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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2408**

Bonnie B Holbrook,
Relator,

vs.

Maschka, Riedy & Ries PLLP,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 13, 2009
Reversed and remanded
Peterson, Judge**

Department of Employment and Economic Development
File No. 11509 07

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Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

Relator challenges the decision of an unemployment law judge (ULJ) that she is disqualified from receiving unemployment benefits because she was discharged for employment misconduct. We reverse and remand for findings on credibility determinations.

FACTS

Relator Bonnie Holbrook worked for respondent law firm Maschka, Riedy & Reis, PLLP (MR&R) running errands and doing clerical and transcription work. Holbrook was scheduled to work Monday through Friday from 8:30 a.m. to 5:15 p.m. She reported directly to the office administrator, Annetta Skogen.

In 2006, Holbrook had numerous absences from work. During Holbrook's annual review in January 2007, Skogen and the managing partner, Jack Riedy, warned Holbrook that her employment would be terminated if her attendance did not improve. During the review, Riedy also told Holbrook that the partners suspected her of using drugs or alcohol. Holbrook denied the allegations.

For the next month or two, Holbrook's attendance improved. But by spring, it declined again. Skogen testified that Holbrook was tardy or had unscheduled absences 23 times from January 1, 2007, through April 25, 2007.

On April 25, 2007, Reidy and Skogen met with Holbrook again and issued her a written warning for poor attendance. They told her that her employment may continue only if she consented to a chemical-dependency evaluation, and if the evaluation

recommended treatment, she must cooperate. The written warning stated that MR&R would hold Holbrook's job for her until she finished any recommended treatment program.

Holbrook underwent the evaluation. The evaluator thought that Holbrook was suffering from depression and stress and recommended a mental-health examination. Holbrook testified that she followed the evaluator's recommendations by undergoing a psychiatric evaluation and going in for a second appointment and that she was awaiting the results of those appointments when her employment was terminated. Skogen testified that MR&R never received a report that Holbrook had undergone a psychiatric evaluation. MR&R terminated Holbrook's employment on Wednesday, June 20, 2007, for poor attendance.

The incidents that prompted the termination occurred on the previous Friday, Monday, and Tuesday, while Skogen was on vacation. On Friday morning, Holbrook asked Skogen if she could leave work at noon to give her friend a ride. Skogen explained to Holbrook that because four secretaries were gone, MR&R needed her to do transcription work and mail duties. Skogen, nevertheless, agreed to let Holbrook leave at 2:00, as long as she returned at 3:00 to continue working. Skogen then left for her vacation. The ULJ found that Holbrook left at 2:00 but did not return, or else returned and merely left a note for another employee to do the mail. Holbrook testified that she left work at 3:00 and returned at 3:45 and that she then spoke with the switchboard operator, who told her that there was no transcription work. She then delegated her mail duties to another employee before leaving at 4:15.

On Monday, without telling any of the partners, Holbrook left work at 11:00 and returned at 1:00. She then left for the day at 2:45, again without telling any of the partners. On Tuesday, Holbrook overslept and arrived at work at 9:45. She left work at noon without telling anyone except the receptionist.

The ULJ concluded that Holbrook is ineligible to receive unemployment benefits because MR&R discharged her for employment misconduct. The ULJ affirmed on reconsideration and denied Holbrook's request for a rehearing. This certiorari appeal followed.

DECISION

This court may affirm the ULJ's decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights "may have been prejudiced because the findings, inferences, conclusion, or decision are . . . affected by . . . error of law," "unsupported by substantial evidence in view of the entire record as submitted," or "arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d)(4)-(6) (2008). This court defers to the ULJ's conclusions regarding conflicts in testimony and the inferences to be drawn from testimony. *Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007).

Whether an employee committed 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." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court will not disturb factual findings that are supported by substantial evidence. *Id.* But whether an employee's act constitutes

disqualifying misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

An employee who was discharged for misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). “Employment misconduct” is defined as

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.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, . . . or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Id., subd. 6(a) (2006).

ULJ’s Conduct of Hearing

Holbrook argues that during the hearing, the ULJ failed to ensure that all relevant facts were fully developed and failed to assist Holbrook with the presentation of evidence. *See* Minn. Stat. § 268.105, subd. 1(b) (2006) (ULJ shall ensure that all relevant facts are clearly and fully developed); Minn. R. 3310.2921 (2007) (ULJ should assist unrepresented parties in presentation of evidence and must exercise control over the hearing procedure to protect parties’ rights to fair hearing and to ensure that relevant facts are clearly and fully developed). Holbrook also contends that a timesheet that she submitted before the hearing was not made available to the ULJ and that her requests to subpoena witnesses were ignored.

During the hearing, the ULJ told Holbrook that she could mark any documents that she had, but Holbrook did not offer the timesheet as evidence. However, Holbrook did testify about the contents of the timesheet. Although not having the timesheet available at the hearing was error, Holbrook has not shown prejudice. *See Ywsyf*, 725 N.W.2d at 530 (relator not entitled to reversal when she failed to show prejudice to substantial rights).

Holbrook also requested the presence of seven witnesses. The ULJ may issue subpoenas to compel the attendance of witnesses but may deny a subpoena request “if the testimony or documents sought would be irrelevant, immaterial, or unduly cumulative or repetitious.” Minn. R. 3310.2914, subp. 1 (2007). In denying Holbrook’s request for reconsideration, the ULJ found that an additional hearing to subpoena the witnesses was not necessary because their testimony was not pivotal and would not change the outcome. Holbrook has not demonstrated on appeal that she was prejudiced by the denial of her subpoena request or that she did not receive a fair hearing.

Substantial Evidence

Holbrook argues that the ULJ’s factual findings are not supported by substantial evidence. We disagree.

The ULJ concluded that MR&R terminated Holbrook for poor attendance and that “[in] the final incidents [Holbrook] knew [Skogen] was on vacation and during that time she was leaving early and was tardy.” The ULJ found that this conduct “display[ed] clearly a serious violation of the standards of behavior that [MR&R] had a right to

reasonably expect of her,” and thus constituted employment misconduct. Substantial evidence in the record supports this finding.

Because employers have the right to expect their employees to work when scheduled, both absence and tardiness may be employment misconduct. *See, e.g., Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986) (“[A]n employee engages in misconduct if he is absent even once without notifying his employer.”); *Evenson v. Omnetic’s*, 344 N.W.2d 881, 883 (Minn. App. 1984) (holding that repeated tardiness, combined with employer’s warnings, is misconduct for purposes of unemployment compensation).

Holbrook argues that her actions in the days leading up to her termination were not employee misconduct. She contends that leaving work early on Friday was a single incident that did not have a significant adverse impact on MR&R. On Friday, Skogen gave Holbrook permission to leave work to give her friend a ride, as long as she returned immediately afterwards and continued working. Based on Skogen’s testimony, the ULJ found that Holbrook either did not return or returned only to leave a note delegating her mail duties to her co-worker.

In light of Holbrook’s history of leaving work early, leaving early on Friday was not a single incident. Holbrook argues that her history of leaving work early should not be considered because the April 2007 agreement in which MR&R told Holbrook that it would hold her job until she finished any treatment, “wipes the slate clean” of Holbrook’s past attendance problems. But Holbrook cites no authority for this argument, and we have not found any. Furthermore, even if leaving early on Friday was a single incident,

by directly violating Skogen's orders, Holbrook demonstrated a lack of concern for her employment. *See Fresonke v. St. Mary's Hosp.*, 363 N.W.2d 328, 330 (Minn. App. 1985) (holding that employee engaged in misconduct despite fact that failure to return to work was isolated incident because conduct was in deliberate and direct contravention of employer's directive to return to work).

Holbrook argues that she left work early on Monday and Tuesday because of illness and that she gave proper notice to the receptionist. On Monday, Holbrook left work at 11:00 and returned at 1:00, and then left for the day at 2:45. On Tuesday, Holbrook overslept and did not arrive at work until 9:45 and then left for the day at noon. She did not notify any partner that she was leaving because of illness on either day; she only told the receptionist.

"[A]bsence because of illness or injury *with proper notice to the employer* [is] not employment misconduct." Minn. Stat. § 268.095, subd. 6(a) (emphasis added). Skogen testified that both the employee handbook and customary practice required Holbrook to give notice to a partner when Skogen is on vacation. Holbrook testified that notifying the receptionist was customary practice. In reviewing the ULJ's decision, this court defers to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344. Skogen's testimony provides substantial evidence supporting the ULJ's finding that Holbrook did not give proper notice.

Holbrook argues that her oversleeping on Tuesday was inadvertent or because of incapacity resulting from medication problems. But in *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985), this court concluded that chronic and excessive

absences were misconduct even though the employee had no control over the cause of her final absence. Holbrook was tardy, left early, or had unscheduled absences 23 times from January 1, 2007, through April 25, 2007.

Credibility Findings

Holbrook argues that the ULJ erred by failing to articulate reasons for discrediting her testimony. “Credibility determinations are the exclusive province of the ULJ.” *Skarhus*, 721 N.W.2d at 345. But “[w]hen the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the [ULJ] must set out reasons for crediting or discrediting that testimony.” Minn. Stat. § 268.105, subd. 1(c). Holbrook contends that her credibility had a significant effect on the outcome of the ULJ’s decision because the credibility determination supported the conclusion that Holbrook failed to give proper notice when Skogen was on vacation. We agree.

Holbrook testified that when Skogen was on vacation, it was customary to notify a receptionist about leaving. Skogen testified that customary practice and the employee handbook required employees to notify a partner. But the employee handbook was not an exhibit at the hearing before the ULJ. The ULJ credited Skogen’s testimony about the customary practice and found that “Holbrook knew she had to get permission from . . . Riedy or one of the partners.”

Holbrook’s credibility regarding the practice of notifying a receptionist about leaving when Skogen was on vacation had a significant effect on the ULJ’s decision because the ULJ found that MR&R fired Holbrook for attendance problems, some of

which were because she did not give proper notice to a partner in the days immediately before her termination, including Friday. Therefore, the ULJ failed to comply with Minn. Stat. § 268.105, subd. 1(c), and we must remand for findings regarding the ULJ's credibility determinations. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (remanding for credibility findings where credibility was central to misconduct determination and ULJ made no specific credibility findings).

Denial of New Hearing

Holbrook argues that because she submitted with her request for reconsideration new evidence that would have demonstrated that certain factual findings were false and would have changed the outcome of the decision, the ULJ abused her discretion in denying the request for reconsideration and an additional evidentiary hearing. Holbrook identifies several reasons why she requested reconsideration, but her brief only addresses the effect that two new documents, (a chemical-use assessment and an office memorandum from Skogen) would have on the outcome of the decision.

In deciding a request for reconsideration, the unemployment law judge shall not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing conducted under [Minn. Stat. § 268.105, subd. 1].

The unemployment law judge must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or (2) would show that the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

Minn. Stat. § 268.105, subd. 2(c) (2006). We defer to the ULJ's decision whether to hold an additional evidentiary hearing and will reverse the decision only for an abuse of discretion. *Skarhus*, 721 N.W.2d at 345.

Holbrook submitted the chemical-use assessment and the office memorandum to refute the ULJ's finding that MR&R was "not aware of any particular mental health issue such as depression or stress, or that Holbrook was missing work regarding it." Holbrook contends that "[e]vidence that led the ULJ to this finding was false." But Holbrook does not identify what evidence led the ULJ to this finding or explain how (1) the two documents would show that the evidence that was submitted at the hearing was likely false and (2) the likely false evidence had an effect on the outcome of the decision. Consequently, Holbrook has not shown that the ULJ abused her discretion by denying her request for reconsideration and an additional evidentiary hearing to consider the two documents.

Reversed and remanded.