STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0414

Mahamed Abdulle Omar,
Relator,

vs.

Transit Team Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 14, 2009
Affirmed
Lansing, Judge

Department of Employment and Economic Development
File No. 418912-4

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Transit Team Inc., 1154 North Fifth Street, Minneapolis, MN 55411-4304 (respondent)

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Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

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

LANSING, Judge

Mahamed Omar appeals, by writ of certiorari, an unemployment-law judge's determination of benefits ineligibility based on violation of his employer's absence-notification policy. Omar also appeals the denial of his request for reconsideration. Because substantial evidence supports the determination that Omar's three consecutive no-call, no-show absences constituted employment misconduct and that additional evidence Omar sought to submit on reconsideration would not change the ineligibility decision, we affirm.

F A C T S

Transit Team, Inc. employed Mahamed Omar as a driver from June 2006 to August 2007. When Omar was hired, he signed a form acknowledging receipt of the employee handbook. The handbook set forth Transit Team's absence policy that required the employee to notify a dispatcher before the start of the employee's shift of any absence that had not been preapproved. Under the policy, three consecutive no-call, no-show absences are grounds for discharge.

Omar's four-day work week extended from Thursday through Sunday. On Thursday, August 2, 2007, Omar did not report for his scheduled shift, and he did not notify anyone of his absence. The following day, August 3, he failed to report for his 5:00-to-noon shift and did not notify anyone before his shift started. Sometime between 10:00 and 11:00 a.m., he called the dispatcher and said that his children were sick. Following that phone call, he did not report to work and did not notify anyone of his

absences on Saturday, August 4 or Sunday, August 5. When Omar came to work on Thursday, August 9, the dispatcher sent him home. Later that day, Omar called the vice president, who told him his job was terminated because of his no-call, no-show absences on August 2, 3, and 4.

Omar applied for unemployment benefits, and the Department of Employment and Economic Development concluded that he was ineligible because his absences without proper notice constituted employment misconduct. Omar appealed.

At the hearing, Omar testified that he worked on Monday, July 30 and Tuesday, July 31—his usual days off—because the dispatcher asked him to work. Omar said he agreed to work those two days because the dispatcher told him that he would not have to work August 2 and 3 and could take his sick children to the doctor. But when Omar submitted a time-off request to the vice president for August 2 through August 9, it was denied because too many other drivers were scheduled to be gone during that time.

Omar admitted that he did not call to report his absence on August 2 or before his shift started on August 3. He said that when he called between 10:00 and 11:00 a.m. on August 3, the dispatcher told him he "didn't care" if Omar came to work anymore and indicated that Omar was fired. Omar told the dispatcher that he would return to work on his "regular day . . . August 9." The unemployment law judge (ULJ) asked Omar why he did not call to notify anyone of his absence on Saturday, August 4. Omar answered, "Because [the dispatcher said], if you show up or not, I don't care, you [are] fired. . . . He was giving me attitude."

Following the evidentiary hearing, the ULJ determined that Omar was ineligible for unemployment benefits because he was discharged for employment misconduct. Omar filed a request for reconsideration, and the ULJ denied the request and affirmed the decision. Omar appeals by writ of certiorari.

D E C I S I O N

We review a ULJ's decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2007). Based on that review, we may affirm, reverse, or modify the ULJ's decision, and we may also remand the case for further proceedings. *Id.*

I

Omar first challenges the ULJ's determination that he was discharged for employment misconduct. Employment misconduct includes "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." Minn. Stat. § 268.095, subd. 6(a) (Supp. 2007).

"[A]bsence because of illness or injury *with proper notice* to the employer" is not employment misconduct. *Id.* (emphasis added). But an "employer has a right to expect an employee to work when scheduled." *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984). As part of these expectations, an employer may establish and enforce reasonable rules governing employee absences. *Wichmann v. Travalia & U.S. Directives,*

Inc., 729 N.W.2d 23, 28 (Minn. App. 2007). "[R]efusing to abide by an employer's reasonable policies" generally constitutes employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

The determination of whether an employee performed the "act alleged to be employment misconduct is a fact question." *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19-20 (Minn. App. 2003). Factual findings are viewed from the perspective that is most favorable to the ULJ's decision and will be sustained if substantial evidence supports the decision. Minn. Stat. § 268.105, subd. 7(d); *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). Determining whether the act amounts to "employment misconduct is a question of law on which a reviewing court remains free to exercise its independent judgment." *Risk*, 664 N.W.2d at 20 (quotation omitted).

The record supports the ULJ's findings that Omar failed on three consecutive days to comply with Transit Team's requirement that an employee inform a dispatcher of his absence at the beginning of his shift if his absence has not been preapproved. Omar admitted that he did not report for his scheduled shifts on August 2, 3, or 4. He also did not dispute that he failed to call to report his absences at the beginning of his shift on those three days. He stated that he called to report his absence on August 3, but that he did not call until approximately five hours after his shift had started. Because Omar did not call at the beginning of his shifts on August 2, 3, or 4, he violated Transit Team's reasonable expectations set forth in the company's employee handbook.

Omar presents three arguments against the ULJ's determination, but none of the arguments withstands analysis. His first argument is that his actions do not amount to

misconduct because they were unintentional. This argument fails because the definition of misconduct in Minn. Stat. § 268.095, subd. 6(a), expressly applies to "intentional, negligent, or *indifferent* conduct." (Emphasis added); *see also id.*, subd. 6(e) (noting this subdivision's definition of employment misconduct is exclusive). Omar's second argument is that he met the policy by calling on the second day. This argument is also flawed because the policy requires employees "to call prior to the beginning of their shift each day that they [are] to be gone." This notice policy requires an employee to assess *each day* whether he is able to work. Omar's third argument is that he was not required to follow the policy because the dispatcher said he "didn't care" if Omar came to work anymore and indicated that Omar was fired. But Omar knew that the dispatcher did not have authority to override the handbook policy, approve time-off decisions, or to discharge an employee. Omar's testimony suggests that he dismissed the dispatcher's statements as mere "attitude," and Omar does not dispute that he showed up for his shift on August 9 expecting to work.

Substantial evidence supports the ULJ's determination of employment misconduct, and the record discloses no error of law.

II

Following the ULJ's initial determination, Omar filed a request for reconsideration and submitted an affidavit to support his allegation that Transit Team violated his rights under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-54 (2006). A ULJ is required to "order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing . . . would likely change

the outcome of the decision and there was good cause for not having previously submitted that evidence." Minn. Stat. § 268.105, subd. 2(c)(1) (Supp. 2007).

FMLA is a federal statute that requires covered employers to provide up to twelve weeks of leave for specific medical reasons, including to care for a child with "a serious health condition." 29 U.S.C. § 2612(a)(1)(C). FMLA does not directly address state unemployment benefits. *See* 29 U.S.C. § 2617 (setting forth enforcement provisions). But, if an employer issues an order that violates FMLA, the employee's failure or refusal to follow the unlawful order is not misconduct under the unemployment-benefits statute. *See Eyler v. Minneapolis Star & Tribune Co.*, 427 N.W.2d 758, 761 (Minn. App. 1988) (stating that "[i]t is not, as a matter of law, misconduct to fail or refuse to follow an unlawful order"). Omar argues that Transit Team issued an unlawful order under FMLA when it required him to work despite his initial request for leave and when it did not exempt him from the absence-notification policy because he was caring for his sick children. But the evidence presented on these issues is insufficient to demonstrate that the ULJ improperly denied Omar's request for reconsideration.

First, the evidence fails to show that Transit Team issued an unlawful order when it required Omar to work despite his initial request for leave. When the need for FMLA leave is foreseeable, an employee must provide his employer with advance notice sufficient to allow an employer to inquire and determine whether the employee is seeking FMLA leave. 29 C.F.R. § 825.301(c) (2007). Courts have consistently held that an employee does not provide his employer with sufficient notice when he merely describes a condition as "sick" or "not well" without providing more information. *See, e.g.*, *Carter*

v. Ford Motor Co., 121 F.3d 1146, 1148 (8th Cir. 1997) (holding that notice was insufficient when employee said he was "sick" and requested sick leave). Omar's time-off request form only stated "kids sick[]" under the "comments" section.

Second, the evidence fails to show that Transit Team likely issued an unlawful order when it required Omar to comply with the absence-notification policy. Unless compliance is impracticable, an employee must comply with his employer's absence-notification policy. *See* 29 C.F.R. § 825.303(a) (2007) (excusing noncompliance only when compliance is impracticable); *see also Chavez v. Thomas & Betts Corp.*, 396 F.3d 1088, 1104-05 (10th Cir. 2005) (holding that FMLA did not excuse employee from complying with no-call, no-show policy), *overruled on other grounds by Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 n.2 (10th Cir. 2006). The federal regulations that became effective on January 16, 2009, clarify that an employee is not "required to leave his or her child in order to report [his] absence while the child is receiving emergency treatment." 29 C.F.R. § 825.303(a) (2009), WL 29 C.F.R. s 825.303(a). On the other hand, if an employee's child has an asthma attack that requires "only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler." *Id.*

Omar testified at the hearing that he did not call in on August 2 because "I was busy, you know. My kid was sick." Although the record indicates that Omar's children were sick, that his wife does not drive, and that one of Omar's children had briefly visited a hospital emergency room on the night of August 1 because of an asthma condition, the

record provides no specific reason why it was *impracticable* for Omar to call his employer at any time on August 2 or August 4 or before 10:00 a.m. on August 3.

We conclude that Omar was not entitled to a second evidentiary hearing under Minn. Stat. § 268.105, subd. 2(c), because the testimony presented in his affidavit would not likely change the outcome of the ULJ's ineligibility decision.

Affirmed.