STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1951

Sanaide Appolon,
Relator,

vs.

Mentor Management, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed October 8, 2018
Affirmed
Bratvold, Judge

Department of Employment and Economic Development
File No. 35766253-3

Sanaide J. Appolon, Oakdale, Minnesota (pro se relator)

Mentor Management Inc., North St. Paul, Minnesota (respondent employer)

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

Considered and decided by Worke, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that she is ineligible for unemployment benefits. Because the ULJ did not abuse his discretion in denying relator's reconsideration request, and we reject challenges to the ULJ's decision that relator engaged in employment misconduct when she was found sleeping on the job, we affirm.

FACTS

Respondent Mentor Management, Inc. (Mentor) provides residential services to children and adults with mental health issues, developmental disabilities, and cognitive injuries. Mentor hired relator Sanaide Appolon in July 2015 as "overnight awake staff," to provide continuous supervision to three children. Appolon's schedule began at 10 p.m. and ended at 8 a.m., and she worked seven days on and seven days off.

Mentor has a policy that overnight awake staff must stay awake during their shift, and Appolon was informed of this policy when she started at Mentor. At some point before May 25, 2016, Mentor received a report from a child that Appolon had been asleep during her shift. Mentor determined that the report was not reliable enough to warn or discipline Appolon, but it sent two employees to check on Appolon during her shift on May 25, 2016. The two employees discovered Appolon "lying on the couch . . . sleeping." Appolon was sent home.

Mentor did not allow Appolon to return to her position until an internal investigation had been completed. Child Protective Services also conducted an investigation and

recommended that Appolon not be allowed to return to the overnight shift. On June 13, Mentor met with Appolon and offered her a full-time shift during the day. Appolon refused and chose to "go into an on-call status because she was unable to commit to a set schedule." Once Appolon went to on-call status, Mentor "called her on numerous occasions to see if she wanted to pick up some on-call hours," but "never heard back from her." On September 13, 2016, Mentor "accepted a voluntary resignation because of [Appolon's] unresponsiveness to hours worked that were available to her."[1] Thus, Appolon's last day of work was May 25, 2016, but Mentor stated that her "[e]ffective date of separation" was September 23, 2016.

In July 2017, Appolon applied for unemployment benefits and received an administrative determination of eligibility, which Mentor appealed. Appolon was sent a notice of hearing, which stated the hearing would "be held by telephone conference call" and that the "judge [would call Appolon] to participate in this hearing."

At the start of the hearing, the ULJ placed a phone call to Appolon, who did not answer. The ULJ left Appolon a message stating that he would call her again in ten minutes. The ULJ waited ten minutes and called Appolon, who again did not answer. The ULJ decided to proceed without Appolon and received testimony from Marilyn Blanchard, area director at Mentor, and Allison Du Lac-Johnson, program coordinator at Mentor.

[1] DEED asserts that Appolon "declined [Mentor's] offer" of on-call employment. But the ULJ found, and the record establishes, that Appolon accepted an on-call position, but did not ever work a shift as an on-call employee.

In October 2017, the ULJ issued a written decision that Appolon was discharged for employment misconduct and ineligible for unemployment benefits. Appolon requested that the ULJ reconsider his decision, arguing she had good reason for missing the hearing. The ULJ denied Appolon's reconsideration request. Appolon seeks review by writ of certiorari.

D E C I S I O N

In reviewing the ULJ's decision, this court may affirm or remand the case for further proceedings, or we may reverse or modify the decision if the substantial rights of the realtor have been prejudiced because the findings, inferences, conclusion, or decision are "made upon unlawful procedure," "affected by other error of law," or "unsupported by substantial evidence in view of the entire record as submitted."[2] Minn. Stat. § 268.105, subd. 7(d)(3)-(5) (Supp. 2017); *see also Cunningham*, 809 N.W.2d at 234-35.

I. The ULJ did not abuse his discretion in denying Appolon's request for reconsideration.

Initially, we note that in her petition to this court, Appolon did not explicitly challenge the ULJ's decision to deny her reconsideration request. But after carefully reviewing her written submissions, we determine that Appolon has implicitly challenged the ULJ's reconsideration decision. Minn. Stat. § 268.105, subd. 7(a) (Supp. 2017).

[2] DEED asserts that the standard of review requires this court to accept the findings of the ULJ, provided that there is evidence in the record that *reasonably* tends to sustain them. DEED relies, in part, on *Wilson v. Mortgage Resource Center, Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). However, this court "discern[s] no inconsistency between Minn. Stat. § 268.105, subd. 7(d)(5) and the standard articulated by the supreme court in *Wilson*." *Gonzalez Diaz v. Three Rivers Cmty. Action, Inc.*, ___ N.W.2d ___, ___, 2015 WL 4637157, at *2 (Minn. App. Sept. 17, 2018).

Under Minnesota law, "[i]f the party who filed the request for reconsideration failed to participate in the hearing, the unemployment law judge must issue an order setting aside the decision and ordering an additional hearing if the party who failed to participate had good cause for failing to do so." Minn. Stat. § 268.105, subd. 2(d) (Supp. 2017). "Good cause" is "a reason that would have prevented a reasonable person acting with due diligence from participating in the hearing." *Id.* We accord "deference to a ULJ's decision not to hold an additional hearing and will reverse that decision only for an abuse of discretion." *Skarhus*, 721 N.W.2d at 345.

In her request for reconsideration, Appolon argued that she missed the hearing for good cause because her phone was not functioning on the day of the hearing and that she called to explain her absence. The ULJ rejected Appolon's claim, stating:

> Department records do not show that Appolon called on September 18, or at any time. Appolon does not explain why she could not use another phone for the hearing but was able to supposedly call the Department on September 18. Appolon does not have good cause that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing.

The ULJ did not abuse his discretion in making this determination. The notice of hearing that was sent to Appolon stated that the "hearing [would] be held by telephone conference call." Further, Appolon provided minimal justification for her absence, and did not explain why she could not have taken steps to ensure her phone was functioning

properly, nor why she was allegedly able to call later in the day,[3] but did not answer her phone when the ULJ called her.[4]

II. The ULJ's decision that Appolon engaged in employment misconduct is not affected by an error of law or unsupported by substantial evidence.

An applicant for unemployment benefits is ineligible if she was discharged for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2016). Employment misconduct is "(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(a) (Supp. 2017).

"Whether an employee engaged in employment misconduct presents a mixed question of fact and law." *Cunningham*, 809 N.W.2d at 235. Whether an employee committed an act is a question of fact. *Id.* But whether an employee's act amounts to employment misconduct is a question of law that this court reviews de novo. *Id.* This court also views "questions of fact in the light most favorable to the decision of the ULJ" and

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[3] In her petition for writ of certiorari to this court, Appolon stated that she "went to a store" to use a phone after her phone malfunctioned. But Appolon did not submit this information to the ULJ in her reconsideration request, and this court cannot consider information that was not submitted to the ULJ. *See* Minn. R. Civ. App. P. 110.01; *McNeilly v. Dep't of Emp't & Econ. Dev.*, 778 N.W.2d 707, 709 n.1 (Minn. App. 2010).

[4] DEED asserts that Appolon was sent, along with the notice of the hearing, an "**APPEAL HEARING GUIDE—**PREPARE FOR YOUR TELEPHONE HEARING," which included instructions to call a specific number if the ULJ does not call within ten minutes of the start of the scheduled hearing time. While DEED included this notice in its addendum, the notice is not in the appellate record. Because this notice is not part of the record, and because it is unnecessary to resolve this appeal, we decline to consider it. *See* Minn. R. Civ. App. P. 110.01; *McNeilly*, 778 N.W.2d at 709 n.1. We question, however, why this notice was not in the record if it was sent to Appolon.

will not disturb the ULJ's fact findings provided there is evidence "in light of the entire record" that supports them. *Id.*

A. Substantial evidence supports the ULJ's decision.

The ULJ found that Appolon "was discovered asleep at work" on May 25 and was discharged for that reason.[5] Blanchard's testimony supported this finding and the ULJ heard no testimony to the contrary. Accordingly, the ULJ's decision is supported by substantial evidence. In her appellate brief, Appolon asserts that she was lying on the couch, but was not sleeping. Appolon did not, however, raise this issue to the ULJ or present any evidence supporting it. Thus, her argument is not properly before this court, and we do not address it. *See McNeilly*, 778 N.W.2d at 709 n.1.

B. The ULJ's decision is not affected by an error of law.

The ULJ determined that Appolon was discharged for employment misconduct because sleeping on the job was a serious violation of Mentor's policies and reasonable expectations. Failing to follow an employer's reasonable policies is misconduct that disqualifies an employee from unemployment benefits. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). More specifically, the supreme court has held that sleeping on the job may amount to employment misconduct. *Auger v. Gillette Co.*, 303 N.W.2d 255,

[5] DEED argues that the ULJ's finding that Appolon was discharged—and did not quit—is supported by substantial evidence. We agree. Minnesota law establishes that a suspension that is of "an indefinite duration" may amount to termination. Minn. Stat. § 268.095, subd. 5(b) (Supp. 2017). Appolon was suspended while Mentor conducted its internal investigation, and the record does not establish that Mentor told Appolon how long the investigation would last. Accordingly, substantial evidence supports the ULJ's determination that Appolon was terminated. Appolon does not challenge this determination on appeal.

257-58 (Minn. 1981). In determining whether the conduct amounts to employment misconduct, Minnesota law provides that, if "the conduct for which the [employee] was discharged involved only a single incident, that is an important fact that must be considered." Minn. Stat. § 268.095, subd. 6(d) (Supp. 2017). Even so, a single violation of employer expectations or policies may amount to employment misconduct if sufficiently serious. *See Wilson*, 888 N.W.2d at 463.

Here, Mentor had a reasonable policy requiring employees to stay awake during the overnight shift. The ULJ summarized his analysis succinctly: "Appolon essentially had one essential work duty to perform, which was to remain awake during the night to monitor and assist minors with emotional health conditions. While this was a single incident, Appolon's failure to remain awake was a serious violation of the employer's reasonable expectation, especially given her task to oversee a vulnerable population." We conclude the ULJ's decision is not affected by an error of law.

Affirmed.