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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-310**

Deborah Ann Mitchell,  
Relator,

vs.

Park Nicollet Clinic,  
Respondent,  
Department of Employment and Economic Development,  
Respondent.

**Filed October 26, 2010  
Affirmed  
Stoneburner, Judge**

Department of Employment and Economic Development  
File No. 238017553

Deborah Ann Mitchell, Brooklyn Park, Minnesota (pro se relator)

Richard R. Voelbel, Felhaber, Larson, Fenlon, & Vogt, P.A., Minneapolis, Minnesota  
(for respondent Park Nicollet)

Lee B. Nelson, Britt K. Lindsay-Waterman, Minnesota Department of Employment and  
Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Stauber, Presiding Judge; Halbrooks, Judge; and  
Stoneburner, Judge.

## UNPUBLISHED OPINION

**STONEBURNER**, Judge

Relator Deborah Ann Mitchell challenges the determination of an unemployment-law judge (ULJ) that she is ineligible for unemployment benefits because she was discharged from employment for attendance issues that constituted employment misconduct. We affirm.

### FACTS

Relator Deborah Ann Mitchell was employed as a customer-service representative by respondent Park Nicollet Clinic (PNC), working about 24 hours per week from December 3, 2007, to November 20, 2009, in PNC's call center. Mitchell was aware of PNC's Attendance and Punctuality Policy that required employees to be present for at least 97% of their scheduled hours and to inform supervisory personnel of any expected absences from scheduled shifts.

In August 2008, Mitchell received her first oral warning that she was in violation of PNC's attendance policy. In December 2008, Mitchell was given a written warning, informing her that her attendance rate had fallen to 91.9% and that she was not properly "swiping in" to the time clock. In February 2009, when Mitchell's attendance rate fell to 87.1%, she was issued a final written warning.

In April 2009, Mitchell, in addition to caring for her two children, one of whom has disabilities, began to assist with her mother's attendance at cancer treatments. Mitchell applied for leave under the Family and Medical Leave Act (FMLA), but her request was denied because she did not qualify for such leave. Mitchell's supervisor

granted some leeway in Mitchell's punctuality and allowed Mitchell to rearrange her scheduled hours to facilitate Mitchell's care for her mother. Mitchell was instructed to call the "sick pager," an answering system for reporting absences, to arrange her absences, but Mitchell continued to call her supervisor directly rather than using the sick pager as instructed.

On September 16, 2009, Mitchell was late for work and her supervisor met with her to discuss this violation. Two days later, Mitchell was one and one-half hours late for her scheduled shift and failed to properly "swipe in." Mitchell's supervisor stated that Mitchell did not explain these infractions as being related to care for her mother. Between August 1, 2009, and October 5, 2009, Mitchell was late for work eleven times.

On October 24, 2009, Mitchell failed to appear for her scheduled shift because she was in jail. Mitchell did not leave a message on the sick pager regarding this absence and was unsuccessful in her attempt to contact the call center, so PNC had no notice of her absence or her whereabouts. Mitchell also missed her scheduled shifts on October 26 and October 27 without calling the sick pager. Mitchell left a message concerning the October 27 absence on her supervisor's direct telephone line, but her supervisor was not in that day to receive the message.

PNC contacted Mitchell on October 27 and learned that Mitchell would not be coming to work that day or the following day because she did not have child care. Mitchell returned to work on November 2, and her supervisor told her that she could work until PNC's human resources department could update Mitchell's attendance record. When Mitchell arrived at work on November 9, she was tardy. After reviewing

Mitchell's absences, which indicated that Mitchell's attendance rate was 90.3%, Mitchell's supervisor decided to terminate Mitchell's employment, but gave Mitchell the option to resign rather than be fired. Mitchell resigned effective November 20, 2009. Mitchell applied for unemployment benefits. The Department of Employment and Economic Development denied benefits. Mitchell appealed, and the ULJ upheld the ineligibility determination, finding that Mitchell was discharged for employment misconduct. Mitchell requested reconsideration, and the ineligibility determination was affirmed. Mitchell appeals from the determination of ineligibility.

## D E C I S I O N

This court may affirm a ULJ's decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights were prejudiced because the findings, inferences, conclusions, or decision are erroneous as a matter of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4), (5) (2008). 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." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Under Minn. Stat. § 268.095, subd. 2(a) (Supp. 2009), "[a] quit from employment occurs when the decision to end the employment was, at the time the employment ended,

the employee's," and under Minn. Stat. § 268.095, subd. 5(a) (2008), "[a] discharge from employment occurs when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity." The ULJ determined that Mitchell was discharged from employment, and Mitchell does not challenge that determination. Rather, Mitchell argues that because she was denied FMLA and because of the unfortunate circumstances of her situation, the ULJ should have given more weight to the reasons for her conduct and concluded that she did not commit misconduct.

We are sympathetic to the personal difficulties Mitchell faced at the time of her discharge, but an employer has the right to expect an employee to follow policies, and knowingly disregarding an employer's reasonable policy is misconduct on the part of the employee. *See Schmidgall*, 644 N.W.2d at 804 (stating that disregarding reasonable policy is misconduct). Mitchell was warned on several occasions that she was failing to satisfy PNC's attendance and punctuality policies and failing to properly notify PNC of anticipated absences by calling the sick pager. Mitchell does not challenge the reasonableness of these policies. The ULJ credited PNC's evidence of Mitchell's absenteeism and found that the events precipitating Mitchell's discharge were not related to the arrangement she had with her supervisor to accommodate her mother's care. "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus*, 721 N.W.2d at 345.

Mitchell's failure to call the sick pager resulted in three absences in October 2009 without notice to PNC. And Mitchell was tardy when she returned to work on November

9. Substantial evidence in the record of Mitchell's extensive tardiness and absenteeism without appropriate notice supports the ULJ's determination that Mitchell's employment was terminated for misconduct and she is therefore ineligible to receive unemployment benefits. *See* Minn. Stat. § 268.095, subd. 4(1) (2008) (stating that employees who are discharged for misconduct are not eligible for benefits).

Mitchell asserts that she was unaware of how her hearing was to be conducted and implies that she thought that she would have an additional opportunity to make a statement to the ULJ. The ULJ has a duty to "exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing" and "ensure that relevant facts are clearly and fully developed." Minn. R. 3310.2921 (2009). The record reflects that the ULJ gave Mitchell an opportunity to respond to the evidence presented by PNC during the hearing. On this record, we conclude that Mitchell had a sufficient opportunity to present her case, and the hearing was conducted fairly.

**Affirmed.**