STATE OF MINNESOTA
IN COURT OF APPEALS
A09-712

Shirley Smith,
Relator,

vs.

Von Maur Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed March 9, 2010
Affirmed
Stauber, Judge

Department of Employment and Economic Development
File No. 21452742-3

Thomas H. Boyd, Joel K. McFarlane, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for relator)

Von Maur Inc., St. Louis, Missouri (respondent)

Lee B. Nelson, Amy R. Lawler, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent Department)

Considered and decided by Stoneburner, Presiding Judge; Johnson, Judge; and Stauber, Judge.

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

STAUBER, Judge

On certiorari appeal from the decision of the unemployment law judge (ULJ) that relator was ineligible to receive unemployment benefits because she was discharged for employment misconduct, relator argues that her repeated absences and tardiness did not constitute employment misconduct because they were not intentional and were due to circumstances and conditions beyond her control. We affirm.

FACTS

In November 1997, relator Shirley Smith began working in the customer service department at Von Maur in Illinois. Approximately six years later, relator transferred to Minnesota to work at the Von Maur facility in Eden Prairie. Relator lived in Minneapolis, and took three buses to reach Von Maur in Eden Prairie. Relator often arrived late due to adverse traffic, lack of transportation, or weather conditions. Relator also frequently missed work because she often caught colds allegedly from working in the employer's air conditioned workplace, and because she had to care for her granddaughter when her daughter was sick. Consequently, relator received a number of warnings about her attendance and tardiness, including a warning in 2005 and three warnings in 2006.

In an effort to alleviate her problems with attendance and tardiness, relator took the earliest departing bus from her home. Relator also arranged to ride with a co-worker, and eventually purchased a car of her own. However, her vehicle was stolen in October 2008, shortly after she purchased it, and relator could not afford to replace it. Despite

relator's problems with attendance and tardiness, relator always called her employer to report her situation.

Between February 2006, and June 18, 2008, relator was tardy approximately 60 times, including 13 late arrivals between November 3, 2007, and June 18, 2008. On June 18, 2008, relator received a written warning about her tardiness and absenteeism. On October 24, 2008, relator received a written warning for accumulating 25 absences during the prior six months. On November 13, 2008, relator was again late, arriving nearly two hours after her shift was scheduled to start. As a result, relator was discharged for irregular attendance.

Relator established a benefit account with respondent Minnesota Department of Employment and Economic Development (DEED), and a DEED adjudicator determined that relator was eligible for benefits. Von Maur appealed that determination and a de novo hearing was held on the matter. Following the hearing, the unemployment law judge (ULJ) reversed, concluding that relator was discharged for employment misconduct and, therefore, ineligible for unemployment benefits. Relator filed a request for reconsideration with the ULJ, who affirmed the decision that relator was ineligible for benefits. This certiorari appeal followed.

D E C I S I O N

We may reverse or modify the decision of a ULJ if the substantial rights of the petitioner may have been prejudiced because the ULJ's findings, inferences, conclusions, or decision are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4)-(5) (2008). Substantial evidence means "(1) such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Employees discharged for misconduct are disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd, 4(1) (2008). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed the alleged act is a fact question. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). We defer to the ULJ's credibility determinations and findings of fact. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

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, 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.

Minn. Stat. § 268.095, subd. 6(a) (2008).

Relator argues that there is no evidence that she engaged in "intentional or negligent or indifferent" employment conduct. Rather, relator argues that the record establishes that she was "proactive and conscientious in her efforts" to meet her employer's expectations. Thus, relator argues that the ULJ erred in concluding that she was discharged for employment misconduct.

We agree that there is little evidence that her conduct was intentional. But the statute does not require that the conduct at issue be intentional. *See* Minn. Stat. § 268.095, subd. 6(a). Rather the statute specifically refers to "intentional, *negligent, or indifferent conduct*." *Id.* (emphasis added). Moreover, caselaw provides that even if not willful or deliberate, excessive absenteeism and tardiness may amount to misconduct. *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985). Likewise, excessive tardiness or absences, particularly after warnings, may evidence an employee's disregard of an employer's interest. *Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App. 1984).

Here, the record reflects that relator was consistently late for work, including approximately 60 late arrivals between February 2006, and June 18, 2008. The record also reflects that relator frequently missed work due to illness or other circumstances. Relator received many warnings, and despite her efforts to improve her tardiness, relator continued to be late for her shift. An employer has a right to reasonably expect that its

employees will be at work on time. Despite many warnings, relator was consistently late. Although relator made efforts to improve her conduct, her failure to improve constitutes negligent and indifferent conduct. Therefore, the ULJ did not err in concluding that relator was discharged for employment misconduct.

Affirmed.