that Johnson also could not be reached by telephone on May 7, 2017, and May 11, 2017. The ULJ's findings on this particular issue are supported by evidence in the record. Freiermuth testified that "there were several instances," in which Johnson was unavailable by phone. She testified that Johnson was unavailable by telephone on May 7 for approximately 12 hours and that Johnson was unavailable by telephone on May 11 for several hours. Freiermuth also testified that Johnson was required to "be available to answer her phone whether it be on vibrate or loud enough to hear" and that, at the time of her discharge, she was reminded "that it was a medical necessity for her to be available by phone, and she was not available." The ULJ made an express determination that Johnson was "not credible." "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's*, 721 N.W.2d 340, 345 (Minn. App. 2006). Accordingly, the ULJ did not err by finding that Johnson was unavailable by telephone on three occasions.

Johnson asserts that she was unavailable by telephone on May 19, 2017, because she "accidentally left her phone off one night," which was "not an intentional act but the act of someone who just worked a full day, came home, went to sleep, and forgot." She contends that her failure to "turn her ringer back on after leaving work" was "an inadvertent act" and, thus, was not misconduct. The statutory definition of employment misconduct is subject to certain exceptions, including an exception for "conduct that was a consequence of the [employee's] inefficiency or *inadvertence*." Minn. Stat. § 268.095, subd. 6(b)(2) (emphasis added). In this context, "inadvertence" means "'an oversight or a slip'" or "'[n]ot duly attentive' or '[m]arked by unintentional lack of care.'" *Dourney v. CMAK Corp.*, 796 N.W.2d 537, 540 (Minn. App. 2011) (alterations in original) (quoting *The American Heritage Dictionary of the English Language* 910 (3d ed. 1992)).

The ULJ understood that Johnson did not intentionally make herself unavailable by telephone but nonetheless found that she engaged in misconduct. The ULJ found that "Johnson negligently forgot to turn the ringer on her phone back on after leaving the campus." The department notes that the statutory definition of misconduct encompasses conduct that is "intentional, *negligent*, or indifferent." *See* Minn. Stat. § 268.095, subd. 6(a) (emphasis added). Negligent conduct may be misconduct if it "displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." *Id.* § 268.095, subd. 6(a)(1). The department emphasizes the fact that Johnson was employed in the medical field, which the supreme court has recognized is a "unique area of employment law where strict compliance with protocol and

militarylike discipline is required." *See Ress v. Abbott Northwestern Hosp.*, 448 N.W.2d 519, 525 (Minn. 1989).

The facts of this case are somewhat different from the facts of *Ress*, in which a nurse acted contrary to established protocols and defied the orders of a medical doctor. *See id.* at 520-23. But this case is similar to *Ress* in that Johnson was required to comply with work rules that had potentially serious consequences. DCRC reasonably expected Johnson to be available by telephone at all times for the sake of the health of its clients. When she began her employment with DCRC, Johnson acknowledged in writing that her "duties and responsibilities" included being "available for consultation on a 24-hour per day basis for all [DCRC] programs." Her job description required her to "be available to work on the nursing unit as the need arises or in the case of emergencies." DCRC provided Johnson with a monthly stipend of $30 to reimburse her for some of the expenses of her cell phone. Johnson's direct supervisor, the executive director of the facility, gave her at least two verbal warnings that her cell phone must be functional at all times to ensure that she is available to medical personnel on a 24-hour basis for on-call medical assistance. The latter of those warnings was given only one day before the third incident. After several missed calls to her cell phone on May 19 from nurses in the detoxification unit about an urgent medical issue, DCRC was not able to reach Johnson by telephone until approximately 14 hours later. Johnson's failure to make herself available by telephone on May 7, May 11, and May 19, 2017, was "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." *See* Minn. Stat. § 268.095, subd. 6(a)(1).

In light of that conclusion, the ULJ did not err by finding that Johnson engaged in misconduct.

Fourth, Johnson argues that the ULJ erred by denying her request for an additional evidentiary hearing based on new evidence. In deciding whether to grant a request for reconsideration, a ULJ initially considers newly discovered evidence only for the purpose of determining whether an additional evidentiary hearing is necessary. Minn. Stat. § 268.105, subd. 2(c). A ULJ must order an additional evidentiary hearing if the new evidence

> (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or
>
> (2) would show that the evidence that was submitted at the hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

Id. This court applies an abuse-of-discretion standard of review to a ULJ's decision to deny an additional evidentiary hearing. *Kelly v. Ambassador Press, Inc.*, 792 N.W.2d 103, 104 (Minn. App. 2010).

The ULJ determined that Johnson did not satisfy either the first or second basis for an additional hearing. The ULJ determined that Johnson did not satisfy the first statutory basis because she "failed to show that evidence which was not submitted at the evidentiary hearing would likely change the outcome of the decision." The ULJ determined that Johnson did not satisfy the second statutory basis because "she failed to show that evidence that was submitted at the evidentiary hearing was likely false and that [it] had an effect on the outcome of the decision."

Johnson does not identify with particularity the new evidence that she would present at an additional hearing and how it would change the outcome of the case. It appears that Johnson wishes to present new evidence concerning her attendance record. But we have already concluded that Johnson was not terminated for poor attendance; she was terminated only for not being available by telephone while on call. Thus, the ULJ did not err by not granting Johnson an additional hearing.

In sum, the ULJ did not err by concluding that Johnson is ineligible for unemployment benefits.

Affirmed.