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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-130**

Jeremy Olsen,
Relator,

vs.

Cbeyond, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 22, 2011**
**Affirmed**
**Connolly, Judge**

Department of Employment and Economic Development
File No. 26275461-3

Jeremy Olsen, St. Francis, Minnesota (pro se relator)

Cbeyond, Inc., Atlanta, Georgia (respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

**CONNOLLY**, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible to receive unemployment benefits because he was discharged for employment misconduct. Because substantial evidence in the record shows that relator committed employment misconduct by knowingly violating his employer's attendance policy after receiving several warnings, we affirm.

## FACTS

Cbeyond, Inc. employed relator Jeremy Olsen as a sales consultant from May 10, 2010 until August 4, 2010. Upon hiring, Cbeyond gives each new employee a copy of its attendance policy which requires employees to call in and personally speak with their supervisor no later than one hour before their start time to report an impending absence from work. Employees who fail to report for work for three consecutive days without calling and personally talking to their supervisor are terminated for "no call/no show." Relator acknowledged receipt of this policy on May 18.

Olsen's start time at Cbeyond was 7:30 a.m. On July 27 and 28, Olsen notified his supervisor by e-mail that he was sick and would not be coming in for work. Olsen's supervisor reminded him that he must personally call in to report all absences. On July 30, Olsen's supervisor informed the human resources manager (HR) about his conversation with Olsen regarding the attendance policy.

The following Monday, August 2 at 8:02 a.m., Olsen e-mailed his supervisor and HR saying that he was "[o]ut sick." Olsen's supervisor responded by e-mail, saying,

"We have gone over this three times. You have to call me when out sick." Olsen did not call his supervisor or anyone else at Cbeyond on August 2. On August 3 at 7:25 a.m., Olsen e-mailed his supervisor and HR saying that he was still sick and was not coming in for work. At 7:49 a.m., Cbeyond's vice president e-mailed Olsen with his cell phone number requesting that Olsen call him. Olsen did not respond to this e-mail or call the vice president. In the afternoon, HR e-mailed Olsen saying that they needed to hear from him orally and requested that he call. HR also reminded Olsen that it is considered a no-call/no-show if they do not hear from him orally. Approximately three hours later, at 3:35 and 3:40 p.m., Olsen called HR and his supervisor, but did not speak to either of them. Olsen then e-mailed HR saying that he tried calling and that he was confused about what no-call/no-show meant. HR responded by e-mail saying that no-call/no-show meant that he has not personally spoken with a supervisor to report his absences. On August 4, Olsen did not report to work or call in one hour before his shift. At 11:42 a.m., Olsen called his supervisor, but did not personally speak to him. Olsen then sent an e-mail to HR and his supervisor at 11:52 a.m. saying that he tried calling and that "nothing ha[d] changed from yesterday."

On August 4, Cbeyond sent Olsen a letter notifying him that his employment was terminated because he failed to report to work and follow the policy about calling in sick on August 2, 3, and 4. Olsen applied for unemployment benefits, but the Minnesota Department of Employment and Economic Development (DEED) determined that he was ineligible for benefits. Olsen appealed DEED's ineligibility determination to a ULJ who held an evidentiary hearing and issued a decision affirming DEED's determination based

on her conclusion that Olsen was discharged for employment misconduct. Olsen requested that the ULJ reconsider her decision, and the ULJ issued an order affirming the decision. Olsen now appeals, challenging the ULJ's decision that he was discharged for employment misconduct.

**D E C I S I O N**

This court may affirm, remand for further proceeding, reverse, or modify the decision of the ULJ if the relator's substantial rights were prejudiced because the decision was based on unlawful procedure, was affected by error of law, was unsupported by substantial evidence, or was arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (2010).

"Whether an employee committed employment misconduct is a mixed question of fact and law." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether the employee committed a particular act is a question of fact, but whether the employee's acts constitute employment misconduct is a question of law. *Id.* This court reviews the ULJ's factual findings "in the light most favorable to the decision." *Id.* This court will not disturb the ULJ's factual findings when the evidence substantially sustains them. *Id.* However, this court "will exercise its own independent judgment in analyzing whether an applicant is entitled to unemployment benefits as a matter of law." *Irvine v. St. John's Lutheran Church of Mound*, 779 N.W.2d 101, 103 (Minn. App. 2010).

An employee who commits misconduct is ineligible for unemployment-compensation 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). Employment misconduct does not include inefficiency or inadvertence, simple unsatisfactory conduct, poor performance because of inability or incapacity, or good-faith errors in judgment. *Id.*, subd. 6(b)(2)-(3), (5)-(6).

As a general rule, an employee's "knowing violation of an employer's policies, rules, or reasonable requests constitutes misconduct." *Montgomery v. F&M Marquette Nat'l Bank*, 384 N.W.2d 602, 604 (Minn. App. 1986), *review denied* (Minn. June 13, 1986). An employer has a right to expect its employees to work when scheduled. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. App. 1984). And an employer may establish and enforce reasonable rules governing employee absences, and refusal to abide by these policies generally constitutes misconduct. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). A knowing violation of these policies constitutes employment misconduct because it demonstrates a substantial lack of concern for the employer's interests. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Olsen presents three arguments as to why the ULJ's decision should be reversed. First, he argues that the ULJ erred in focusing on the time that he called Cbeyond to report his absences from work because the timing of his calls was not the basis of his termination and there was no evidence presented at the evidentiary hearing concerning the employer's policy on reporting absences. This argument is unpersuasive because it misconstrues the evidence in the record. At the evidentiary hearing, HR testified about

Cbeyond's attendance policy, which requires employees to orally report absences one hour before the start of their shift, and testified that Olsen received a copy of this policy. The termination letter Cbeyond sent to Olsen states that he was terminated for "fail[ing] to report to work and follow the Cbeyond policy regarding calling in sick." The record also shows that Olsen failed to orally report his impending absences to his supervisor at least one hour before the start of his shift for three consecutive days in August. Thus, substantial evidence in the record shows that the timing of Olsen's calls, or lack thereof, was the basis of his termination and that evidence of Cbeyond's policy was introduced at the evidentiary hearing.

Second, Olsen argues that an inconsistency in the termination letter he received supports his claim that the timing of his calls did not form the basis of his termination. Olsen points out that the termination letter, dated August 4, states that his termination was effective August 2, and therefore, the timing of his calls, or lack thereof, on August 3 and 4 could not have formed the basis for his termination. This argument also fails because it misconstrues the evidence in the record. Although the letter states that his termination was effective August 2, HR testified that the effective date of his termination listed in the letter was a typographical error and should have stated August 4, the date of the letter. The ULJ found HR's testimony more credible than Olsen's. This court gives deference to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344. Thus, the inconsistency in the letter was explained during the evidentiary hearing and does not support Olsen's claim that the timing of his calls did not form the basis of his termination.

Finally, Olsen claims that an e-mail sent to him by HR on August 3 at 4:37 p.m. indicates that he left a voicemail regarding his absences with HR on or about that time, and that the ULJ failed to consider on reconsideration call logs proving that he called and spoke with his supervisor on August 3 at 3:34 p.m. Olsen argues that this evidence shows that he acted like an average reasonable employee would have acted under the circumstances and the ULJ should have granted an additional evidentiary hearing to consider the call logs. But, even assuming that Olsen did leave a voicemail at or around 4:37 p.m. on August 3 and that he called and spoke with his supervisor at 3:34 p.m. on August 3, this evidence does not change the fact that Olsen failed to follow Cbeyond's attendance policy requiring that he orally report his absences from work at least one hour before his 7:30 a.m. start time. And, the record shows that Olsen received a copy of the policy when he was hired and that his supervisor reminded him of the policy on July 29. Thus, additional evidence of phone calls to the employer in the afternoon of August 3 would not have changed the ULJ's decision, and therefore the ULJ did not err when she did not order an additional evidentiary hearing based on the call logs. *See* Minn. Stat. § 268.105, subd. 2(c) (2010) (providing for additional evidentiary hearing when relator shows that new evidence would likely change or have effect on outcome of ULJ's decision).

Because Olsen knew about and failed to follow Cbeyond's attendance policy after receiving several warnings, his conduct displayed a substantial lack of concern for the employment and a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee. Substantial evidence supports the ULJ's

decision that Olsen engaged in employment misconduct by failing to properly communicate with Cbeyond regarding his absences from work.

**Affirmed.**