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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1453**

Terri Brown,
Relator,

vs.

CommonBond Housing (Corp),
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed May 3, 2011
Affirmed
Wright, Judge**

Minnesota Department of Employment and Economic Development
File No. 25520575-5

Terri Brown, St. Paul, Minnesota (pro se relator)

CommonBond Housing (Corp), St. Paul, Minnesota (respondent)

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

Considered and decided by Wright, Presiding Judge; Stoneburner, Judge; and
Collins, Judge.*

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

UNPUBLISHED OPINION

WRIGHT, Judge

Relator challenges the determination of the unemployment law judge (ULJ) that relator is ineligible to receive unemployment benefits because she committed employment misconduct. We affirm.

FACTS

Relator Terri Brown worked full-time as a staff accountant for CommonBond Housing from March 29, 2010, to April 5, 2010. Brown's supervisor advised Brown that her regular work schedule would be 8:00 a.m. to 5:00 p.m. To accommodate Brown's part-time job, CommonBond limited Brown's work week to Monday through Thursday and permitted her to take a daily 90-minute lunch break from 11:30 a.m. to 1:00 p.m. Brown agreed to this schedule.

Brown was several minutes tardy for work on her first day; and she was between 30 and 60 minutes tardy on each of the next three days. Brown advised her supervisor that she arrived late each day because she had overslept. On each of the last three days of Brown's employment, Brown's supervisor warned her that she must arrive at work by 8:00 a.m. and explained that Brown's tardiness caused her supervisor to work late. CommonBond terminated Brown's employment on April 5, 2010, because of her recurring tardiness and unsatisfactory work product.

Brown applied for unemployment benefits and the Minnesota Department of Employment and Economic Development (DEED) determined that Brown was eligible to receive unemployment benefits because she was not discharged for employment

misconduct. CommonBond appealed. After a hearing, the ULJ concluded that Brown is ineligible to receive unemployment benefits because she committed employment misconduct by failing to report to work on time. Following Brown's request for reconsideration, the ULJ affirmed the decision. This certiorari appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2010).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct is “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.” *Id.*, subd. 6(a) (2010).

Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact. *Skarhus v.*

Davanni's Inc., 721 N.W.2d 340, 344 (Minn. App. 2006). A ULJ's factual findings are reviewed in the light most favorable to the decision and will not be disturbed on appeal if there is evidence that reasonably tends to sustain those findings. *Schmidgall*, 644 N.W.2d at 804. But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Id.* Because credibility determinations are the exclusive province of the ULJ, we accord such determinations deference on appeal. *Skarhus*, 721 N.W.2d at 344.

Brown argues that her tardiness was not intentional, negligent, or indifferent and was caused by health issues. An employee's refusal to abide by the employer's reasonable policies ordinarily constitutes employment misconduct. *Schmidgall*, 644 N.W.2d at 804. Even when it is neither willful nor deliberate, excessive tardiness may constitute employment misconduct. *See Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985) (holding that excessive absenteeism, though not willful, demonstrated employment misconduct); *Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App. 1984) (holding that excessive tardiness, particularly after warnings, may evince employee's disregard of employer's interest and constitute employment misconduct); *Flahave v. Lang Meat Packing*, 343 N.W.2d 683, 687 (Minn. App. 1984) (stating that repeated violations of employer's attendance policy demonstrated substantial disregard of employer's interest and duties and obligations employee owed to employer). Brown's punctuality did not improve after three warnings to arrive on time, nor did Brown ever advise her supervisor that she would be late. Moreover, Brown never provided CommonBond with a medical excuse for her tardiness or documentation of any medical

condition. Nor was any medical evidence presented to the ULJ. Rather, Brown explained that she was tardy repeatedly because she was tired and had difficulty getting up in the morning.

Brown argues that CommonBond's schedule did not adequately accommodate her other job and caused her additional exhaustion and stress. She also maintains that CommonBond did not need her to arrive at work by 8:00 a.m. But the record reflects that Brown agreed to this schedule. And although Brown disputes the ULJ's credibility assessments against her, we accord the ULJ's credibility determinations deference on appeal. *Skarhus*, 721 N.W.2d at 344. Brown also asserts that CommonBond provided a poor working environment and an inflexible and intolerant supervisor. But these issues were not raised before the ULJ and are not related to the reason for the employment-termination decision.

Because CommonBond had the right to expect Brown to arrive at work on time in order to fulfill her job duties, Brown's repeated late arrival is a serious violation of the standards of behavior that CommonBond has the right to expect of its employees. *See* Minn. Stat. § 268.095, subd. 6(a)(1); *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986) (“[E]xcept in certain limited circumstances, an employee engages in misconduct if he is absent even once without notifying his employer.”). Brown's tardiness, particularly in light of repeated discussions with her supervisor about the importance of arriving at work on time and after receiving warnings about the negative consequences of her late arrival, also displayed a substantial lack of concern for the employment. Minn. Stat. § 268.095, subd. 6(a)(2). Accordingly, the ULJ correctly

concluded that Brown is ineligible to receive unemployment benefits because she was discharged for employment misconduct.

Affirmed.