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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1608**

Julia Omar,
Relator,

vs.

Juxtaposition Arts, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent

**Filed June 27, 2011
Affirmed
Wright, Judge**

Minnesota Department of Employment and Economic Development
File No. 25320393-3

Julia Omar, Crystal, Minnesota (pro se relator)

Juxtaposition Arts, Inc., Minneapolis, Minnesota (respondent)

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

Considered and decided by Wright, Presiding Judge; Larkin, 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UNPUBLISHED OPINION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

In this certiorari appeal from the denial of unemployment benefits, relator argues that the unemployment law judge (ULJ) erred by concluding that relator was discharged for employment misconduct and, therefore, is ineligible to receive unemployment benefits. We affirm.

FACTS

Relator Julia Omar was employed as an office manager by respondent Juxtaposition Arts, Inc., from March 5, 2008, to May 6, 2010. Juxtaposition Arts terminated Omar's employment for excessive absenteeism and failure to notify her employer in advance of her absences. Omar applied for unemployment benefits, and a Department of Employment and Economic Development adjudicator determined that Omar was discharged for employment misconduct and, therefore, is ineligible to receive unemployment benefits.

Omar appealed, and a telephonic hearing was held before a ULJ. DeAnna Cummings, the executive director of Juxtaposition Arts, appeared on behalf of Juxtaposition Arts. Cummings testified that Juxtaposition Arts has a policy governing employee absences. This policy states that an employee must notify Cummings of an absence each day before the employee's shift begins. Cummings reminded employees of this policy at a staff meeting in March 2010, which Omar attended; and Cummings provided employees with several methods of contacting her directly.

Omar was required to work from approximately 9 a.m. to 5 p.m., for a total of 30 hours weekly. Between March 15, 2010 and May 6, 2010, Omar was absent on approximately one-half of her scheduled work days. During the two weeks before her discharge, Omar was absent from work for six consecutive work days between April 29 and May 6. Cummings testified that Omar failed to notify Cummings that she would be absent on April 29 and April 30. On Monday, May 3, Omar left Cummings a voicemail message at 1:34 p.m., well after the start of her scheduled work day. In the message, Omar acknowledged her recent absences and her failure to notify Cummings of those absences. The next day, Omar again failed to notify Cummings of her absence. On Wednesday, May 5, at 7:37 a.m., Omar left Cummings a voicemail message in which she apologized for failing to call “over the last few days,” acknowledged that she “should have called,” and explained that she had a “serious family emergency” and would not be in for the rest of the week.

When Omar did not report to work on Thursday, May 6, Cummings decided to terminate Omar’s employment. Cummings advised Omar by letter that she was discharged because of her “unacceptably inconsistent” attendance since March 2010. Cummings also explained that on some occasions Omar advised Cummings that she would be late to work but failed to arrive at all and, on other occasions, Omar entirely failed to notify Cummings of her absences.

At the telephonic hearing, Omar testified that all of her absences were caused by her need to care for her infant children, who suffer from chronically poor health. Omar did not refute Cummings’s testimony about her attendance, but she testified that she

notified Cummings by telephone of all of her absences except for one occasion when she emailed Cummings to notify her.

The ULJ issued findings of fact and an order, holding that Omar is ineligible to receive unemployment benefits because she committed employment misconduct by repeatedly failing to notify Juxtaposition Arts that she would be absent from work. After granting Omar's request for reconsideration, the ULJ affirmed his 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). But an employee’s absence from work, “with

proper notice to the employer, in order to provide necessary care because of the illness, injury, or disability of an immediate family member” is not employment misconduct. *Id.*, subd. 6(b)(8) (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.*

An employer may establish and enforce reasonable rules governing employee absences. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). It is reasonable for an employer to require its employee to give notice that she will be absent. See *Winkler v. Park Refuse Serv., Inc.*, 361 N.W.2d 120, 123 (Minn. App. 1985) (stating that employer reasonably can expect employee to keep employer apprised of employee’s whereabouts). An employee’s refusal to abide by the employer’s reasonable policies ordinarily constitutes employment misconduct. *Schmidgall*, 644 N.W.2d at 804.

The ULJ determined that Omar committed employment misconduct because she repeatedly failed to follow Juxtaposition Arts’s policy for reporting her absences. Specifically, the ULJ found that Omar failed to report many of her absences between

March 29 and May 6, 2010, was absent from work for four consecutive days during her final week of employment, and notified her employer of only two of those absences.

Omar challenges the ULJ's determination of witness credibility and his resolution of conflicting testimonial evidence. But because credibility determinations are the exclusive province of the ULJ, we accord such determinations deference on appeal. *Skarhus*, 721 N.W.2d at 344. The ULJ found that Omar's testimony lacked credibility and was vague, Cummings was more responsive and persuasive than Omar, and Cummings "describes a more likely chain of events than Omar."

Our review of the record establishes that the ULJ's findings are supported by substantial evidence. Cummings's testimony established that Omar did not provide notice each day that she was absent. Omar did not refute Cummings's testimony regarding the number of days on which Omar was absent or that Juxtaposition Arts's policy required Omar to notify Cummings each day that she would be absent. And Omar testified that she knew about this requirement.

The ULJ correctly concluded that Juxtaposition Arts had the right to expect Omar to notify the company if she was going to be absent and that Omar's repeated failure to do so constitutes "a pattern of behavior not an isolated incident." Omar's repeated failure to notify Juxtaposition Arts of her absences is a serious violation of the standards of behavior that Juxtaposition Arts has the right to expect of its employees. *See Minn. Stat. § 268.095*, subd. 6(a)(1); *Schmidgall*, 644 N.W.2d at 806 (holding that "an employee's decision to violate knowingly a reasonable policy of the employer is misconduct"); *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 [the employee] is absent even once without notifying [the] employer.”).

Omar contends that her actions do not constitute employment misconduct because she was absent from work to care for her sick children. Absence from work to care for a sick family member is not employment misconduct when proper notice is given. Minn. Stat. § 268.095, subd. 6(b)(8). But the record establishes that Omar failed to provide her employer with proper notice. Therefore, this exception does not apply here; and Omar’s failure to comply with Juxtaposition Arts’s notice policy is employment misconduct.

Because there is substantial evidence in the record to sustain the ULJ’s factual findings and the ULJ correctly applied the law, we affirm the ULJ’s determination that Omar committed employment misconduct and, therefore, is ineligible to receive unemployment benefits.

Affirmed.