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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1696**

Teresa Campbell,
Relator,

vs.

POS Plus, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 22, 2013
Affirmed
Kirk, Judge**

Department of Employment and Economic Development
File No. 29792696-3

Teresa Campbell, Waconia, Minnesota (pro se relator)

POS Plus, Inc., Chanhassen, Minnesota (respondent)

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

Considered and decided by Kirk, Presiding Judge; Stoneburner, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Relator challenges the determination of the unemployment-law judge (ULJ) that she is ineligible for unemployment benefits because she was discharged for employment misconduct. We affirm.

FACTS

In October 1997, relator Teresa Campbell began working part time at respondent POS Plus, Inc., a small company that buys and sells cash-register systems and peripheral devices. From October 1999 until April 2012, Campbell worked full-time at POS Plus cleaning plastic and equipment. POS Plus requires employees to call in before their shift begins if they are going to be absent.

Prior to 2012, Campbell was frequently absent due to illness, although she properly reported those absences before her shift began. Campbell received verbal warnings from her supervisor about her attendance on multiple occasions.

In 2012, Campbell's absences due to illness continued. In January, Campbell called in sick to work on four days, reporting that she was having problems with her knee. In February, Campbell called in sick on five days due to knee problems, was late to work once, and left work early for a doctor's appointment once. In March, Campbell had knee surgery and was absent from work for the entire month because of complications from the surgery. Campbell returned to work on April 2 with work restrictions from her doctor. Because of those restrictions, POS Plus allowed her to sit while she performed her job. From April 10 through 13, Campbell called in sick, stating that she was having

issues with her knee. Campbell properly reported all of her absences by calling POS Plus at least 30 minutes prior to the time she was scheduled to be at work.

On April 16, Campbell called POS Plus and reported she would be absent from work because her dog was sick. On April 17, Campbell again called in sick to work because of her dog's illness. That morning, Campbell, who does not drive, and her husband brought their dog back to the veterinarian, who performed emergency surgery and then kept their dog overnight. Campbell called in sick on April 18, and that afternoon she returned to the veterinarian with her husband to pick up their dog. On April 19, Campbell again called in sick because of her dog's illness. Later that day, the owner of POS Plus called Campbell and discharged her.

Campbell applied for unemployment benefits, and the Minnesota Department of Employment and Economic Development (DEED) determined that Campbell was eligible for unemployment benefits. After POS Plus appealed DEED's determination, a ULJ held an evidentiary hearing. At the hearing, the owner of POS Plus testified that he discharged Campbell for being late or absent from work, which put stress on the other employees of his small business.

Following the hearing, the ULJ determined that Campbell was ineligible for unemployment benefits because she was discharged for employment misconduct. The ULJ found that at least some of Campbell's absences related to her knee were avoidable and that at least two or three of the four absences due to her dog's illness were avoidable because Campbell acknowledged that her husband also missed work to be with their dog. As a result, the ULJ determined that "[w]hen viewed as a whole, Campbell's poor

attendance was intentional, negligent, and/or indifferent conduct that displayed a serious violation of the standards of behavior POS had a right to reasonably expect.”

Campbell requested reconsideration, arguing that POS Plus did not adequately accommodate her knee injury at work and that her absences were warranted. She also submitted additional documentation from her doctor. The ULJ affirmed his previous decision, determining that Campbell was not entitled to another evidentiary hearing based on the additional evidence she submitted and that Campbell’s absences because of her dog’s illness were “particularly significant and demonstrate a lack of concern for the employment.” This certiorari appeal follows.

D E C I S I O N

When reviewing a ULJ’s eligibility decision, this court may affirm, remand 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 affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2012). 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).

The relevant issue in this case is not whether POS Plus should have discharged Campbell, but whether Campbell is eligible for unemployment benefits now that she is unemployed. *Windsperger v. Broadway Liquor Outlet*, 346 N.W.2d 142, 143 (Minn.

1984). An employee who was discharged is eligible for employment benefits unless the discharge was for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2012). “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) (2012). Employee misconduct does not include absence due to illness or injury of the employee if he or she gave proper notice to the employer. *Id.*, subd. 6(b)(7) (2012). “Whether an employee committed employment misconduct is a mixed question of fact and law.” *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether the employee committed the act is a fact question, which this court views in the light most favorable to the decision. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether the employee’s act constitutes employment misconduct is a question of law, which is reviewed de novo. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

An employer has the right to expect an employee 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 regarding employee absences. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). “Whether an employee’s absenteeism and tardiness amounts to a serious violation of the standards of behavior an employer has a right to expect depends on the circumstances of each case.” *Stagg*, 796 N.W.2d at 316.

While the ULJ found that some of Campbell's absences due to her knee injury and her pet's illness were avoidable, it is not clear what the ULJ meant by that term since it is not included in the unemployment-benefits statute. However, reading the ULJ's use of the term in the context of his order, we interpret it to mean that the ULJ viewed those absences as conduct that demonstrated a serious violation of standards the employer had the right to expect or a substantial lack of concern for her employment.

The record establishes that, before she took time off for her dog's illness, Campbell's absences from work were primarily due to illness or her knee injury, and the owner of POS Plus acknowledged that he had no reason to believe that Campbell was not actually sick when she reported her absences. In addition, both the owner of POS Plus and Campbell's supervisor acknowledged that Campbell properly notified them of her absences by calling a half hour before her shift began, in accordance with their policy. As a result, these absences did not constitute misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(7).

As to her absences due to her dog's illness, Campbell was absent from work for four days, and each day she called POS Plus to report that she would be absent due to her dog's illness. There is no indication that those absences were approved by POS Plus as vacation or sick leave. And absences due to a pet's illness are not excluded from the definition of employment misconduct, unlike absences due to the illness of an employee or an employee's immediate family member. *See* Minn. Stat. § 268.095, subd. 6(b)(7), (8) (2012) (excluding absences due to an applicant's illness, or the illness of the applicant's immediate family member, from the definition of employment misconduct).

The ULJ determined that Campbell displayed a serious violation of the standards of behavior that POS Plus had a right to reasonably expect, namely, that she would work as scheduled, when she was absent from work due to her dog's illness, and this determination is supported by substantial evidence in the record. Further, on reconsideration, the ULJ found that her absences because of her dog's illness were "particularly significant and demonstrate a lack of concern for the employment," which is also supported by substantial evidence in the record. We conclude that the ULJ did not err by determining that Campbell was ineligible for unemployment benefits because she was discharged for employment misconduct.

Affirmed.