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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-353**

Billy Johnson,
Relator,

vs.

North Country Security, Inc.,
Respondent,

Department of Employment and
Economic Development,
Respondent

**Filed November 9, 2010
Affirmed
Hudson, Judge**

Department of Employment and
Economic Development
File No. 23549892-3

Billy Johnson, Baxter, Minnesota (pro se relator)

North Country Security, Inc., Brainerd, Minnesota (respondent)

Lee B. Nelson, Britt K. Lindsay-Waterman, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent Department)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Hudson,
Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Relator challenges the unemployment-law judge's (ULJ) decision that he was ineligible for unemployment-compensation benefits, arguing that his employer's requests for a physician's note were not reasonable; that he attempted to provide a physician's note; and that his date of discharge was incorrect. Because the employer's request was reasonable, the ULJ's findings were supported by substantial evidence, and relator's discharge was attributable to employment misconduct regardless of his date of discharge, we affirm.

FACTS

Relator Billy Johnson started working for North Country Security (NCS) on April 8, 2008.¹ Johnson was a full-time security guard at the Crow Wing County Judicial Center, where he was in regular contact with the public. Johnson's last day of work was approximately August 29, 2009. On that date, Johnson was at work with a cough, and his supervisor informed Johnson that he was taking Johnson off the schedule because of fears of the H1N1 flu virus.

On August 31, Johnson informed his supervisor that his physician had diagnosed him with bronchitis but cleared him for work. The supervisor responded that Johnson needed to produce a physician's note stating that he was "100 percent." On September 4, Johnson came to work to pick up his paycheck, and his supervisor again asked for a

¹ NCS is co-owned by a husband-and-wife team. For clarity's sake, the husband, who was Johnson's supervisor, is referred to as the "supervisor," and the wife, who testified at the hearing, is referred to as the "co-owner."

physician's note stating that "[Johnson] didn't have a fever or swine flu." Between September 6 and September 23, Johnson contacted his supervisor several times to state that his cough was controlled and that he could return to work, but his supervisor reiterated the request for a physician's note stating that "[Johnson] was 100 percent better."

On approximately October 5, Johnson developed a contagious infection as a result of taking antibiotics to treat his bronchitis. His physician ordered him not to work for a week. On October 12, Johnson informed his supervisor that his physician had cleared him for work, but he once again did not produce a physician's note. The supervisor told Johnson that NCS had hired a replacement for his position and that NCS no longer needed a note from his physician.² During his medical leave, however, Johnson had also applied for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development (DEED) had informed Johnson's supervisor of his application. When Johnson spoke to his supervisor on October 12, Johnson's supervisor also told him that NCS could not place Johnson on the schedule until it had resolved Johnson's unemployment claim, and even then, NCS could only employ Johnson part-time.

During October 2009, Johnson called NCS regularly about returning to work, and NCS continued to ask Johnson for a physician's note. On approximately November 17,

² Johnson did not testify to this fact at the hearing; instead, he first made this statement on his request for reconsideration. Even though he did not order an additional hearing, the ULJ adopted this fact in the decision on reconsideration.

NCS asked Johnson to return his keys and badge. At no time did Johnson submit a physician's note to NCS.

A DEED adjudicator determined that Johnson was ineligible for benefits due to employment misconduct. Johnson appealed the decision. After a hearing, a ULJ found that NCS discharged Johnson because he failed to produce a physician's note stating that he was not contagious and able to work. Johnson filed a request for reconsideration, arguing that the ULJ erred in finding that (1) August 29 was his date of discharge; (2) NCS simply wanted a note stating that Johnson was not contagious and able to return to work; and (3) Johnson had never tried to submit a physician's note to NCS. On reconsideration, the ULJ affirmed his decision, but amended the findings to state that NCS discharged Johnson on October 12 and that NCS had requested a physician's note stating that Johnson was 100% healthy. This certiorari appeal followed.

DECISION

This court may remand, reverse, or modify the decision of the ULJ if the substantial rights of the petitioner may have been prejudiced because the findings, conclusions, or decisions are affected by an error of law or are unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008).

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). "Employment misconduct means any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for

the employment.” *Id.*, subd. 6(a) (Supp. 2009). Employment misconduct is not inefficiency or inadvertence, a good faith error in judgment, or an absence because of illness or injury of the employee with proper notice. *Id.*, subd. 6(b).

“Whether an employee has engaged in conduct that disqualifies him from unemployment benefits is a mixed question of fact and law.” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). “Whether the employee committed a particular act is a question of fact.” *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). This court will reverse or modify the ULJ’s findings of fact only when they are “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(5). “But whether the act committed by the employee constitutes employment misconduct is a question of law.” *Peterson*, 753 N.W.2d at 774. This court therefore reviews de novo the ULJ’s determination of misconduct. *Id.*

First, Johnson appears to argue that the ULJ erred in finding that NCS’s request for a physician’s note was reasonable, and Johnson specifically argues that it was unreasonable for his supervisor to request a physician’s note saying that he was 100% healthy. “[R]efusing to abide by an employer’s reasonable policies and requests amounts to disqualifying misconduct.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). “What is reasonable will vary according to the circumstances of each case.” *Nelson v. Star Tribune*, 445 N.W.2d 864, 868 (Minn. App. 1989) (quotation omitted).

The ULJ found that, if taken literally, “[t]he reasonableness of this requirement is questionable.” We agree. But when the request is considered in context, it was reasonable for Johnson’s supervisor to request a physician’s note clearing Johnson to return to work.

Johnson repeatedly testified that his supervisor requested a note stating that he was 100% healthy. But Johnson acknowledged that his supervisor did not expect him to produce a physician’s note stating that he was completely free of disease. The co-owner of NCS also confirmed that NCS needed a physician’s note stating that Johnson was no longer contagious and that he could return to work. Based on this testimony, there is substantial evidence indicating that NCS was simply requesting a physician’s note clearing Johnson to return to work. Such a request—particularly in light of the H1N1 concerns of the day—was reasonable.

Johnson also argues that the ULJ erred in finding that Johnson did not obtain, submit, or try to submit a physician’s note. But the hearing transcript contains substantial evidence to support this finding: both Johnson and the co-owner of NCS repeatedly testified that Johnson never obtained or submitted a physician’s note to NCS.

In his request for reconsideration, Johnson stated that on October 12, Johnson told his supervisor that he “could provide a doctor’s note” but that “[his supervisor] no longer needed a note from [Johnson’s] doctor, he was just waiting to see what was happening with [Johnson’s] unemployment claim.” On a request for reconsideration, the ULJ cannot consider new evidence except for the limited purpose of determining whether to order an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(c) (Supp. 2009).

But here, the ULJ adopted in part and rejected in part Johnson's statement on reconsideration: the ULJ found that on October 12, the supervisor told Johnson "not to worry about the note until the unemployment insurance claim was addressed"; but the ULJ did not discuss Johnson's statement that he also told his supervisor that he could provide a physician's note. Apparently, the ULJ discredited this statement, as Johnson never referred to any attempts to provide NCS with a physician's note in his hearing testimony. Or the ULJ may have credited Johnson's statement, but found that Johnson's efforts were essentially "too little, too late," as both Johnson and the co-owner of NCS testified that his supervisor repeatedly asked Johnson for a physician's note during August, September, and October, but Johnson never produced one. Regardless, either of these grounds for rejecting Johnson's statement is supported by substantial evidence.

Finally, Johnson argues that the ULJ erred in finding that he was discharged on October 12. "A discharge from employment occurs when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow [the employee] to work for the employer in any capacity." Minn. Stat. § 268.095, subd. 5(a) (2008).

In his initial decision, the ULJ found that NCS discharged Johnson on August 29. But, on reconsideration, the ULJ determined that NCS discharged Johnson on October 12. The ULJ found that on October 12, the supervisor told Johnson that he had been replaced; that he need not worry about obtaining a physician's note until he had taken care of his unemployment claim; and that he had to resolve his unemployment claim before he could return to work. As such, the ULJ found that "a reasonable person

would [have] believe[d] that the employer [would] no longer allow [the employee] to work for the employer in any capacity.”

We conclude that the ULJ’s finding regarding Johnson’s date of discharge is supported by substantial evidence. Johnson testified that his supervisor made contradictory statements on October 12. Johnson testified that on the one hand, “[his supervisor] had somebody to replace [Johnson]” and that “[his supervisor] no longer needed a note from [Johnson’s] doctor,” but on the other hand, his supervisor stated that he was waiting to resolve Johnson’s unemployment claim and that, once this was done, Johnson might be able to return to work part-time. Although there are some indications that Johnson’s supervisor left the door open for Johnson to return to work, there is substantial evidence to support the ULJ’s finding that by October 12, a reasonable person would have believed that NCS would not rehire Johnson in the future.

Moreover, even if we were to conclude that Johnson was discharged on November 17, it would not affect the outcome of Johnson’s appeal. As the ULJ observed, “[t]hroughout all of this [Johnson] did not do the one thing asked of him,” which was bringing in a physician’s note clearing him for work. Both Johnson and the co-owner of NCS testified that Johnson and NCS continued to communicate well after October 12. There is evidence that throughout October, Johnson continued to call NCS about being put back on the schedule, NCS renewed its request for a physician’s note, and NCS hoped that Johnson would bring one in. But he never did. Hence, regardless of whether Johnson was discharged on October 12 or November 17, he was discharged for

employment misconduct, as he failed to comply with his employer's reasonable request for a physician's note.

Affirmed.