**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-1015**

Kara Dahl,
Relator,

vs.

We Clean Carpet,
Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed March 17, 2014**
**Affirmed**
**Stoneburner, Judge**

Department of Employment and Economic Development
File No. 30759515-3

Thomas H. Boyd, Kristopher D. Lee, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for relator)

We Clean Carpet, Minneapolis, Minnesota (respondent employer)

Munazza Humayun, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent Department)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

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

**STONEBURNER**, Judge

Relator challenges the determination of an unemployment-law judge (ULJ) that she was discharged from her employment for employment misconduct, making her ineligible for unemployment benefits. We affirm.

## FACTS

Relator Kara Dahl began working for We Clean Carpet (employer) as a telemarketer and sales representative in 2005. In October 2012, she injured her back, affecting her ability to work. Dahl initially kept employer advised of her condition and her work restrictions, supported by doctor's notes dated October 13, October 16, November 1, November 5, and November 8. The November 8 doctor's note stated that Dahl would not be able to attend work from November 5 through November 19 and "should be excused from work until further re-evaluated." Dahl saw her doctor again on November 19. On November 22, Dahl mailed a November 19 doctor's note to employer, stating that Dahl "is unable to attend work from 11/19/2012 until further notice." The note further states that Dahl was scheduled for some tests "so we should know better within 1 week from today." Employer did not receive the November 19 doctor's note.

On November 23, Dahl left a voicemail for employer, stating that she was waiting for MRI test results and would call employer on November 26, or employer could call her. Employer did not call Dahl, and Dahl did not call employer on November 26. Dahl did not contact employer again until the evening of December 25, when she left a voicemail for employer indicating that medical restrictions had been lifted and she could

return to work as of December 26. Employer called Dahl on December 27 to inform Dahl that her position had been filled on November 30 and that there were no current positions available.

Dahl applied to respondent Department of Employment and Economic Development (DEED) for unemployment benefits. DEED made a determination of ineligibility, and Dahl appealed. The ULJ conducted a telephone hearing. Employer testified that several doctor's notes were received in one mailing in mid-November, restricting Dahl's employment from the date of injury through November 19. Employer testified that Dahl's November 23 voicemail stated that employer should call her back or that Dahl would call again in a few days. Employer had no further contact from Dahl until Dahl left the December 25 voicemail.

Dahl submitted the November 19 doctor's note, stating that Dahl was unable to work "until further notice," and Dahl testified that, because she did not get her test results when expected, she thought it was pointless to call employer again after she left the November 23 voicemail. Dahl testified that she assumed that employer would call her if more information was needed.

The ULJ found that Dahl was discharged on December 27, the day employer informed Dahl that her position had been filled. The ULJ found that Dahl's discharge was due to Dahl's failure to communicate with employer for 32 days, after stating on November 23 that she would call again on November 26, and that this failure to keep employer informed of her condition violated employer's reasonable expectations and demonstrated a substantial lack of concern for her employment. The ULJ concluded that

because Dahl's conduct constituted employment misconduct, she is ineligible for unemployment benefits.

Dahl requested reconsideration, arguing that she did not violate employer's reasonable expectations because she had timely communicated with employer about her injury and work restrictions. The ULJ affirmed the determination of ineligibility, reiterating that Dahl's failure to communicate with employer from November 23 to December 25, particularly in light of her statement that she would call on November 26, demonstrated a substantial lack of concern for employment and violated employer's reasonable expectations. This certiorari appeal followed.

**D E C I S I O N**

This court may affirm, remand to the ULJ for further proceedings, reverse, or modify the decision of the ULJ if the substantial rights of the relator are prejudiced because the findings, conclusions, or decision are affected by an error of law, are unsupported by substantial evidence, or are arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (4)-(6) (2012).

An employee who is discharged for employment misconduct is not eligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Employment misconduct is defined as "any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly" either "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee" or "a substantial lack of concern for the employment." *Id.*, subd. 6(a) (1)-(2) (2012). But absence due to illness

or injury is not considered employment misconduct if the employee provides proper notice to the employer. *Id.*, subd. 6(b)(7) (2012).

Whether an employee committed misconduct sufficient to disqualify her from receipt of unemployment benefits is a mixed question of law and fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). "Whether [an] 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 views the ULJ's factual findings in the light most favorable to the decision and gives deference to the credibility determinations made by the ULJ. *Id.* Accordingly, this court will not disturb the ULJ's factual findings when the evidence substantially sustains them. *Id.* However, "[d]etermining whether a particular act constitutes disqualifying misconduct is a question of law," which we review de novo. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011).

Dahl argues that the ULJ erred by determining that her failure to communicate with employer constituted employment misconduct. Dahl asserts that the ULJ's determination that she failed to keep employer informed between November 23 and December 25 is contrary to the record. Dahl primarily relies on the November 19 doctor's note, stating that she would be unable to attend work "until further notice," as constituting proper notice that her continued absence from work was due to her back injury.

DEED argues that Dahl's failure to communicate with employer on November 26, after stating that she would communicate on that date, and her failure to communicate

with employer again until December 25 did not keep employer properly "apprised," citing *Winkler v. Parke Refuse Serv.*, 361 N.W.2d 120, 123 (Minn. App. 1985) for the proposition that an employer can "reasonably expect an employee keep it apprised" so that an employer can adequately plan staffing needs. DEED argues that even if employer had received the November 19 doctor's note, the employer would have expected further communication about Dahl's condition to be communicated within the timeframe stated in the doctor's note. DEED notes that updating employer periodically, even to communicate that the test results had not been received, would have taken Dahl just a few minutes, and DEED asserts that Dahl's failure to make contact for 32 days indicates a lack of concern for her job.[1]

A continuing pattern of absenteeism and tardiness may constitute misconduct, because it tends to show disregard of an employer's interest or lack of concern for the employment. *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985). And "an employer cannot be expected to hold a job open indefinitely." *Winkler*, 361 N.W.2d at 123 (quotation omitted).

The case law does not establish a bright-line rule defining what constitutes "proper notice" of absence due to illness or injury. But Dahl's statement that she would call

[1] In her reply brief, Dahl argues that she was actually discharged on November 30, 2012, the day employer filled her position, and argues that this court should only consider her actions up to November 30, rather than through December 27, the date on which she learned that her position was no longer available. This argument is waived because it was not raised in Dahl's principal brief. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). Additionally there is no evidence in the record to support an argument that Dahl's employment was terminated before December 27, despite evidence that the position she had held was filled earlier.

employer on November 26 established employer's reasonable expectation that Dahl would communicate about her situation on or near that date. Dahl asserts that the ULJ erred by disregarding the importance of the written statement in the November 19 doctor's note that she could not return to work "until further notice" and by giving undue weight to Dahl's November 23 voicemail. But Dahl ignores the expectation of communication established by the doctor's note and Dahl's voicemail as well as Dahl's established pattern of frequently updating employer about her condition.

Dahl argues that she "had nothing further to report" on November 26 and that employer should have called her if more information was needed. But Dahl provides no authority suggesting that an employer is responsible for procuring updates from an absent employee. The definition of employment misconduct focuses on the employee's conduct, not the employer's conduct. *See Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 877 (Minn. App. 2011) ("[T]here is no exception for misconduct that could have been avoided by better management actions.").

We conclude that the ULJ did not err by determining that Dahl's failure to update employer on her situation from November 23 to December 25 violated employer's reasonable expectations of more timely and frequent communication about her ability to work. And we conclude that Dahl's conduct demonstrated a substantial lack of concern for her job, constituting employment misconduct that disqualifies Dahl from receiving unemployment benefits.

**Affirmed.**