STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2075

Kelli A. Tesmar-Meyer,
Relator,

vs.

Minnesota School of Business Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed September 29, 2009
Affirmed
Shumaker, Judge

Department of Employment and Economic Development
File No. 21079559-3

Christopher James Perske, 115 South Broadway, Suite 100, Jordan, MN 55352 (for relator)

Minnesota School of Business, Inc., 1401 West 76th Street, Suite 100, Richfield, MN 55423-3852 (respondent-employer)

Lee B. Nelson, Amy R. Lawler, Department of Employment and Economic Development, 1st National Bank Building, Suite E200, 332 Minnesota Street, St. Paul, MN 55101-1351 (for respondent DEED)

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Hudson, Judge.

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

SHUMAKER, Judge

On appeal from denial of unemployment benefits, relator contends that the unemployment law judge incorrectly determined that she is ineligible to receive benefits because she had committed employment misconduct. Relator also argues that she was denied assistance in obtaining subpoenas for her telephone records. Because relator was discharged for repeatedly disregarding her employer's attendance policy, and because she failed to present any evidence that she requested a subpoena for her phone records or that such records would have affected the outcome of the case, we affirm.

FACTS

The material facts are not in dispute. Relator Kelli Tesmar-Meyer was employed full time by respondent, Minnesota School of Business, Inc. (MSB) from July 2004 through July 21, 2008. Tesmar-Meyer was made aware of MSB's call-in policy, which required her to call in prior to the start of a scheduled shift if she would be tardy or absent, and to provide a justifiable reason therefor. She knew that a failure to do so would be a violation of MSB's attendance policy.

On April 11, 2008, MSB gave Tesmar-Meyer an oral warning after she came late to an all-school meeting. Then, on April 18, 2008, Tesmar-Meyer failed to attend a mandatory in-service meeting, and MSB gave her a written warning for this absence. That warning stated that she would be terminated if she failed to attend all mandatory meetings or to arrive on time. Nevertheless, on July 8, 2008, Tesmar-Meyer failed to arrive on time for her 8:45 a.m. shift and failed to notify MSB until 9:56 a.m. that she

would be late. As a result, MSB issued Tesmar-Meyer a second written warning, again indicating that Tesmar-Meyer would be terminated if she continued to disregard MSB's attendance policy.

On July 18, 2008, MSB hosted a charity walk that Tesmar-Meyer was required to attend. She did not do so and alleges that she called MSB at 6:00 a.m. prior to her 9:00 a.m. report time and attempted to leave a message, but no one answered MSB's answering service. For medical reasons, Tesmar-Meyer had little sleep the previous night and, after attempting to contact MSB, she fell back asleep. She did not attempt to contact MSB again until she woke up around noon. MSB terminated Tesmar-Meyer's employment on July 21, 2008, for failure to abide by MSB's attendance policy.

Tesmar-Meyer filed for unemployment benefits but was denied because she was terminated for employment misconduct. She requested a hearing before an unemployment law judge (ULJ). On September 22, 2008, the ULJ determined that Tesmar-Meyer was ineligible for unemployment benefits because she was discharged for employment misconduct. The ULJ determined that Tesmar-Meyer's failure to correct her behavior after being warned about MSB's attendance policies was a serious violation of the standards of behavior that MSB reasonably expected of her. The ULJ found MSB's testimony that Tesmar-Meyer did not attempt to call MSB on the morning of July 18, 2008, credible because it was supported by MSB's phone records. The ULJ also noted that Tesmar-Meyer admitted that she did not leave a message on MSB's answering service. On review following her request for reconsideration, the ULJ affirmed his prior

decision finding that Tesmar-Meyer was provided with an opportunity to present additional evidence but failed to do so. This appeal followed.

D E C I S I O N

On review of a denial of unemployment benefits, we may affirm the decision of the ULJ, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced. Minn. Stat. § 268.105, subd. 7(d) (2008). A petitioner's rights may have been prejudiced if the findings, inferences, conclusion, or decision of the ULJ (1) violates constitutional provisions; (2) is in excess of the statutory authority or jurisdiction of the department; (3) was made upon unlawful procedure; (4) was affected by other error of law; (5) "unsupported by substantial evidence in view of the entire record as submitted"; or (6) arbitrary or capricious. *Id.*; *see Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007) (citing this standard of review).

Employment Misconduct

Tesmar-Meyer first challenges the ULJ's determination that she committed employment misconduct. Whether an employee committed employment misconduct 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 reviewed for clear error. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Tesmar-Meyer contends that the ULJ incorrectly determined that she had committed employment misconduct for multiple violations of the call-in policy because her conduct was not a serious violation of MSB's standards and did not display a substantial lack of concern for her employment. Respondent Department of Employment and Economic Development (DEED) argues that Tesmar-Meyer's conduct, as a whole, constituted employment misconduct because of her repeated failure to notify MSB that she would be late prior to the start of her scheduled shift, as required by the attendance policy. An employee who is discharged from employment is ineligible to receive unemployment benefits if the employee is discharged because of employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2008). "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." *Id.*, subd. 6(a).

Tesmar-Meyer concedes that on July 8 and July 18 she was either tardy for or absent from her scheduled shifts. The ULJ considered evidence that MSB warned Tesmar-Meyer on several occasions that she would be terminated if she continued to disregard the attendance policy. MSB had a right to expect that Tesmar-Meyer would comply with its attendance policy, particularly after it had warned her that her failure to do so would result in the termination of her employment. Despite MSB's warnings, Tesmar-Meyer failed to comply with the attendance policy. Further, the ULJ's factual finding that Tesmar-Meyer did not call MSB prior to the start of the charity walk was

supported by MSB's phone records and Tesmar-Meyer's own admission that she did not leave a message on MSB's answering service. The ULJ found MSB's testimony more credible, and we give deference to the credibility determinations of the ULJ, viewing the factual findings in the light most favorable to the decision. *See* Minn. Stat. § 268.105, subd. 1(c) (2008) (stating that the ULJ must set out the reason for crediting or discrediting testimony when the credibility of an involved party or witness has a significant effect on the outcome of a decision); *see also Skarhus*, 721 N.W.2d at 344 (stating that appellate courts give deference to a ULJ's credibility determinations).

The ULJ properly determined that Tesmar-Meyer's failure to correct her behavior after multiple warnings constituted employment misconduct. *See Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 524 (Minn. 1989) (stating that Minnesota courts often cite disregard of warnings as a reason for finding employment misconduct); *Flahave v. Lang Meat Packing*, 343 N.W.2d 683, 686-87 (Minn. App. 1984) (affirming that employee's failure to notify employer of absences on four occasions in one year constituted misconduct).

Subpoena

Tesmar-Meyer also argues that she was denied any assistance in obtaining a subpoena for her phone records, despite allegedly seeking assistance from DEED. DEED argues that the phone records are immaterial because the employment misconduct for which Tesmar-Meyer was terminated stems from several instances where she violated the attendance policy. We agree.

The ULJ is obligated to assist unrepresented parties in the presentation of evidence, to control the hearing in order to protect a party's right to a fair hearing, and to ensure that relevant facts are clearly and fully developed. Minn. R. 3310.2921 (2007). In affirming his initial decision, the ULJ noted that Tesmar-Meyer had the opportunity to request additional evidence after the evidentiary hearing but failed to request a subpoena for phone records. Although Tesmar-Meyer asserts that the department was obligated to help her obtain the subpoenas, she has failed to present any evidence that she requested that the ULJ assist her in obtaining a subpoena for phone records. Additionally, even if her telephone records would show that she placed an unanswered call to MSB's answering service, Tesmar-Meyer does not dispute that she failed to notify her employer that she would be late on July 18 before the scheduled time for the charity walk. Thus, a record showing that she called, but did not reach anyone to whom notice was required to be given, does not refute the ULJ's finding that she failed to notify her employer of her absence or tardiness in clear contravention of MSB's attendance policy. A ULJ may refuse to issue a subpoena if the documents sought "would be irrelevant." Minn. R. 3310.2914, subp. 1 (2007). Thus, the ULJ did not err.

Affirmed.