STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1230

John R. Schmitz,
Relator,

vs.

Simondelivers.com,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed June 16, 2009
Affirmed
Connolly, Judge

Department of Employment and Economic Development
File No. 20677083-3

Sherri D. Hawley, 13055 Riverdale Drive N.W., Suite 500, PMB 246, Coon Rapids, MN 55448; and

Jessica Slattery Karich, Winthrop & Weinstine, P.A., Suite 3500, 225 South Sixth Street, Minneapolis, MN 55402-4629 (for relator)

Simondelivers.com, Inc., c/o ADP-UCM/The Frick Co., P.O. Box 66744, St. Louis, MO 63166 (respondent)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101 (respondent department)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Relator argues that he was erroneously denied unemployment benefits because his excessive absences were unintentional, beyond his control, and did not constitute employment misconduct. He also contends that the employer's attendance policy was unreasonable. Because relator's excessive absences constituted employment misconduct, we affirm.

FACTS

Relator John R. Schmitz began working as a delivery driver for Simondelivers.com (Simondelivers) in March 2007. Relator was discharged from his employment on February 17, 2008 due to excessive absences.

Simondelivers has a no-fault attendance policy that assigns points for unexcused absences. An employee who works 10-hour shifts is subject to discharge under the policy if he accrues more than 7.25 points within a 12-month rolling period. Relator generally worked 10-hour shifts.

Relator missed numerous days of work during his employment. Relator missed one day of work because his four-year old daughter was sick and another when he could not find anyone to watch his daughter while he went to work. Relator also missed a week of work in December 2007 because his driver's license was suspended due to child-support arrears and he could not drive to work.

On January 21, 2008, relator did not call in absent or report for work. Relator, who normally worked morning shifts on Mondays, was scheduled to work the night shift

that day. Although this shift was highlighted on the schedule, relator did not notice it and assumed that he was not scheduled for that day. After missing his shift on January 21, his employer issued relator a final notice warning him that any further unscheduled absences would result in termination of employment.

In January 2008, relator received a phone call from the police department advising him that a Jeep, registered in his name, had been driven by his ex-wife's fiancé while the fiancé was intoxicated. The Jeep had been given to his ex-wife in the divorce settlement, but relator paid to get the Jeep out of the impound lot. He then drove the Jeep until February 17, when his ex-wife appeared with an attorney and a law enforcement officer at his home to confiscate the Jeep, which legally belonged to her. In the early morning hours of February 18, 2008, relator then called his employer to inform them that he did not have a method of transportation to get to work. He asked if someone could pick him up, but that was not possible. Relator was subsequently discharged for poor attendance.

Relator filed for unemployment benefits, which were denied due to absenteeism that was avoidable or could have been avoided such that it constituted employment misconduct. Relator appealed this decision and a telephone hearing was held with an unemployment-law judge (ULJ).[1] The ULJ affirmed the initial department decision, finding relator ineligible for unemployment benefits due to employment misconduct. Relator requested reconsideration, and the ULJ affirmed her original decision. This appeal follows.

[1] Simondelivers did not participate in this hearing.

D E C I S I O N

Relator argues that (1) he did not commit misconduct because each absence was unintentional and outside of his control; (2) even taken together, the absences do not constitute misconduct under his employer's attendance policy; and (3) if the absences did violate the employer's policy, that policy was not reasonable as applied to relator. Respondent Department of Employment and Economic Development (DEED) asserts that the absences constituted employment misconduct under Minnesota law and relator was therefore correctly determined to be ineligible for unemployment benefits.

When reviewing the decision of a ULJ, this court may affirm the decision, remand it for further proceedings, or reverse or modify it if the substantial rights of the petitioner have been prejudiced because the findings, inferences, conclusion, or decision are "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d) (Supp. 2007).

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 the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court views 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). This court also gives deference to the

credibility determinations made by the ULJ. *Id*. As a result, this court will not disturb the ULJ's factual findings when the evidence substantially sustains them. Minn. Stat. § 268.105, subd. 7(d). But whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo. *Scheunemann*, 562 N.W.2d at 34.

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). Employment misconduct means "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." *Id.*, subd. 6(a) (Supp. 2007). The statute further articulates:

> Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Id.

"An employer has the right to establish and enforce reasonable rules governing absences from work. Refusing to abide by an employer's reasonable policies generally constitutes disqualifying employment misconduct." *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007) (citations omitted).

Relator was absent numerous times during his employment with Simondelivers. The ULJ ultimately determined that the absences that occurred due to relator's daughter's illness and a last-minute loss of childcare were unavoidable and not employment misconduct. However, the ULJ concluded that the week-long absence in December, the missed shift in January, and the inability to make it to work because of a lack of transportation in February were avoidable and therefore constituted employment misconduct. Relator argues that each incident was unintentional and out of his control.

Relator was absent for a week in December because he lost his driver's license due to unpaid child support. Relator claims that because the notice went to his ex-wife's house, and she did not notify him of his license being revoked until it was too late to avoid the suspension, this absence was out of his control. We disagree. As stated by the ULJ: "It was [relator's] responsibility to make sure that his child support payments were up-to-date and to see to it that the child support office had his new address so that his license would not be revoked." Being absent for a week because relator failed to take the necessary steps to insure that his driver's license remained valid is a "serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." Minn. Stat. § 268.095, subd. 6(a). This is especially true considering that relator was employed as a delivery driver.

Relator was a no-call, no-show for a Monday night shift. Relator claims that he did not notice the shift on his schedule, even though it was highlighted, because he never worked the Monday night shift. It was relator's responsibility to check his schedule

closely. He failed to do so and missed an entire shift. It was reasonable for Simondelivers to expect that its employees would check their schedules and appear at work as scheduled. Failing to appear for an entire shift is a serious violation of the standards of behavior that Simondelivers had a right to expect from relator. Following this unexcused absence, relator was warned that any other absences would result in termination.

On February 18, 2008, relator called Simondelivers to inform them that he did not have transportation to work. No alternative arrangements could be made, and relator missed his shift. Relator argues that his vehicle was repossessed by his ex-wife, and thus his lack of transportation was unintentional and out of his control. Again, we disagree. The ULJ clearly articulated its reasoning:

> [Relator] was responsible for securing reliable transportation to get to work. [Relator] knew that the Jeep Cherokee had been awarded to his ex-wife in the divorce; it was his responsibility to have his name removed from the title and transfer the title to his ex-wife. [Relator] also had a responsibility to uphold the divorce settlement and return possession of the Jeep Cherokee to his ex-wife after he got it released from the impound lot. [Relator] himself made the decision to rely on a vehicle that he did not rightfully possess to get to work.

Relator's absences, other than those involving childcare, were within his control and constituted a "serious violation of the standards of behavior the employer has the right to reasonably expect of the employee." *Id.*

Relator argues that, even taken together, the absences do not constitute misconduct under his employer's attendance policy. He asserts that because the ULJ concluded that

the absences relating to childcare were not misconduct, relator had not accumulated enough points to be terminated according to the attendance policy.[2] The question to be answered by this court, however, is not whether relator should have been terminated under the policy, but whether he qualifies for unemployment benefits. *See Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981) ("Here the issue is not whether the employees should have been terminated. We are only considering whether, now that both are terminated, there should be unemployment compensation. . . ."). As stated in Minn. Stat. § 268.095, subd. 6(e) (Supp. 2007), "[t]he definition of employment misconduct provided by this subdivision shall be exclusive and no other definition shall apply." Relator's absences qualify as misconduct under the definition found in the statute. These absences do not cease being employment misconduct simply because relator may have accumulated fewer than the minimum number of points needed for termination under his employer's attendance policy. Furthermore, although relator's childcare absences are not considered employment misconduct under Minnesota law it does not follow that they are ineligible for points under that attendance policy. Because we are only considering whether unemployment benefits were properly denied, and not whether relator was properly terminated, relator's argument that the absences do not constitute misconduct under the attendance policy is misplaced.

[2] Relator accumulated points as follows: 1.25 points for a sick child, 1.25 points for cancelled childcare, 1.25 points for the driver's license suspension week, 4.5 points for the no-call, no-show shift, and 1.25 points for the shift missed due to a lack of transportation. This amounted to 9.5 points, and because only 7.25 points were required for termination, relator was terminated. If the childcare points are not considered, relator had only accumulated seven points, which is not enough for termination under Simondelivers.com's attendance policy.

Lastly, relator argues that Simondelivers' attendance policy was not reasonable as applied to him. He argues that a single absence brought him from the level of no warning, 3.75 points, to a level justifying termination, 7.75 points. Relator asserts that this was unreasonable. What relator fails to note, however, is that he was not terminated after the absence that brought his point total to 7.75. Rather, he was given a final notice warning him that any further absences would result in termination. Relator's employment was subsequently terminated because of an additional absence. Therefore, application of this policy was not unreasonable. Furthermore, as previously articulated, our task is to determine if unemployment benefits were properly denied, not whether application of the attendance policy was unreasonable.

Relator was absent three times over the course of three months due to circumstances within his control. This was "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee" and therefore constituted employment misconduct. Minn. Stat. § 268.095, subd. 6(a).

Affirmed.