STATE OF MINNESOTA
IN COURT OF APPEALS
A10-849

Viki Kosanke,
Relator,

vs.

Ecolab USA, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 28, 2010
Affirmed
Larkin, Judge

Department of Employment and Economic Development
File No. 23842732-3

Viki Kosanke, North Branch, Minnesota (pro se relator)

Ecolab USA, Inc., St. Louis, Missouri (respondent)

Lee B. Nelson, Christina Altavilla, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent-department)

Considered and decided by Larkin, Presiding Judge; Ross, Judge; and Stauber, Judge.

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

LARKIN, Judge

Relator challenges an unemployment-law judge's determination that she is ineligible to receive unemployment benefits because she was discharged for employment misconduct. We affirm.

FACTS

Relator Viki Kosanke began work as a PC analyst for respondent Ecolab USA, Inc., in 2004. In October 2009, Kosanke contracted the H1N1 virus and was absent from work between October 15 and October 23. Kosanke was told that if she returned to work on October 26, she would not need a doctor's note to substantiate her illness.

Kosanke returned to work on October 26 and was placed on a performance improvement plan. The performance improvement plan dealt with Kosanke's interpersonal interactions and communication skills, as well as her professionalism, conduct, and task performance. Kosanke had previously complained to human resources that she felt she was being subjected to sexual harassment by her supervisor. On October 27, Kosanke e-mailed her supervisor that she would not be reporting to work as she did not feel that she could do her job effectively with the constant harassment and distractions. On October 29, Kosanke was informed that she would need a doctor's note in order to return to work. Kosanke did not provide a doctor's note. And she refused to return to work until human resources had investigated her complaints.

On November 9, Kosanke had a conversation with the director of human resources regarding Kosanke's harassment claim. On November 12, Kosanke was discharged for

her unilateral decision not to return to work during the period that her performance improvement plan and sexual harassment claim were being investigated.

Kosanke established a benefits account with the Department of Employment and Economic Development (DEED). A DEED adjudicator found that Kosanke was ineligible to receive unemployment benefits because she had quit her job for a reason not caused by the employer. Kosanke appealed this decision, and an evidentiary hearing was held. The unemployment-law judge (ULJ) concluded that Kosanke was discharged for employment misconduct and therefore ineligible to receive unemployment benefits. Kosanke requested reconsideration of this decision, and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

Our review of a ULJ's eligibility determination is governed by Minn. Stat. § 268.105, subd. 7(d) (2010), which provides, in relevant part:

> The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:
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> . . .
>
> (4) affected by [an] error of law; [or]
>
> (5) unsupported by substantial evidence in view of the entire record as submitted[.]

Minnesota courts have defined substantial evidence as: "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or

(5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). 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 the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment." *Id.*, subd. 6(a) (2010). The misconduct definitions set out in the act are exclusive and "no other definition applies." *Id.*, subd. 6(e) (2010). "If the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct . . . ." *Id.*, subd. 6(d) (2010).

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 a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* This court reviews the ULJ's factual findings "in the light most favorable to the decision" and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Generally, an employer has a right to expect its employees to work when scheduled. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43,

45 (Minn. App. 1984). "An employer has the right to establish and enforce reasonable rules governing absences from work," and an employee's refusal to comply can constitute employment misconduct. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007).

The ULJ found that Kosanke refused to report to work until human resources had investigated her complaints. The record supports this finding. On October 27, Kosanke e-mailed her supervisor that she would not be reporting to work as she did not feel that she could do her job effectively with the constant harassment and distractions. On October 29, Kosanke was informed that she would need a doctor's note in order to return to work. Kosanke did not get a doctor's note. Instead, she refused to return to work until human resources had investigated her complaints. On November 6, a human resources representative informed Kosanke that her recent absences were unexcused and that she needed to return to work, provide justification for her unexcused absences, and cooperate with the company's investigation of her gender discrimination claims. Kosanke still refused to return to work, and Ecolab discharged her.

The ULJ then addressed whether Kosanke was discharged for employment misconduct and reasoned that

> [a]n employer has the right to reasonably expect that its employees will report to work as scheduled. Here, Kosanke decided unilaterally not to report to work after she received a performance improvement plan that she felt was unwarranted as it was in retaliation to her suggestion that her conduct was being more heavily scrutinized because of her gender. Kosanke's absences were for a personal reason. They were not caused by her illness even though Ecolab required her to bring a doctor's note excusing her prior absences for illness.

The ULJ therefore concluded that "Kosanke should have reported to work while Ecolab was investigating her complaints. An employee does not have the right to change their terms of work just because they have a complaint about their work conditions." We agree. Kosanke's refusal to return to work displayed clearly a serious violation of the standards of behavior Ecolab had a right to reasonably expect, and her actions constituted employment misconduct.

Kosanke argues that she "would have never voluntarily terminated [her] job" and that "Ecolab never provided any proof that they told [her] that if [she] didn't return to work by November 12, 2009, that [she] would be considered to have voluntarily terminated [her] job due to job abandonment." But as noted above, although the DEED adjudicator initially determined that Kosanke quit her employment, Kosanke challenged this determination, and the ULJ found that she had been discharged. Therefore, Kosanke's arguments regarding whether or not the evidence supports a finding that she quit are irrelevant.

Kosanke also argues that because she submitted evidence and participated in the telephonic hearing before the ULJ and her former employer did not participate in the hearing, the ULJ's findings are not supported by substantial evidence. Regardless of Ecolab's level of participation, our review of the record indicates that the ULJ's findings are substantially supported by the evidence. In fact, the evidence submitted by Kosanke alone is sufficient to sustain the ULJ's finding that Kosanke refused to report for work and was therefore discharged for employment misconduct. Moreover, DEED "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." Minn. Stat. § 268.069, subd. 2 (2010). In conclusion, the ULJ did not err by determining that Kosanke is not eligible to receive unemployment benefits.

Affirmed.

Dated:

Judge Michelle A. Larkin