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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1045**

Heather Pech,
Relator,

vs.

Orthopaedic Resources Management Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 13, 2010
Reversed
Randall, Judge***

Department of Employment and Economic Development
File No. 21255635-3

Susan A. Daudelin, Daudelin Law Office, L.L.C., Bloomington, Minnesota (for relator)

Orthopaedic Resources Management, Minneapolis, Minnesota (respondent employer)

Lee B. Nelson, Amy R. Lawler, Minnesota Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent DEED)

Considered and decided by Ross, Presiding Judge; Shumaker, Judge; and Randall,
Judge.

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

UNPUBLISHED OPINION

RANDALL, Judge

Relator challenges the decision by the unemployment law judge that she was discharged for employment misconduct and ineligible to receive unemployment benefits when she failed to report for work. Because relator's unexcused absence was a single incident that did not have a significant adverse impact on her employer, we reverse.

FACTS

Relator Heather Pech was employed as a training coordinator by respondent Orthopaedic Resources Management, Inc. (ORM). Relator worked full time for ORM and was allowed to work from home on Mondays unless she was required to attend work meetings or train new employees.

On September 8, 2008, relator's supervisor, Sandy Rutherford, informed relator that she would need to come into the office to train a new employee the following Monday, September 15. Relator told Rutherford that it would be "no problem" for her to be at the office. At approximately 6:15 a.m. on September 15, relator called the ORM office and left a voicemail message for Rutherford indicating that she was unable to come into the office that day because she could not find daycare for her young son. In the message, relator claimed that she had planned to have her mother watch the child, but her mother received late notice that she was scheduled to work a double shift at her job. At approximately 10:00 a.m. that morning, relator's mother left a message for relator at the ORM office stating, "I am just wondering what you did with [the child]. I thought you

were going to drop him off this morning.” After learning of this message, Rutherford concluded that relator had not been truthful about her lack of childcare.

Relator was subsequently discharged from her employment with ORM. Relator applied for unemployment benefits and a Department of Employment and Economic Development (DEED) adjudicator initially determined that she was ineligible. Relator appealed the determination and a de novo hearing was held.

At the hearing, Rutherford testified that relator was discharged because she had lied about her lack of daycare and failed to follow ORM policy in reporting her absence. Rutherford also noted that relator had been disciplined on previous occasions for other inappropriate conduct.

Relator acknowledged that she was expected to report to the office to train an employee on Monday, September 15. But she testified that she was forced to stay home because she was unable to find childcare for her son. Relator claimed that she originally planned to have her mother watch the child, but her mother received late notice that she would need to work a double shift at work on Sunday and Monday. According to relator, the first shift was from Sunday night until 4:00 a.m. Monday, and the second shift began at 2:00 p.m. Monday. Although her mother was available to watch the child Monday morning, relator claimed she did not feel comfortable leaving the child with her because she had gotten “virtually no sleep” the previous night. Relator alleged that her only other care option was a relative who was unable to care for the child. Relator further testified that her mother called because she was unaware that relator had decided to stay home with the child.

Following the hearing, the unemployment law judge (ULJ) found that relator was ineligible for unemployment benefits because her failure to report to the office constituted employment misconduct. On relator's request for reconsideration, the ULJ affirmed the decision. This certiorari appeal followed.

D E C I S I O N

This court may reverse or modify the decision of a ULJ if the substantial rights of the petitioner may have been prejudiced because the ULJ's findings, inferences, conclusions, or decisions are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008).

An employee discharged for misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Misconduct includes “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) (2008). But it does not include

[i]nefficiency, 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.

Id.

“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 an employee committed the alleged act is a fact question. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court defers to the ULJ’s credibility determinations and findings of fact. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But whether a particular act constitutes employment misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

Relator argues that her unexcused absence from work does not constitute employment misconduct because it was a single incident that did not have a significant adverse impact on ORM. *See* Minn. Stat. § 268.095, subd. 6(a). Conversely, DEED contends that relator’s absence was not a single incident. DEED relies upon Rutherford’s testimony that relator was also discharged for poor work performance and for two previous violations of ORM’s confidentiality policy.

After reviewing the record, we conclude that relator’s unexcused absence was a single incident that did not have a significant adverse impact on ORM. Despite allegations of additional instances of misconduct, *the ULJ focused exclusively on the unexcused absence*. The other alleged instances *were not the basis for the discharge*. *See Hansen v. C.W. Mears, Inc.*, 486 N.W.2d 776, 780 (Minn. App. 1992) (stating that the misconduct that formed the basis for a benefits applicant’s ineligibility must be the reason for the discharge), *review denied* (Minn. July 16, 1992). Although the ULJ found that relator did not have a valid excuse for her absence, there is no evidence in the record

that this single incident had a *significant* adverse impact on ORM. The only reason that relator was required to report to the office that day was to train a new employee. Relator's training responsibilities were fulfilled by a co-worker who was already scheduled to assist in the training.

Citing *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415 (Minn. App. 1986), DEED argues that even a single unexcused absence constitutes employment misconduct. In *Del Dee Foods*, this court held that "except in certain limited circumstances" a single unexcused absence from work constitutes employment misconduct. 390 N.W.2d at 418. DEED's reliance on *Del Dee Foods* is misplaced. Significant amendments to the statutory definition of "employment misconduct" have been made since that case was decided. *See* 2003 Minn. Laws 1st Spec. Sess. ch. 3, art. 2, § 13, at 1473-74. Under the current statute, a single unexcused absence must have a significant adverse impact on the employer before it constitutes misconduct. *See* Minn. Stat. § 268.095, subd. 6(a). Here, as pointed out above, there is no evidence of any significant adverse impact on the employer. Relator is entitled to unemployment benefits.¹

Reversed.

¹ Although not addressed by the parties, we note that relator's absence would be considered "inadverten[t]" or "simple unsatisfactory conduct" under the statute. *See* Minn. Stat. § 268.095, subd. 6(a) (stating that inadvertence and simple unsatisfactory conduct do not constitute employment misconduct). Relator's conduct falls within these exceptions. She made efforts to obtain daycare for her child before deciding to work from home, contacted ORM early that morning to inform the company of her lack of daycare, and worked from home to complete her other work duties.