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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2194**

Anne Thompson,
Relator,

vs.

Orion ISO, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 27, 2012
Affirmed
Kalitowski, Judge**

Department of Employment and Economic Development
File No. 28345931-4

Anne Thompson, Hopkins, Minnesota (pro se relator)

Orion ISO, Inc., Golden Valley, Minnesota (respondent)

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

Considered and decided by Chutich, Presiding Judge; Kalitowski, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Pro se relator Anne Thompson challenges the decision of the unemployment-law judge (ULJ) that she is ineligible for unemployment benefits because she was discharged for employment misconduct. She contends that (1) the ULJ erred by concluding that she committed employment misconduct, and (2) she did not receive a fair hearing. We affirm.

DECISION

Thompson was employed to provide personal support to a 21-year-old man with cerebral palsy and a seizure disorder from April 1, 2006, until her discharge on July 15, 2011. Respondent Orion ISO Inc., a social service agency, is the employer of record for unemployment insurance purposes. Sandra Webster, the mother of Thompson's client, is the managing employer who hired Thompson and generally directed her work.

In the days leading up to Thompson's discharge, Webster wrote two warning letters regarding Thompson's performance. The first letter faulted Thompson for substandard work, attitude, and rudeness. The letter specifically referenced an incident during which Thompson's client injured himself during a temper tantrum and another incident in which Thompson was sleeping while on the job. The second letter faulted Thompson for being late to work on July 13, 2011, because she overslept. On July 14, 2011, Thompson called in sick to work because she had a headache. Then on the morning of July 15, 2011, Thompson was late for work. Webster informed Thompson that she did not need to come in to work and that Webster would have no more hours for

Thompson. Webster testified that during this conversation, she asked Thompson to meet with her to sign the warning letters, but Thompson refused. Orion then discharged Thompson, citing Thompson's absence on July 14, her refusal to meet with Webster, and "other issues of concern" including tardiness.

I.

This court reviews a ULJ's decision to determine whether a party's substantial rights were prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d)(4)-(5) (2010). Substantial evidence is "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). This court reviews factual findings in the light most favorable to the decision and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

An applicant who is discharged from employment shall be ineligible for unemployment benefits if the applicant was discharged for "employment misconduct." Minn. Stat. § 268.095, subd. 4 (2010). "Employment misconduct" is defined as "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 committed employment

misconduct is a mixed question of fact and law. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether the employee committed a particular act is a question of fact, which this court will not disturb if substantially supported by the evidence. *Cunningham v. Wal-Mart Assocs.*, 809 N.W.2d 231, 235 (Minn. App. 2011). But whether that act constitutes employment misconduct is a question of law that this court reviews de novo. *Stagg*, 796 N.W.2d at 315.

The ULJ found that the evidence does not support allegations that Thompson was absent without cause on July 14, was insubordinate for refusing to meet with Webster on July 15, or that she reacted inappropriately while caring for her client. Therefore, the ULJ's misconduct determination rests entirely on Thompson's tardiness.

The ULJ found that Thompson admitted she was tardy one or two days per week over the five years she worked for Webster and that she was frequently late for reasons within her own control. Although Thompson disputes this finding on appeal, the record supports the finding. In addition, Thompson's testimony establishes that she was aware her tardiness caused Webster to be late to work and that Webster had warned her not to be late.

Even if not deliberate or willful, such a pattern of chronic and excessive tardiness constitutes employment misconduct. *See id.* at 317 (holding that employee discharged for excessive absenteeism and tardiness committed employment misconduct); *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986) (holding that even a single work absence without permission may constitute misconduct). Webster and Orion had the right to reasonably expect Thompson to work the hours she was scheduled. *See*

Smith v. Am. Indian Chem. Dependency Diversion Project, 343 N.W.2d 43, 45 (Minn. App. 1984) (holding that employer has the right to expect employee to work when scheduled). Therefore, Thompson’s repeated tardiness constitutes a violation of the standards of behavior that Webster and Orion had a right to expect of her. *See Evenson v. Omnetic’s*, 344 N.W.2d 881, 883 (Minn. App. 1984) (holding that employee’s “tardiness, combined with several warnings, . . . is a violation of standards of behavior which the employer had a right to expect”).

Thompson contends that even if excessive tardiness constitutes employment misconduct, her tardiness cannot be part of the reason for her termination because Webster agreed that Thompson could make up the time she missed in the morning at the end of the day. But Webster’s agreement to have Thompson work the full amount of time for which she was paid does not constitute permission for tardiness, particularly because Webster frequently reminded Thompson to be on time.

The record supports the ULJ’s conclusion that Thompson was discharged for excessive tardiness despite repeated warnings. Because excessive tardiness constitutes employment misconduct, the ULJ did not err in concluding that Thompson is ineligible for benefits.

II.

Thompson next argues that she did not receive a fair hearing. The ULJ is to conduct the evidentiary hearing as an “evidence gathering inquiry” and “must ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b) (2010). The ULJ “must exercise control over the hearing procedure in a manner that

protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2011); *see Miller v. Int'l Express Corp.*, 495 N.W.2d 616, 618 (Minn. App. 1993) (stating official conducting hearing has obligation to recognize and interpret the parties' claims, particularly when the parties are pro se).

Thompson asserts that because she was on pain medication during the appeal hearing, she was "totally unprepared" to present her case to the ULJ. The record does not support Thompson's claim. At the beginning of the hearing, the ULJ explained the appeal-hearing procedure at length. He then informed Thompson that she had the right to "request the hearing be rescheduled so that documents or witnesses can be subpoenaed." The ULJ then listed each of the proposed exhibits and stated, "I've read the other exhibits to you. Do you feel . . . that under the circumstances you're ready and able to go ahead with the hearing this afternoon." Thompson responded, "I do." She did not indicate to the ULJ that she had taken pain medication or that she was operating at reduced capacity. And she did not request that the hearing be rescheduled.

Nor does the record support Thompson's contention that the ULJ failed to give her "the same opportunity to be walked through the incident" as Webster. The ULJ first questioned both sides in a similar fashion about the general nature of Thompson's employment. The ULJ then questioned Orion's witnesses, including Webster, about Orion's allegations of misconduct. Thompson declined the opportunity to ask questions of Orion's witnesses. The ULJ then questioned Thompson at length about the terms of her employment and the allegations of misconduct leveled against her. Thompson specifically responded to questions regarding tardiness, sleeping on the job, her absence

on July 14, the incident involving her client's temper tantrum, and the circumstances surrounding her discharge. After the ULJ finished questioning Thompson, he asked if she had other testimony she wished to offer that she had not already provided, and she responded, "No." Thompson then proceeded to refute more of Webster's testimony. At the hearing's close, both sides gave closing statements.

On this record, the ULJ amply developed the record as to the material issues and we conclude that Thompson received a fair hearing.

Affirmed.