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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1581**

Lisa M. Bates,
Relator,

vs.

Accu-Tronics Mfg. Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 12, 2008
Affirmed
Wright, Judge**

Minnesota Department of Employment and Economic Development
File No. 7677 07

Lisa M. Bates, 471 267th Street, Osceola, WI 54020 (pro se relator)

Accu-Tronics Manufacturing Inc., 4255 White Bear Parkway, Suite 2100, St. Paul, MN
55110 (respondent)

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Considered and decided by Wright, Presiding Judge; Klaphake, Judge; and
Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WRIGHT, Judge

Relator challenges the decision of the unemployment law judge that relator was discharged for employment misconduct and, therefore, is disqualified from receiving unemployment benefits. We affirm.

FACTS

Relator Lisa Bates was employed as an inspector with respondent Accu-Tronics Manufacturing, Inc. (AMI) from March 7, 2006, through April 11, 2007. Bates was scheduled to work Monday through Friday from 7:00 a.m. to 3:30 p.m.; and she reported directly to her supervisor, Kathy Swan. Early in her tenure with AMI, Bates received a copy of AMI's employee handbook, which includes a policy governing absences. This policy states that, unless an employee is on vacation or has formally applied for and been granted a leave of absence, an employee must notify his or her supervisor each day of an absence. Failure to comply with the reporting requirement for any two days within a one-month period constitutes "abandoning the job" and is grounds for dismissal.

During the course of her employment with AMI, Bates experienced personal problems and was in marriage counseling. These difficulties were exacerbated by the death of her mother-in-law in late March 2007 and by a marital-relationship crisis on the evening of Wednesday, April 4, 2007.

The following morning, Bates called John Swan, a friend and co-worker, and told him about the events of the previous evening. Bates advised him that she would be out of the office for the remainder of the work week and would call the following Monday.

Bates believed that John Swan would relay this information to either his mother, Kathy Swan, who was Bates's supervisor, or to his father, Mike Swan, who is an operations manager at AMI. Bates had no vacation time remaining. And during her discussion with John Swan, Bates did not address whether she planned to apply for personal leave or use sick leave for her absence.

On Monday, April 9, Bates left Kathy Swan a voicemail message stating that she was unable to work for most of the upcoming work week because of the acute emotional trauma she had recently endured. Bates stated that she would call back later in the week. But once again, Bates did not address applying for personal leave or using sick leave. And Bates did not discuss the time that she had already missed. Bates called Kathy Swan again on Thursday, April 12, and advised Kathy Swan that she intended to return to work. Kathy Swan responded that a termination letter had been mailed the previous day because of Bates's multiple unapproved absences.

Bates applied for unemployment benefits from the Department of Employment and Economic Development (the department). After a department adjudicator determined that she is disqualified from receiving unemployment benefits, Bates appealed to an unemployment law judge (ULJ). At the subsequent hearing, Kathy Swan testified that she received neither Bates's April 5 message given to John Swan nor Bates's April 9 voicemail message. Kathy Swan also testified that she had tried unsuccessfully to reach Bates by telephone during Bates's absence and that Bates had not requested a personal leave of absence. Mike Swan testified that Bates was terminated for

having at least two “no-shows,” or unexcused absences. Mike Swan also testified that Bates called only one time after missing four days of work.

The ULJ concluded that Bates committed employment misconduct and, therefore, is disqualified from receiving unemployment benefits. Following Bates’s request for reconsideration, the ULJ affirmed his earlier decision. This certiorari appeal followed.

D E C I S I O N

On certiorari appeal, we may review the decision of a ULJ to determine whether the substantial rights of a relator have been prejudiced because the findings, inferences, conclusion, or decision are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2006).

Bates challenges her disqualification from receiving unemployment benefits, arguing that she did not commit employment misconduct. Whether an employee committed employment misconduct presents 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. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). When we review the ULJ’s factual findings, we apply a deferential standard of review and view those findings in the light most favorable to the decision. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ULJ’s factual findings will not be disturbed on appeal if they are

supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5). But whether the act committed by the employee constitutes employment misconduct presents a question of law, which we review de novo. *Scheunemann*, 562 N.W.2d at 34.

Employment misconduct is “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.” Minn. Stat. § 268.095, subd. 6(a) (2006). An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. *Id.*, subd. 4(1) (2006).

An employer has a right to expect an employee to work when scheduled. *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984). Similarly, an employer has a right to establish and enforce reasonable rules regarding absenteeism. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). An employer may require an employee to keep the employer apprised of the employee’s whereabouts because such information allows the employer to plan for staffing needs. *Winkler v. Park Refuse Serv., Inc.*, 361 N.W.2d 120, 123 (Minn. App. 1985). Minnesota’s appellate courts have consistently recognized both excessive absenteeism and absences without notice to the employer as forms of employment misconduct. *See, e.g., Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986) (“[E]xcept in certain limited circumstances, an employee engages in misconduct if he is absent even once without notifying his employer.”); *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985) (“[Relator’s] pattern of persistent absence demonstrated negligent behavior toward

her employer, justifying termination and justifying withholding unemployment compensation benefits.”).

The ULJ determined that Bates committed employment misconduct because she failed to follow AMI’s policy for reporting absences. Bates argues to the contrary, challenging the ULJ’s determination of witness credibility and his resolution of conflicting testimonial evidence. But because credibility determinations are the sole province of the ULJ, we accord them deference on appeal. *Nichols v. Reliant Eng’g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006). According to Bates, she called John Swan on April 5 to advise him that she would be absent for the next two days, and her April 9 voicemail message notified Kathy Swan of her absence for the following work week. Contrary to the factual findings of the ULJ, Bates asserts that AMI received both of her messages. But Mike Swan testified that Bates called only once. And Kathy Swan testified that she never received a message from Bates and that she spoke with Bates only once, on April 12. Moreover, it is undisputed that Bates had no vacation time remaining and that Kathy Swan did not grant her a leave of absence. Indeed, the ULJ found that Bates failed to contact Kathy Swan for more than one week, and she failed to submit a written request for a leave of absence. These findings, which are supported by substantial evidence, will not be disturbed.

We agree with the ULJ’s determination that, although Bates contacted John Swan, this notification was not in compliance with AMI’s absence policy because “a single conversation with a co-worker and a single message on an answering machine fall short of [AMI’s] expectations.” Bates argues that, on two occasions, she followed the call-in

procedure by calling at least one hour before her scheduled start time and leaving a voicemail message because her supervisor was not available. But even if leaving a voicemail message were sufficient, AMI's policy required Bates to notify her employer on a daily basis. And the record establishes that this requirement was not met. Therefore, the ULJ correctly concluded that Bates failed to follow her employer's reasonable expectations for notification of absences from work.¹

Because there is substantial evidence in the record to sustain the ULJ's factual findings and the ULJ correctly applied the law, we affirm the ULJ's determination that Bates committed employment misconduct and, therefore, is disqualified from receiving unemployment benefits.

Affirmed.

¹ Bates also contends that she had a physician's note, as required by AMI policy for absences of more than three days but that she was terminated before being given a chance to present it to Kathy Swan. Bates, however, was not discharged for failing to provide a physician's note, justifying her absences. Rather, she was discharged for failing to provide notice that she would be absent and for incurring four "no-shows."