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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1860**

Nancy L. Hadfield,
Relator,

vs.

North Memorial Health Care,
Respondent,

Department of Employment and
Economic Development,
Respondent.

**Filed May 13, 2013
Affirmed
Cleary, Judge**

Department of Employment and
Economic Development
File No. 29804321-3

Lindsay Webb Davis, St. Paul, Minnesota (for relator)

North Memorial Health Care, Robbinsdale, Minnesota (respondent)

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

Considered and decided by Cleary, Presiding Judge; Johnson, Chief Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

CLEARY, Judge

Relator brings a certiorari appeal of the decision determining that she is ineligible to receive unemployment benefits, arguing that the unemployment-law judge (ULJ) erred when she determined that relator was discharged for misconduct and that the absence due to illness or injury with proper notice to the employer exception to misconduct under Minn. Stat. § 268.095, subd. 6(b)(7), does not extend to tardiness. We affirm.

FACTS

Relator Nancy Hadfield began working for North Memorial Health Care (North Memorial) as an operating room staff nurse in 1985. She worked 72 hours every two weeks, which is one shift short of full-time. Relator suffered from several health problems including chronic tonsillitis and allergies. She also suffered from a skin condition that caused severe itching, and she had open wounds on her arms and legs from scratching. Relator's supervisors were aware of her medical conditions and that she was seeing doctors for treatment.

In 2011, relator's health problems began to affect her attendance and timeliness at work. Relator was given a verbal warning in December 2011 regarding her tardiness. Relator requested that she be allowed to start her shift at a later time, and North Memorial adjusted her starting time from 6:45 a.m. or 8:00 a.m. to 9:30 a.m. Despite this adjustment, relator was still often tardy to work. She received a written warning in February 2012, which stated that she was expected to be ready for her shift at 9:30 a.m. and that she was to check in with the charge nurse upon her arrival. The warning also

noted that going forward relator would need to anticipate her needs to arrive on time, and that if she failed to comply with North Memorial's expectations she faced further discipline up to and including discharge. In March 2012, North Memorial again informed relator that her frequent tardiness exceeded North Memorial's guidelines. For the three preceding pay periods, relator had been late 19 times. As a result, relator was suspended for three days. From April 10–28, 2012, relator was late 9 times. On May 2, 2012, relator arrived 27 minutes late for her shift without informing North Memorial. Relator was called into a meeting and given the option to resign or be discharged. Relator chose to resign and signed a letter to that effect.

Relator applied for unemployment benefits, and the Minnesota Department of Employment and Economic Development (DEED) issued a determination of ineligibility. Relator appealed the determination, and a telephone hearing was held before a ULJ on July 31, 2012. During the hearing, relator was represented by an attorney, and North Memorial elected not to appear.

Relator testified during the hearing that the "majority" of her tardiness was attributable to her health problems. Relator stated that during the time in question she had been experiencing fatigue, that she found herself "oversleeping quite a bit," and that her doctor "thought it was either from the chronic tonsil infections, the allergies that were undiagnosed, or both." She also stated that her tardiness was partially attributable to the distance that she had to walk from the locker room, where she changed into her uniform, to the time clock. She explained:

At one time we had a time clock outside of our locker room which was in the lower level and that was installed for the purpose of the surgery department[.]. We had to change into scrub clothes before we could start our shift. During the course of the last couple years they had also kind of changed the rules I guess as it were. We could no longer use the time clock downstairs and punch in before we changed. We had to arrive, change our clothes, walk up the stairs, walk down a hall that was probably 100 yards long [], and we could only use the time clock that was outside of the front desk.

Relator agreed with the ULJ's suggestion that she had to adjust her arrival time for these changes and stated that she did make adjustments "the majority of the time."

The ULJ issued a decision determining that relator was discharged for employment misconduct and was ineligible to receive unemployment benefits.¹ The ULJ found that North Memorial expected that employees would arrive on time for their shift, that they would work their entire shift, and that they would inform a supervisor before the start of a shift if they expected to be late or absent. The ULJ also found that relator was aware of this policy. The ULJ held that North Memorial had "a reasonable right to expect its employees to show up for work on time and to follow reasonable rules and regulations." She determined that relator was not absent due to illness, but that relator was chronically tardy and had a habit of arriving several minutes late for her shift regardless of what time her shift was supposed to start. The ULJ further noted that, in

¹ Although appellant signed a letter of resignation, the ULJ determined that she was discharged from employment because "she only submitted her resignation because North Memorial already informed her that it wasn't going to allow her to remain employed in any capacity." *See* Minn. Stat. § 268.095, subd. 5(a) (2012) ("A discharge from employment occurs when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity.").

documents submitted to DEED, relator admitted that her tardiness was attributable to “oversleep, not allowing enough time for travel, changing, consuming too much time to conceal a skin condition, and snow delays.” The ULJ held that “[n]one of these reasons have anything to do with chronic tonsillitis or infections that she complained about.” Finally, the ULJ noted that relator was 27 minutes late on her final day of work and failed to notify North Memorial. She determined that “[b]ecause [relator’s] behavior displays clearly a serious violation of the standards of behavior North Memorial had the right to reasonably expect, she is ineligible for benefits.”

Relator filed a request for reconsideration. The ULJ affirmed her decision, noting that the decision was factually and legally correct. This certiorari appeal followed.

D E C I S I O N

I.

This court may affirm, remand, reverse, or modify the decision of the ULJ if the substantial rights of a petitioner are prejudiced by the findings, conclusions, or decision, are affected by an error of law, are unsupported by substantial evidence, or are arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2012).

An employee discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2012). “Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). “Whether the employee committed a particular act is a question of fact.” *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied*

(Minn. Oct. 1, 2008). “This court views the ULJ’s factual findings in the light most favorable to the decision. This court also gives deference to the credibility determinations made by the ULJ. As a result, this court will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Id.* (citations omitted). “Whether a particular act constitutes disqualifying misconduct is a question of law, which this court reviews de novo.” *Schmidgall*, 644 N.W.2d at 804.

“Unemployment benefits are paid from state funds and are not considered . . . paid by an employer.” Minn. Stat. § 268.069, subd. 2 (2012). “The [Commissioner of Employment and Economic Development] has the responsibility for the proper payment of unemployment benefits regardless of the level of interest or participation by an applicant or an employer in any determination or appeal.” *Id.* Whether an applicant is entitled to unemployment benefits “must be determined based upon that information available without regard to a burden of proof.” *Id.*

“Employment misconduct means 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 a right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a) (2012). “[A]bsence because of illness or injury of the applicant, with proper notice to the employer” does not constitute employment misconduct. Minn. Stat. § 268.095, subd. 6(b)(7).

Whether North Memorial submitted information proving that relator was discharged due to misconduct.

Relator first argues that North Memorial did not specify the reasons for her tardiness that led to discharge. It is unclear whether she is arguing that North Memorial had a burden to provide such evidence, that the alleged misconduct was not the reason for her discharge, or that her tardiness was based on her illnesses and was therefore excusable because it fell under the exception in Minn. Stat. § 268.095, subd. 6(b)(7).

Relator does not cite any authority to support the argument that an employer must state the reasons for an employee's tardiness or absence. An employer does not have the burden of proving that an employee's behavior constituted misconduct. *See* Minn. Stat. § 268.069, subd. 2 (noting that an employee's "entitlement to unemployment benefits must be determined based upon that information available without regard to a burden of proof"). The ULJ had plenty of evidence from which to determine whether relator was entitled to unemployment benefits. North Memorial submitted documents that demonstrated relator's failure to comply with North Memorial's tardiness guidelines, and relator testified during the hearing about the reasons for her tardiness. If relator is arguing that North Memorial had the burden to prove that her behavior constituted misconduct, then relator's argument is unpersuasive.

If relator is arguing that the alleged misconduct was not the reason for her discharge, this argument is equally unpersuasive. Relator offers no evidence that North Memorial had another reason for discharging her. Relator cites *Hansen v. C.W. Mears, Inc.*, 486 N.W.2d 776 (Minn. App. 1992), *review denied* (Minn. July 16, 1992), for the

proposition that, in order to render a person ineligible to receive unemployment benefits, the alleged misconduct must be the reason for the employee's discharge. North Memorial treated relator's discharge as a resignation, so relator's employee-separation form does not indicate a specific reason for discharge. However, the form plainly states that relator is not eligible for rehiring because of her "continual non-compliance with North Memorial Tardy Guidelines." The conclusion that relator was discharged for her habitual tardiness is substantially supported by evidence submitted during the hearing, including testimony and documentation that relator had received multiple warnings and a suspension for tardiness. There is nothing in the record to support relator's argument that she was discharged for any other reason.

Because these two possible arguments are without merit, relator appears to be arguing that all of the reasons for her tardiness, other than getting delayed by traffic, were attributable to her illnesses, and therefore her tardiness did not constitute misconduct. *See* Minn. Stat. § 268.095, subd. (6)(b)(7). This argument is addressed at length below.

Whether the ULJ considered certain medical and personnel evidence.

Relator next argues that the ULJ erred by not considering important medical and personnel evidence that she had submitted to DEED but did not enter into evidence during the hearing. Relator contends that these documents demonstrate that she was in regular communication with North Memorial about her medical issues, that North Memorial counseled her about how to apply for a leave of absence, and that North Memorial approved two leaves of absence during the last month of her employment. She further argues that the evidence provides medical certification of her illnesses.

Even if the ULJ did not specifically mention the evidence in her determination of ineligibility or decision upon reconsideration, relator fails to demonstrate that the ULJ did not consider the evidence. Relator submitted the documents to DEED prior to the hearing, and both she and her attorney discussed the documents during the hearing. Further, relator fails to demonstrate how a failure to consider the documents is prejudicial. Appellate review of an error alleged by relator is appropriate if the error may affect her substantial rights. *See* Minn. Stat. § 269.105, subd. 7(d); *Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (holding that, to prevail on appeal, an appellant must show both error and prejudice resulting from the error). The ULJ did not determine, and DEED does not argue, that relator was not in communication with North Memorial about her medical issues, that North Memorial did not counsel her about how to apply for a leave of absence, or that North Memorial did not approve two leaves of absence. Nor did the ULJ hold that relator did not suffer from the medical illnesses she claimed. The ULJ determined that the reasons to which relator attributed her tardiness did not have anything to do with the chronic tonsillitis or infections that she complained about. The documents in question do not demonstrate that the reasons for relator's absence are attributable to her illnesses.

Whether relator's behavior was misconduct and whether the ULJ's decision is supported by substantial evidence.

Relator next argues that her behavior did not constitute misconduct and that the ULJ's decision is not supported by substantial evidence. Relator contends that several instances of tardiness were directly related to her illnesses. Relator does not dispute that

there were also other reasons for her tardiness, including traffic delays, fatigue, oversleeping, taking too long to conceal her skin condition, and not allowing enough time for travel, changing, and arriving at the approved time.

After her first warning in December 2011, relator's starting time was moved to 9:30 a.m., giving her at least an extra 90 minutes to arrive to work on time. When her start time was 6:45 a.m. or 8:00 a.m., she was often just a few minutes late. When she began her new starting time, she was consistently at least a few minutes late. During the hearing, the ULJ noted that relator was consistently a few minutes late, even after the schedule change. Relator explained that the location of the time clock where she punched in at the beginning of her shift had changed and was now very far away from the locker room, causing her to be a few minutes late every day. The ULJ asked if relator needed to adjust her arrival time to account for the change, and relator indicated that she did need to adjust her arrival time and that she did "the majority of the time." Relator was able to consistently arrive at work less than 30 minutes after her scheduled starting time, suggesting that she would be able to consistently make it to work on time if she planned ahead. Relator's tardiness constitutes indifferent conduct that demonstrates "a substantial lack of concern" for her employment. *See* Minn. Stat. § 268.095, subd. 6(a)(2).

The evidence presented at the hearing shows that relator was 1–15 minutes late on 23 occasions between February 15 and May 2. Relator explained that the reasons for her tardiness included fatigue, oversleeping, taking too much time to conceal her skin condition, accidents, snow delays, and not allowing enough time for travel, changing, and

arriving at the approved time clock. During the hearing, relator agreed that she needed to adjust the amount of time she allowed herself to get to work on time, based on where the time clock was located. The evidence substantially supports this conclusion.

Relator relies on *Gerr v. Target-Fridley*, 382 N.W.2d 231 (Minn. App. 1986), to argue that the evidence demonstrates that her tardiness was due to illness and that she properly notified North Memorial of her absences. In *Gerr*, this court held that an employee's absences from work due to illness did not constitute misconduct because the employee notified her employer every time she was going to be absent and verified the absence with a doctor's note. 382 N.W.2d at 233–34. The court determined that absences due to illness alone do not constitute misconduct and stated, “we cannot find that an employee's absences due to documented illnesses demonstrated lack of concern for her job.” *Id.*

In contrast to *Gerr*, relator here admitted that she was tardy to work on a number of occasions for reasons other than her illnesses. She submitted documents to DEED confirming these other reasons. Although relator claimed that her ongoing medical issues contributed to her tardiness, the ULJ rejected this argument as lacking evidentiary support. Furthermore, unlike the employee in *Gerr*, relator did not scrupulously comply with North Memorial's absence-notification requirements. North Memorial required relator to notify it every time she expected to be absent or tardy, which relator did not do on her final shift on May 2. Relator's reliance on *Gerr* is unavailing.

When an employee is absent from work because of illness and gives the employer proper notice, the absence is not employment misconduct. Minn. Stat. § 268.095,

subd. 6(b)(7). “This court has recognized the employer’s right to establish and enforce reasonable work rules relating to absenteeism.” *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985). “Refusing to abide by an employer’s reasonable policies generally constitutes disqualifying employment misconduct.” *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). “Even a single incident can be misconduct if it represents a sufficient enough disregard for the employer’s expectations.” *Blau v. Masters Rest. Assocs., Inc.*, 345 N.W.2d 791, 794 (Minn. App. 1984); *see also Moeller v. Minn. Dep’t of Transp.*, 281 N.W.2d 879, 882 (Minn. 1979) (holding that, even though the employee was legitimately ill, failure to report to work without notifying the employer constituted misconduct).

Relator does not argue that she was unaware of North Memorial’s expectation that she call ahead if she anticipated that she would be tardy to work. Relator had been warned several times regarding North Memorial’s expectations regarding attendance and notification. There is substantial evidence in the record that relator did not notify North Memorial that she would be late on her last day of work. Because relator knew of the expectations and failed to abide by them, her failure to notify North Memorial that she would be late on May 2 constitutes employment misconduct.

Whether relator’s non-illness-related tardy days constituted misconduct.

Relator also argues that her non-illness-related tardy days do not constitute misconduct. In light of the analysis above, even if relator’s non-illness-related tardiness was not misconduct, her failure to notify North Memorial that she would be late on May 2 constituted disqualifying misconduct.

Relator relies on *Jones* to argue that “an employee’s actions on the last day of employment do not necessarily constitute misconduct.” Relator misstates the holding in *Jones*. The *Jones* court noted that “[r]egardless of the reason for [the employee’s] absence on her last day of work, [the employee’s] pattern of persistent absence demonstrated negligent behavior toward her employer, justifying termination and justifying withholding unemployment compensation benefits.” 361 N.W.2d at 120. The employee in *Jones* may not have committed misconduct on her final day, but she was discharged for her previous excessive absenteeism, in violation of the employer’s policy. *Id.* at 118. In contrast, relator’s actions here on her last day of work did constitute employment misconduct.

II.

Relator also argues that the ULJ erred when she concluded that the absence due to illness or injury with proper notice to the employer exception to misconduct under Minn. Stat. § 268.095, subd. 6(b)(7), does not extend to tardiness. In light of the analysis above, relator’s failure to notify North Memorial that she would be late on May 2 constituted disqualifying misconduct, and the ULJ’s conclusion regarding the exception does not affect relator’s substantial rights.

Affirmed.