STATE OF MINNESOTA
IN COURT OF APPEALS
A09-692

Douglas Oyen,
Relator,

vs.

UCare Minnesota,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 8, 2009
Reversed and remanded
Toussaint, Chief Judge
Dissenting, Halbrooks, Judge

Department of Employment and Economic Development
File No. 21716217-3

Douglas J. Oyen, 10705 45th Avenue North, Plymouth, MN 55442-3124 (pro se relator)

UCare Minnesota, Post Office Box 52, Minneapolis, MN 55440-0052 (respondent)

Lee B. Nelson, Department of Employment and Economic Development, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351 (for respondent DEED)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Johnson, Judge.

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

TOUSSAINT, Chief Judge

By writ of certiorari, relator Douglas Oyen challenges the decision of the unemployment-law judge (ULJ) that he was discharged for misconduct and is therefore ineligible for unemployment benefits. Respondent Department of Employment and Economic Development (DEED) concedes error and requests that the matter be remanded for further proceedings. We agree. Because a key witness, relator's coworker, did not answer his telephone at work when called to testify, although he was at work and under the control of the employer, respondent UCare Minnesota at the time of the hearing, we reverse and remand.

D E C I S I O N

This court may reverse or remand a decision of a ULJ if "the substantial rights of the petitioner may have been prejudiced" because the decision was made on unlawful procedure, affected by error of law, unsupported by substantial evidence, or arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d) (2008).

The issue here is whether relator's absence from work constituted misconduct. An employee who is discharged for misconduct is not eligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). "Employment misconduct" is "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) displays clearly a substantial lack of concern for the employment." Minn. Stat. § 268.095, subd. 6(a) (2008). "An employer has the

right to establish and enforce reasonable rules governing absences from work," and refusal to comply with these reasonable policies can constitute misconduct. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). Even "a single absence from work may constitute misconduct when an employee has not actually received permission to be absent." *Del Dee Foods, Inc. v. Miller,* 390 N.W.2d 415, 417 (Minn. App. 1986). But an employee's act is not misconduct if it is a single incident that does not have a significant adverse impact on the employer or if the employee made a good-faith error in judgment if judgment was required. Minn. Stat. § 268.095, subd. 6(a). Whether an employee engaged in specific actions is a question of fact, but whether those acts constitute misconduct is a question of law reviewed de novo. *Scheunemann v. Radisson S. Hotel,* 562 N.W.2d 32, 34 (Minn. App. 1997).

Relator appealed the initial determination that he was ineligible for unemployment benefits, and a hearing was held before the ULJ. It was undisputed that relator, a programmer, submitted a request for vacation over the 2008 Christmas holiday. His supervisor denied him permission to take off December 26, 2008, because his coworker, also a programmer, had already been granted the day off and the supervisor did not want both programmers gone on the same day. After relator told his coworker of the supervisor's decision, the coworker offered to tell the supervisor that he would "cover" for relator on December 26, did so, and then reported to relator what he had told the supervisor. Relator did not confirm this arrangement with his supervisor but took December 26 off. Shortly after he returned to work, he was discharged for failing to report to work on December 26 after his supervisor had denied his request to take that

day off.

The supervisor gave conflicting testimony as to whether she knew of the coworker's offer to cover for relator on December 26 and could not recall the coworker's response when she asked him, after the fact, whether he had offered to cover for relator. She acknowledged that the coworkers had been allowed to cover for each in the past, with two weeks' notice and her approval.

Although the coworker had told relator a few days before the hearing that he would testify, he did not answer his telephone when the ULJ called him three times. The employer's human-services specialist confirmed that the coworker was at work that day. Relator testified to his own belief that the coworker did not testify because he feared for his job if his testimony confirmed relator's account. The supervisor testified that she had not discussed with the coworker whether he would be a witness for relator.

The ULJ found that, after relator returned from vacation, the supervisor told relator that the request for his coworker to cover for relator had not been cleared with her and that she was not aware that the coworker had been covering for relator that day. The ULJ ruled that, because relator had never cleared with the supervisor his arrangement to have his coworker cover for him on December 26 and did not clarify what "cover" meant, he engaged in misconduct, rendering him ineligible for unemployment benefits. The ULJ did not refer to the coworker's failure to testify.

Relator requested reconsideration, asserting, in relevant part, that he believed the employer had dissuaded his coworker from testifying and that his supervisor had known the coworker was going to cover for him. The ULJ affirmed on reconsideration.

On appeal, relator argues that he did not commit misconduct because he relied on his coworker's commitment to cover for him, his supervisor was aware of this fact, and it was consistent with the company's policy to allow one employee to cover for another. He asserts that the ULJ's key findings are contradictory and/or unsupported by the evidence, and he contends that the coworker's testimony would have been favorable to him, as shown by the fact that his coworker had agreed to testify but then failed to answer his telephone when the ULJ called. Relator also asserts that, even if his failure to confirm the arrangement with his supervisor constituted misconduct, it should not render him ineligible for benefits because it was a single incident and the employer failed to demonstrate that it had a significant adverse impact. He asks this court to reverse the ULJ's decision.

DEED, acknowledging problems with the testimony and findings and the possibility that relator's coworker may have been dissuaded from testifying by the employer, asks this court to reverse and remand for an evidentiary hearing in which the ULJ ensures that the coworker's testimony is taken, by subpoena if necessary. The employer has not participated in this appeal.

We note that the coworker's testimony likely would be relevant to whether the supervisor knew of and agreed to the coworker's offer to cover for relator on December 26. We consider his failure to testify in the context of the ULJ's duty to "ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2008). The ULJ is especially bound to "assist unrepresented parties in the presentation of evidence," as well as to "exercise control over the hearing procedure in a manner

that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2007). Here, several days before the hearing, relator had obtained the coworker's informal agreement to testify, although no subpoena had been obtained. The employer's human-services representative told the ULJ that the coworker was at his place of employment that day. Yet the ULJ did not ask the employer to make the employee available to testify. This type of "significant procedural defect" so prejudices a party's ability to present his or her case that a reversal and remand is required. *See, e.g.*, *Thompson v. County of Hennepin*, 660 N.W.2d 157, 161 (Minn. App. 2003) (reversing and remanding because failure of allegedly subpoenaed witnesses to appear constituted significant procedural defect).

Relator, however, urges this court to reverse on the record and rule either that no misconduct occurred or that, if it did, it was a single incident without adverse impact on the employer, so that he is eligible for benefits. But because we see fact issues that must be decided by the ULJ, we reverse and remand so that the coworker's testimony can be taken and the ULJ can make findings and a determination on the issue of eligibility. On remand, a subpoena should be issued to ensure that the coworker will testify. *See* Minn. Stat. § 268.188(a) (2008) (giving commissioner authority to issue subpoenas to compel attendance of individuals); Minn. R. 3310.2914, subp. 1 (2007) (further addressing issuance of subpoenas).

Reversed and remanded.

HALBROOKS, Judge (dissenting)

While I agree with the majority on a reversal of the ULJ's decision in this matter, I respectfully dissent on the sole issue of whether or not a remand is necessary. I would simply reverse without remanding and hold that, under the facts as found by the ULJ, relator did not commit misconduct rendering him ineligible to receive unemployment benefits.

Like the majority, I am concerned by the fact that the coworker, who had previously agreed to testify, did not answer the phone calls from the ULJ, despite the ULJ's three attempts to reach him. This is troubling, particularly when it is undisputed that the coworker was present at work the day of the hearing and when there was no attempt by the employer to produce him or further inquiry by the ULJ. The ULJ should have made credibility determinations as required under Minn. Stat. § 268.105, subd. 1(c) (2008), when the credibility of the supervisor's and the relator's testimony was at issue. Nonetheless, the facts as found by the ULJ are sufficient to review the decision.

I agree that even a single absence from work without permission can constitute misconduct. *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417-18 (Minn. App. 1986). And an employer can undoubtedly "establish and enforce reasonable rules governing absences from work," which the employee can refuse to comply with only at his or her peril. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). But here, relator did not refuse to follow rules regarding absences from work as set out by the employer, and his actions should not be deemed misconduct.

After relator's initial request for a day off on December 26 was denied by his supervisor because his coworker already had the day off, relator spoke to his coworker. As found by the ULJ: the coworker told relator that he would talk to the supervisor and cover for him that day; the coworker spoke with the supervisor and told her that if she needed his help on December 26, she could call him at home; and the coworker then returned to relator's desk and advised him that he had told the supervisor that she could call him if she needed help that day. As the supervisor acknowledged, relator and his coworker had been allowed to cover for each other in the past, with two weeks' notice and her approval. Here, the arrangements were made with more than two weeks' notice and, according to the coworker, with the supervisor's approval. While it undoubtedly would have been prudent for relator to have confirmed this arrangement with the supervisor, the failure to do so cannot be seen in any way as constituting misconduct. At worst, it constituted an error in judgment, which does not amount to misconduct. Minn. Stat. § 268.095, subd. 6(a) (2008); *see Benson v. Iowa Beef Processors*, 348 N.W.2d 394, 397 (Minn. App. 1984) (holding in relevant part that when an employee failed to go to a supervisor and instead relied on fellow workers' instructions to perform a job he was unfamiliar with, resulting in failure to comply perfectly with procedures, it constituted at most a good-faith error of judgment and not misconduct).

Finally, as relator points out, a single incident that does not have a significant adverse impact on the employer is not misconduct. Minn. Stat. § 268.095, subd. 6(a). The employer provided only general testimony that the supervisor had an urgent need for a programmer to resolve an issue that arose on December 26. To determine whether an

incident had a significant adverse impact, the employee's conduct must be examined in the context of the employee's job responsibilities. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App 2006) (holding that when a cashier stole a minimal amount of food, there was an adverse impact on the employer, who could no longer trust her to handle money and accurately account for items sold to customers and employees). Here, there was no specific testimony as to the impact of relator's absence. *See Pierce v. DiMa Corp. (1992),* 721 N.W.2d 627, 630 (Minn. App. 2006) (concluding that when an employer provided no evidence that employee's single violation of employer's cash-register policy had a significant adverse impact on employer, employee's act did not constitute disqualifying misconduct).

I would reverse and hold that relator is eligible for unemployment benefits without the need to remand for additional testimony or findings.