STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1699

Jennifer Pflipsen,
Relator,

vs.

Hellmuth & Johnson PLLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed July 13, 2010
Affirmed
Wright, Judge

Minnesota Department of Employment and Economic Development
File No. 22790743-3

Mary R. Vasaly, Maslon, Edelman, Borman & Brand, Minneapolis, Minnesota (for relator)

John J. Steffenhagen, Hellmuth & Johnson, Eden Prairie, Minnesota (for respondent Hellmuth & Johnson)

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Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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

WRIGHT, Judge

Relator challenges the determination of the unemployment law judge (ULJ) that relator is ineligible to receive unemployment benefits because she committed employment misconduct. We affirm.

FACTS

Relator Jennifer Pflipsen worked at the law firm of Hellmuth & Johnson (Hellmuth) from March 10, 2006, to June 4, 2009. Beginning in May 2007, Pflipsen worked as a legal assistant for two partners in the firm. Because both partners began their work day no later than 8:30 a.m., Pflipsen was scheduled to begin at 8:00 a.m.

In August 2008, Pflipsen began to arrive late for work on a regular basis. According to Pflipsen, problems in her personal life resulted in major depression, which interfered with her ability to sleep. Consequently, it was difficult for her to wake up in the morning. Pflipsen informed her supervisor, Susan Marsh, of her medical condition, and Marsh accommodated Pflipsen's tardiness by not taking any disciplinary action.

Between January 5 and February 3, 2009, Pflipsen was tardy for work every day. Because Pflipsen's tardiness disrupted his practice, one of the partners with whom Pflipsen worked asked Marsh to review Pflipsen's work schedule with her. On February 3, Marsh stressed the importance of arriving at work on time and changed Pflipsen's start time to 8:30 a.m. The next day, Pflipsen was not tardy. But she arrived late the following two days, causing Marsh to speak with her again about the importance of arriving at work on time. Of the 45 work days between February 9 and April 17, 2009,

Pflipsen arrived on time once, 15 minutes late four times, and at least 20 minutes late 40 times.

In March 2009, Marsh asked Pflipsen whether she continued to have sleep-related problems. Pflipsen replied that she did not. When asked why she continued to be tardy, Pflipsen told Marsh, "I don't know. I don't know why I can't get in on time . . . I just can't seem to get there and I don't know why and I should be able to." Pflipsen did not advise Marsh that she continued to have medical reasons for her tardiness.

On April 29, Marsh gave Pflipsen a performance counseling report, which warned that continued tardiness may result in termination. Pflipsen continued to arrive late for work, and Marsh gave her a second warning on June 2. Pflipsen was tardy again the next day, and Marsh warned Pflipsen that if she was tardy again, she would be terminated. When Pflipsen was tardy the next morning, she explained that she was tardy because she inadvertently changed the time on her alarm clock. Because Pflipsen was tardy after receiving a final warning, Marsh terminated Pflipsen's employment.

Pflipsen applied for unemployment benefits. An adjudicator from the Minnesota Department of Employment and Economic Development determined that Pflipsen was ineligible to receive unemployment benefits because she was discharged for employment misconduct in the nature of excessive tardiness. Pflipsen appealed the determination. Following a telephonic hearing, a ULJ concluded that Pflipsen's excessive tardiness was a serious violation of the standards Hellmuth had the right to reasonably expect of Pflipsen and displayed a substantial lack of concern for the employment. On those bases, the ULJ concluded that Pflipsen was discharged for employment misconduct and,

therefore, is ineligible to receive unemployment benefits. Pflipsen sought reconsideration. The ULJ modified certain factual findings but affirmed the decision. This certiorari appeal followed.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator 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) (2008).

Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). A ULJ's factual findings are reviewed in the light most favorable to the decision and will not be disturbed on appeal if there is evidence that reasonably tends to sustain those findings. *Schmidgall*, 644 N.W.2d at 804. But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Id*.

An employee who is discharged for employment misconduct is ineligible 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) that displays clearly a substantial lack of concern for the employment." *Id*., subd. 6(a) (2008).[1] Inefficiency, incapacity, or "good faith errors in judgment if judgment was required" are not employment misconduct. *Id*., subd. 6(b) (2008). "[A]bsence because of illness or injury with proper notice to the employer" also is not employment misconduct. *Id.*

Even when it is neither willful nor deliberate, excessive absenteeism and tardiness may constitute employment misconduct. *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985); *see also Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App. 1984) (holding that excessive tardiness or absences, particularly after warnings, may evidence employee's disregard of employer's interest). But the existence of a mental impairment can take otherwise inappropriate conduct out of the category of employment misconduct. Minn. Stat. § 268.095, subd. 6(a); *see Loewen v. Lakeland Mental Health Ctr., Inc.*, 532 N.W.2d 270, 275 (Minn. App. 1995) (stating that when "mental state may have impaired [relator's] ability to evaluate and respond" to her employer's requests, it was "premature . . . to disqualify [her] from receipt of reemployment insurance benefits without first determining her mental status").

[1] Pflipsen argues that the 2009 amendments to this section apply to her case. Minn. Stat. § 268.095, subd. 6, was amended by 2009 Minn. Laws ch. 15, § 9, at 47-48, which is effective for determinations rendered on or after August 2, 2009. "Determination" is defined as "a document sent to an applicant . . . that is an initial department ruling on a specific issue." Minn. Stat. § 268.035, subd. 12c (Supp. 2009). Here, the determination was issued on June 22, 2009, prior to the effective date for the 2009 amendments. Consequently, the 2009 amendments do not apply.

Pflipsen argues that the undisputed facts in the record demonstrate that her excessive tardiness was the result of her mental impairment and, therefore, does not constitute employment misconduct. But the ULJ's factual finding that Pflipsen's medical condition was not the cause of her tardiness between March and June 2009 is substantially supported by the record. First, Pflipsen did not attribute her late arrivals at work to a mental or any other medical condition during that period. Marsh testified that Pflipsen informed her in March 2009 that she was no longer experiencing sleeping difficulties and did not know why she could not arrive at work on time. Marsh's testimony is consistent with Pflipsen's letter of April 30, 2009, in which she advised Marsh that Pflipsen "didn't have the ability to sleep more than a few hours a night *until approximately a month ago, give or take a week*." (Emphasis added.) Although Pflipsen asserts that she did not tell Marsh that she no longer was having difficulty sleeping, we defer to the ULJ's finding that Marsh's version of events, which is supported by the record, is more credible. *See Skarhus*, 721 N.W.2d at 344 (stating that credibility determinations are the exclusive province of ULJ).

Second, Pflipsen had opportunities to explain that her chronic late arrival continued to be caused by her medical condition after March 2009. For example, when she received two final warnings in June, Pflipsen failed to do so. Rather, she stated that she did not know why she could not arrive at work on time. And Pflipsen explained that her final tardy arrival was caused by her failure to set her alarm clock accurately, not by her inability to sleep the night before.

Pflipsen also contends that a letter from a social worker demonstrates that Pflipsen's medical condition continued to cause sleeping difficulties throughout her employment, including during the period between March 2009 and the end of her employment in June 2009. But this letter was not provided to Hellmuth prior to the decision to terminate Pflipsen's employment. Rather, it was submitted in July 2009 as part of the unemployment-benefits proceeding. Even assuming that this letter offers evidence that Pflipsen's tardiness was caused by a medical condition, Pflipsen was required to provide proper notice of the medical cause of her tardiness to her employer in order to exempt her conduct from the definition of employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(b) (stating that absence because of illness "with proper notice to the employer" is not employment misconduct). The ULJ's decision not to rely on the letter when determining whether Pflipsen's tardiness was employment misconduct, therefore, is not an abuse of discretion.

In light of our requirement to view the evidence in the light most favorable to the ULJ's findings, the ULJ's finding that Pflipsen's medical condition did not cause her chronic tardiness after March 2009 is substantially supported by the record.

Pflipsen also argues that because her conduct was inadvertent, it was not employment misconduct. But Minn. Stat. § 268.095, subd. 6(a), does not require the conduct at issue here to be intentional. Rather, the statute specifically refers to "intentional, *negligent, or indifferent conduct*." *Id*. (emphasis added). Pflipsen was tardy on almost a daily basis for nine months. On multiple occasions, her supervisor discussed the importance of arriving at work on time, and she attempted to accommodate Pflipsen's

tardiness by changing her start time from 8:00 a.m. to 8:30 a.m. Pflipsen continued to be tardy, however, well after she told Marsh she was no longer having sleeping difficulties. Pflipsen's tardiness also was detrimental to her employer, as she was unavailable to provide necessary support to the partners for whom she worked when they arrived each morning. As a result, coworkers were required to fulfill Pflipsen's duties until she arrived. Even if Pflipsen's tardiness was not intentional, it was sufficiently chronic and excessive to constitute a violation of the standards that her employer has the right to reasonably expect of its employees and to demonstrate a substantial lack of concern for her employment. *See Flahave v. Lang Meat Packing*, 343 N.W.2d 683, 687 (Minn. App. 1984) (stating that "repeated infractions of [relator's] employer's work rule demonstrate [relator's] substantial disregard of [relator's] employer's interest and of the duties and obligations that [relator] owed to [relator's] employer").

In her reply brief, Pflipsen argues for the first time that the ULJ did not adequately explain his credibility determinations. Issues that were neither raised nor argued in an appellant's initial brief are waived and cannot be revived in a reply brief. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). Thus, we decline to consider Pflipsen's argument on this issue.

In sum, the evidence substantially supports the ULJ's finding that Pflipsen's chronic tardiness between March and June 2009 was not caused by a medical condition. Because Hellmuth had the right to expect Pflipsen to arrive at work on time in order to fulfill her duties, Pflipsen's conduct was a serious violation of the standards Hellmuth had the right to expect. Pflipsen's chronic tardiness, particularly in light of repeated

discussions with her employer about the importance of arriving at work on time and after receiving several warnings, also displayed a substantial lack of concern for the employment. Accordingly, the ULJ did not err by concluding that Pflipsen committed employment misconduct and, therefore, is ineligible to receive unemployment benefits.

Affirmed.