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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0308**

Rhonda Peterson,
Relator,

vs.

DJ's Companies Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 14, 2020

Affirmed

Smith, John, Judge *

Department of Employment and Economic Development
File No. 37742589-2

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DJ's Companies Inc., Albertville, Minnesota (for respondent employer)

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Considered and decided by Slieter, Presiding Judge; Frisch, Judge; and Smith, John,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm the determination of an unemployment-law judge (ULJ) that relator, Rhonda Peterson, is ineligible for unemployment benefits because the ULJ made sufficient findings, including credibility findings, to support the conclusion that Peterson committed misconduct.

FACTS

Peterson began working for respondent-employer DJ's Companies Inc. (DJ's) in May 2015. Peterson missed numerous days of work in 2019, including a full week in July. DJ's modified its attendance policy during that week to require employees to use vacation days when they called in sick. Anne Savitski, the vice president of DJ's, testified that she and Peterson spoke about the new attendance policy in July 2019. But Savitski did not issue any written or verbal warnings to Peterson about her attendance.

Savitski testified that she told Peterson that DJ's changed its attendance policy because Peterson had been abusing it, and that Peterson had used all of her remaining vacation time. Savitski testified that Peterson agreed that she had abused the policy by taking a lot of time off, but asked to use one vacation day for the day before Labor Day, so she could go to Chicago to help her son move. Savitski denied Peterson's request. The following week, Peterson asked for Monday, August 23, and Friday, August 26, off from work to help her son move the following week. Savitski denied this request as well.

Peterson did not appear for work on August 23 or 26 because she was in Chicago. She also did not work on August 29 because she was ill. Savitski did not speak to Peterson

about her absences, but instead allowed her to continue working while Savitski searched for a replacement. DJ's prepared an advertisement to find a replacement for Peterson, and posted it on August 23 when she did not arrive for work. In September, Peterson sustained injuries in a car accident that caused her to miss work in September and October. Savitski terminated Peterson's employment by letter before Peterson was cleared by her doctor to return to work.

At the evidentiary hearing before the ULJ, Savitski testified that Peterson called the president of DJ's on August 21, and told him that she was not coming in on August 23 and 26, and that he would "have to fire her if he didn't like it." Peterson testified that the president gave her permission to be absent on August 23 and 26, and denied the statement attributed to her by Savitski. Peterson testified that the president told her to go "take care of what you need to do and get back to work." Peterson then testified that she had no notice that her job was in jeopardy because of her attendance. She finally testified that no one from DJ's talked to her about her attendance, and that the majority of her absences occurred during the slow season when she understood that absences were tolerated.

After the evidentiary hearing, the ULJ issued its findings of facts, reasons for decision, and decision. The ULJ concluded that Peterson violated her employer's expectations on August 23 and 26, 2019, because she did not have permission to be absent. The ULJ concluded that Peterson was nevertheless eligible for unemployment benefits because the preponderance of the evidence showed that her conduct was not serious. The ULJ concluded that Peterson's conduct was not serious because Savitski never warned her about her absences and retained her as an employee while searching for a replacement.

DJ's requested that the ULJ reconsider her decision. The ULJ determined that her previous decision was incorrect, reversed that decision, and concluded that Peterson was ineligible for unemployment benefits. In reversing the decision, the ULJ reasoned that Peterson's misconduct was serious because DJ's began taking immediate steps to replace her, and that DJ's delay in communicating to Peterson did not detract from the seriousness of the misconduct. This certiorari appeal followed.

D E C I S I O N

Peterson challenges the ULJ's determination that she is ineligible for unemployment benefits. This court may affirm the ULJ's decision, remand for further proceedings, or reverse "if the substantial rights of the petitioner may have been prejudiced." Minn. Stat. § 268.105, subd. 7(d) (Supp. 2019). The substantial rights of the petitioner may have been prejudiced if the ULJ's findings, conclusions, or decision are affected by an error of law, unsupported by substantial evidence, or are arbitrary or capricious. *Id.* Peterson asks this court to reverse the ULJ's decision because (1) the ULJ did not make the specific credibility findings required by Minn. Stat. § 268.105, subd. 1a(a) (2018), and (2) her absences were not misconduct. Because the ULJ made specific credibility findings and did not err in concluding that Peterson's absences were employment misconduct, we affirm.

I. The ULJ set forth reasons for discrediting Peterson's testimony as required by Minn. Stat. § 268.105, subd. 1a(a).

First, Peterson argues that the ULJ committed reversible error by not specifically addressing her testimony that she had permission to be absent on August 23 and 26, 2019. We disagree.

When the credibility of a witness's testimony has a "significant effect on the outcome of a decision, the [ULJ] must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1a(a). This court defers to the ULJ's credibility determinations when they are supported by substantial evidence and the ULJ sets forth a valid reason for crediting or discrediting a witness. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532-33 (Minn. App. 2007) (deferring to the ULJ's determination that a witness was not credible in light of other evidence). Substantial evidence supports a finding when a witness's testimony is either corroborated or refuted by other evidence in the record. *See id.* at 532.

Peterson argues that the ULJ could only have concluded that her absence was misconduct by implicitly discrediting her testimony to the contrary. She contends that the ULJ committed reversible error by failing to state reasons for discrediting her testimony concerning the phone call between her and the president of DJ's. Respondent Minnesota Department of Employment and Economic Development (DEED) argues that the ULJ found that Peterson did not have permission to be absent, and argues that determination is supported by the record and meets the requirements of Minn. Stat. § 268.105, subd. 1a(a).

In her order, the ULJ found that Peterson did not have permission to be absent on August 23 and 26. The ULJ found that Savitski's testimony was more credible than Peterson's, stating: "The findings of fact regarding whether Peterson had permission to be absent August 23, and 26, 2019, are based upon Savitski's testimony." In determining that Savitski's testimony was more credible, the ULJ relied on records submitted by Savitski documenting Peterson's absences. *See Ywswf*, 726 N.W.2d at 532-33 (deferring to

credibility findings because the ULJ found that corroborating evidence made employer's testimony more credible than relator's).

Peterson argues that the ULJ was required to state specific reasons for discrediting her testimony that she had permission to be absent. But Peterson cites to no authority, and we are aware of none, that requires a ULJ to parse through each line of a party's testimony in making a credibility determination. The ULJ is required, when the credibility of a witness significantly affects the outcome of the decision, to "set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1a(a). The ULJ did so here.

The ULJ made specific findings supporting its conclusion that Savitski's testimony was credible while Peterson's was not. The ULJ found that "Peterson's testimony was not credible" because it "changed several times during the hearing, including [regarding] the reasons for the absences, [regarding] her symptoms, and generally was not consistent." Peterson testified that she was absent for an entire week in July because she had the flu. But she provided conflicting information concerning her precise symptoms, whether she attempted to go to work, and whether she contacted a doctor. Peterson testified that she spoke to Savitski after Savitski changed the attendance policy, but later denied that Savitski gave her the updated policy. Peterson also testified that she had no idea that her job was in jeopardy because of her attendance, but later testified that Savitski avoided her after her absences on August 23 and 26. The ULJ's finding that Peterson's testimony that she had permission to be absent was not credible is thus supported by substantial evidence as required by Minn. Stat. § 268.105, subd. 1a(a) because it is based on inconsistencies in her testimony that belie her assertions.

II. The ULJ did not err in concluding that Peterson’s absences were employment misconduct.

Second, Peterson argues that she did not commit employment misconduct because she believed she had permission to be absent. DEED argues that Peterson committed employment misconduct because she seriously violated her employer’s expectations by refusing to come to work. We agree that Peterson’s absences were employment misconduct.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2018). Employment misconduct is “any intentional, negligent, or indifferent conduct, on the job or off the job, that is a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee.” *Id.*, subd. 6(a) (Supp. 2019). But, “conduct an average reasonable employee would have engaged in under the circumstances” is not employment misconduct. *Id.*, subd. 6(b)(4) (Supp. 2019).

Whether an employee committed an act that renders them ineligible for unemployment benefits is a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Appellate courts review a ULJ’s factual findings “in the light most favorable to the decision.” *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). But reviewing courts examine whether a particular act renders a person ineligible for unemployment benefits de novo. *Id.*

The ULJ found that Peterson did not have permission to be absent on August 23 and 26. Savitski’s immediate search for Peterson’s replacement showed that Peterson’s

absences had a serious impact on the company. Savitski's testimony and the ULJ's finding that Peterson's contrary testimony was not credible provides substantial support for the ULJ's finding that Peterson did not have permission to be absent.

Peterson argues that she did not commit misconduct under Minn. Stat. § 268.095, subd. 6(b)(4), because an average reasonable employee would not have gone to work if they believed that their boss had allowed them to be absent. This argument fails because the ULJ found that Peterson did not have permission to be absent. Being absent without permission from work is not "conduct an average reasonable employee would have engaged in under the circumstances" because the average reasonable employee understands that they are required to attend work when not excused. *See Hanson v. Crestliner Inc.*, 772 N.W.2d 539, 543 (Minn. App. 2009) (indicating that "a single absence without permission from the employer may amount to misconduct"). The ULJ's conclusion that Peterson committed employment misconduct is thus not erroneous.

Affirmed.