STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1157

Caryn L. Columbus,
Relator,

vs.

Apex Print Technologies, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 15, 2008
Affirmed
Halbrooks, Judge

Department of Employment and Economic Development
File No. 4211 07

Caryn L. Columbus, 1020 Burns Avenue, St. Paul, MN 55106 (pro se relator)

Apex Print Technologies, Inc., 100 South Owasso Boulevard West, Little Canada, MN 55117 (respondent)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101 (for respondent department)

Considered and decided by Willis, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

HALBROOKS, Judge

Pro se relator Caryn Columbus challenges the decision of an unemployment-law judge (ULJ) that she is disqualified from receiving unemployment benefits because she was discharged from employment due to misconduct. Relator also asserts that the ULJ improperly denied her subpoena request and that she was denied a fair hearing because her employer failed to disclose its witnesses. Because the ULJ correctly determined that relator was discharged because of employment misconduct and because relator was not denied a fair hearing, we affirm.

FACTS

Relator was employed by respondent Apex Print Technologies, Inc., as a senior account coordinator from July 31, 2005, until February 27, 2007. According to relator, her hours were flexible, and she was scheduled to work "approximately 8:00 to 4:00." But relator's supervisor, Betty Van Gorder, testified that relator was able to choose a start time of either 7:30, 8:00, or 8:30 a.m., and that, although relator was allowed initially to start at different times, depending on the day, she had made a commitment before December 5, 2006, to start at 8:00 a.m. According to Van Gorder, Apex is "not a flex time company," and after the initial flexibility with relator's start time, Apex "got to the point where we needed to commit to, like other employees, what her start time was."

On December 5, 2006, Van Gorder spoke with relator and informed her that her repeated late arrival at work was becoming an issue. After being told that she should arrive at work no later than 8:15 a.m., relator responded that she was going to work hard

to correct the problem. Despite the conversation with Van Gorder, relator continued to arrive late for work, resulting in an e-mail from Van Gorder that relator had to arrive on time. After the December 5th conversation between Van Gorder and relator, Apex began to track relator's arrival times. In the 59 scheduled work days between the December 5, 2006 conversation and her termination, appellant arrived at work by 8:00 a.m. only once and arrived within 15 minutes of her scheduled 8:00 a.m. start time only nine other days.

On February 26, 2007, relator called Apex to report that she had the flu but would try to come in once her stomach settled down. She called again later to say that she would not be in that day because her car had a flat tire. According to relator, she was unable to get a new tire until the next morning at 8:00 a.m. She called Apex at 8:30 a.m. on February 27, 2007, to inform them that she was on her way to work after getting the new tire. Two hours after arriving at work on February 27, relator was called into Van Gorder's office and told that she was terminated. Van Gorder testified that relator's tardiness "seemed to be a pattern that we couldn't correct with her showing up on time." But according to Van Gorder, relator was also terminated because of low productivity.

Relator applied for unemployment benefits but was denied benefits after respondent Department of Employment and Economic Development (DEED) determined that she was terminated because of employment misconduct due to excessive tardiness. Relator appealed that determination, and a telephone hearing was held before a ULJ. At the hearing, relator claimed that her tardiness was due to health problems caused by a thyroid condition. Relator testified that her thyroid condition affects her ability to stay alert and prompt and makes it difficult to wake up in the morning. Relator stated that she

had informed Apex of her medical condition and claimed that an e-mail exchange confirmed that Apex was aware of her problem. Relator was unable to produce these e-mails at the hearing, and the ULJ denied her request for a subpoena to Apex to produce the e-mails. Relator also testified that she was not aware that her productivity was a problem, in contradiction to Van Gorder's assertion that relator was discharged for low productivity as well as her excessive tardiness.

The ULJ concluded that relator's termination was the result of employment misconduct arising from her excessive tardiness and low productivity. Relator filed a request for reconsideration, and the ULJ affirmed his conclusion that relator's tardiness was employment misconduct, disqualifying her from unemployment benefits. This certiorari appeal follows.

D E C I S I O N

This court may overturn or modify a ULJ's decision if

> the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:
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> (1) in violation of constitutional provisions;
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> (2) in excess of the statutory authority or jurisdiction of the department;
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> (3) made upon unlawful procedure;
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> (4) affected by other error of law;
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> (5) unsupported by substantial evidence in view of the entire record as submitted; or
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> (6) arbitrary or capricious.

Minn. Stat. § 268.105, subd. 7(d) (2006).

Employment-misconduct cases present mixed questions 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." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether the employee's act constitutes disqualifying misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804; *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. App. 2007).

An applicant for unemployment benefits is disqualified from receiving benefits if the conduct causing her discharge amounts to employment misconduct. Minn. Stat. § 268.095, subd. 4 (2006). "Employment misconduct" means

> any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.
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> Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Minn. Stat. § 268.095, subd. 6(a) (2006).

The ULJ concluded that relator was discharged because of employment misconduct based on her termination for excessive tardiness and low productivity. In addressing relator's thyroid problem, the ULJ stated that while it "may have made it more difficult for [relator] to get up in the morning, her consistent tardiness does rise to the level of employment misconduct." The ULJ determined that relator's tardiness displayed

a "serious violation of the standards of behavior that Apex had a right to reasonably expect of its employees."

Despite relator's argument that she was never given a proper warning, the record demonstrates that she had ample notice that her tardiness was regarded by Apex as a problem. Apex notified relator orally on December 5, 2006, that her tardiness was an issue and was notified again in an e-mail on January 5, 2007, that she needed to get more "on track" with timely starts. Relator's continued tardiness, after being warned, demonstrates a lack of concern for her employment and constitutes employment misconduct. *Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App. 1984); *cf. also Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985) (finding that chronic absenteeism, even if not intentional, amounts to employment misconduct disqualifying an individual from benefits); *McLean v. Plastics, Inc.*, 378 N.W.2d 104, 107 (Minn. App. 1985) (holding that excessive absences in 12 months, even though not willful, constituted misconduct after two warnings). No official warning is required to terminate an employee for employment misconduct. *See Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981) (holding that a warning was not essential to demonstrate that an employee acted in willful disregard of an employer's interest). The record supports the ULJ's conclusion that relator's tardiness was employment misconduct, and relator's argument that she was not given proper warning before her termination lacks merit.

Relator also contends that her absences were a result of her thyroid problem. Absences due to illness are not misconduct "with proper notice to the employer." Minn. Stat. § 268.095, subd. 6(a). As the statute provides, proper notice must be given to the

employer to avoid misconduct. Here, relator gave Apex no notice other than generally informing the company of her condition. According to Van Gorder, relator "mentioned that she had" a thyroid problem "but we didn't understand or know if she needed accommodations for that. . . . She simply said she would correct it and that she would be there [on time]." Relator's argument assumes their general knowledge of her condition should suffice for proper notice. But Apex's general knowledge of relator's thyroid condition without proper notice does not negate the ULJ's determination that her tardiness constituted employment misconduct. Minn. Stat. § 268.095, subd. 6(a).

Relator also challenges the ULJ's denial of her request for a subpoena for e-mail communications between herself and Apex, arguing that the e-mails would demonstrate that Apex was aware of her thyroid problem and its effect on her ability to be on time.

Minn. Stat. § 268.188(a) (2006) authorizes the department to issue subpoenas to compel a witness to attend or to compel production of documents. But a ULJ may deny a subpoena request "if the testimony or documents sought would be irrelevant, immaterial, or unduly cumulative or repetitious." Minn. R. 3310.2914, subp. 1 (2007).

The ULJ did not give a reason for denying relator's subpoena request during the telephone hearing, but when the ULJ evaluated relator's request for reconsideration, he determined that the e-mails showed only that Van Gorder had knowledge of relator's thyroid problem. As the ULJ notes, the record already supports a finding that Apex had knowledge of relator's thyroid condition, absent the e-mails relator sought to subpoena. The e-mails fail to establish relator gave proper notice as required by Minn. Stat. § 268.095, subd. 6(a), and are therefore irrelevant to relator's challenge. Minn.

R. 3310.2914, subp. 1. Although relator argues that *Olisa v. Pepsi Bottling Group* supports her argument that she should be provided a new hearing, that case involved subpoenas to provide eye-witness testimony crucial to the appellant's argument. No. A05-572, 2006 WL 278992, at *2 (Minn. App. Feb. 7, 2006). Here, because the evidence sought is irrelevant and/or cumulative to evidence already in the record, the ULJ properly denied relator's request.

Relator argues that she was denied a fair hearing because she was not given notice of Apex's witnesses and because she was intimidated by the presence of Apex's owner and general manager at the hearing. The ULJ is to conduct the evidentiary hearing as an "evidence gathering inquiry" rather than "an adversarial proceeding" and "shall ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2006). 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 (2007). Under the discovery rules for unemployment-benefit hearings, a party only need disclose its witnesses "following [a] demand by another party." Minn. R. 3310.2914, subp. 2 (2007). "The demand and the response may be made by mail or by telephone," and if a party fails to comply with the disclosure requirements, the ULJ "must, upon request by the demanding party, consider rescheduling the hearing." *Id.*

Relator sent Apex an e-mail requesting that her former employer provide her with "the name of any witnesses you may have" on March 22, 2007. Apex did not provide the names of all of the witnesses that it intended to call at the hearing before the ULJ. But at the hearing, after witnesses for both parties were introduced, the ULJ asked if there were

"[a]ny questions about the procedures of the hearing" to which relator responded, "[N]o." Relator did not ask the ULJ to reschedule the hearing, as allowed by Minn. R. 3310.2914 (2007), and never raised this issue before the ULJ. Her argument is therefore not properly before this court on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

In addition, both witnesses who relator asserts intimidated her limited their testimony to general statements about the nature of the business and the fact that call-center employees were more flexible in their starting time than employees in the manufacturing side of the business. In light of the limited nature of the testimony provided by the general manager and owner of Apex and the lack of any support in the record that the Apex manager or owner behaved in an overbearing or intimidating way, we conclude that relator was not prejudiced by any error that may have occurred.

Affirmed.