STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1161

Aina Giovingo,
Relator,

vs.

SMSC Gaming Enterprises,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed June 9, 2009
Affirmed
Crippen, Judge*

Department of Employment and Economic Development
File No. 20602869-3

Aina P. Giovingo, 5980 176th Street West, Farmington, MN 55024-9419 (pro se relator)

Todd M. Roen, Bluedog Paulson & Small PLLP, 5001 American Boulevard, Suite 500, Minneapolis, MN 55437 (for respondent SMSC Gaming Enterprises)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, 1st National Bank Building, Suite E200, 332 Minnesota Street, St. Paul, MN 55101-1351 (for respondent Department of Employment and Economic Development)

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

Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Crippen, Judge.

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

CRIPPEN, Judge

Relator Aina Giovingo disputes an unemployment law judge's (ULJ) decisions denying benefits and denying consideration of new evidence after a hearing. Because the ULJ's decisions are supported by the evidence in the record, we affirm.

FACTS

Relator began working in food service at Mystic Lake Casino in June 2006. Respondent SMSC Gaming operates the casino, and the hospitality division utilizes a point system for tracking and disciplining employees' absences from scheduled shifts. The system assigns points for any unscheduled absence, including illnesses for which no documentation is provided. Discipline progresses and the employee may be terminated for accruing 12 points. The system also builds in a reduction in points for periods of good attendance. Relator learned of the point system at her employee orientation.

The record shows that relator accumulated points in 2007 based on undocumented illness reports. Relator rapidly accumulated points again in January 2008, first for an absence on New Year's Day and then for her next two shifts that week. She provided no documentation of illness when she returned, and she was aware that points attributed to these absences brought her to within one point of termination. In the early morning hours of January 19, on her way home from the previous evening's shift, police stopped relator and cited her for driving with a suspended license. She called the casino and told them

she could not drive and could not work her shift later that day. Missing the shift pushed her over the 12-point mark, and her employment was terminated.

Respondent Department of Employment and Economic Development denied relator unemployment benefits because her excessive absences constituted misconduct. In a hearing before the ULJ, relator testified that she gave the casino a doctor's note after the January illness and that the January 19 absence was beyond her control. The ULJ upheld denial of benefits. Relator moved the ULJ for reconsideration and provided a note from her doctor that she obtained after the hearing. The ULJ did not consider the note and affirmed his decision.

D E C I S I O N

Relator first challenges the finding that she failed to provide proper documentation for her early January absences. Factual findings are viewed in a light favorable to the decision and will not be disturbed if supported by substantial evidence. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006); *see also* Minn. Stat. § 268.105, subd. 7(d)(5) (Supp. 2007) (authorizing reversal when decision is unsupported by substantial evidence).

The ULJ addressed the January illness, stating that relator missed seven shifts "[d]uring her last year of employment" without providing medical documentation. Substantial evidence supports this conclusion. The casino provided a copy of relator's attendance record, and the employer's witness testified that relator did not provide a note when she returned to work in January. The only contrary evidence was relator's own assertion, which the ULJ explicitly did not credit. Relator did not provide any

documentation to establish that she provided notes for any of her illnesses. Giving deference as we must to the ULJ's credibility determination, we affirm the finding that relator did not supply a note in January. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 534 (Minn. App. 2007) (noting deference given to ULJ's credibility determinations).

Relator next argues that her absences do not constitute misconduct. Whether acts amount to misconduct "is a question of law, on which a reviewing court remains free to exercise its independent judgment." *Risk v. Eastside Beverage*, 664 N.W.2d 16, 20 (Minn. App. 2003) (quotation omitted); *see also* Minn. Stat. § 268.105, subd. 7(d)(4) (Supp. 2007) (authorizing reversal when decision based on error in law).

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.* Still, 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). Therefore, 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). In general, "an employee's decision to violate knowingly a reasonable policy of the employer is misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002). A continuing pattern of absenteeism

and tardiness in the face of warnings may constitute misconduct, because it tends to show disregard of an employer's interest or lack of concern for the employment. *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985).

Here, respondent SMSC Gaming used a reasonable attendance policy: documented illnesses accrue no points; excessive absences can be remedied with improved attendance; and progressive discipline warns employees who are in danger of severe consequences. Relator knew of the policy, and she knew that she could avoid points for medical absences by providing a note when she returned. Relator had numerous unexcused absences and several serious and avoidable violations of the attendance policy in January 2008. The ULJ correctly determined that relator's circumstances, taken as a whole, constituted misconduct. Her conduct demonstrated a serious violation of her employer's reasonable standards of behavior and a substantial lack of concern for her employment.

Relator also argues that the January 19 absence should not count against her because the driver's license suspension was beyond her control. The employee's personal responsibility for an absence does warrant consideration. *See McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721, 724-25 (Minn. App. 1991) (concluding that excessive absences did not demonstrate culpable misconduct because employee made good-faith efforts to solve issues that were beyond her control). But relator has not shown that an alleged error causing her driver's license suspension was beyond her control. She also has not shown that she could not arrange for someone to cover her shift or that she could not arrange alternative transportation. Because she had accumulated

enough points that another absence could cause her to lose her job, the failure to arrange transportation is sufficient to show willfulness so as to constitute misconduct.

Finally, relator contends that the ULJ should have reopened the record to consider her newly obtained doctor's note. An employee's request for an additional evidentiary hearing may be granted only if new evidence "would likely change the outcome . . . and there was good cause for not having previously submitted that evidence." Minn. Stat. § 268.105, subd. 2(a), (c)(1) (Supp. 2007). We give deference to a ULJ's decision not to hold an additional hearing. *Ywswf*, 726 N.W.2d at 533.

Here, the ULJ found that relator "has not shown that she had good cause" for failing to acquire the doctor's note before the April hearing. The record supports this finding. She knew that the January illness-related absence contributed to her discharge. She demonstrated that she could obtain a note from her doctor about that illness, because she did so after the hearing. In fact, relator's testimony suggested that she had discussed the January illness with her doctor before the hearing, but apparently did not ask for any documentation at that time.

The ULJ did not address whether the note would have changed the outcome. But the note confirms only that relator went to the doctor on January 2. It says nothing about whether she got a note at that time or gave a note to her employer. And the policy would not allow the April note to serve as documentation for the January illness because employees must provide documentation as soon as they return to work. The April note

would not have changed the outcome of the hearing, and the ULJ did not err by denying a hearing on the subject.

Affirmed.