STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0778

Gloria Johnson,
Relator,

vs.

Minneapolis Special School District #001,
Respondent,

Department of Employment and
Economic Development,
Respondent.

Filed March 9, 2015
Affirmed
Hudson, Judge

Department of Employment and
Economic Development
File No. 322506050-3

Anne M. Loring, Minneapolis, Minnesota (for relator)

Minneapolis Special School District #001, c/o TALX UCM Services Inc., St. Louis, Missouri (respondent)

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

Considered and decided by Hudson, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

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

HUDSON, Judge

Relator challenges the unemployment law judge's (ULJ) decision that she is ineligible for unemployment benefits because she was discharged for employment misconduct, arguing that her conduct constituted ordinary negligence and was not a serious violation of the standards of behavior expected by her employer. Because substantial evidence supports the ULJ's decision that relator was discharged for employment misconduct, we affirm.

FACTS

Relator Gloria Johnson was employed as a school bus driver for the Minneapolis Special School District until she was discharged from employment in February 2014. Following her dismissal, relator applied for unemployment benefits, and the Minnesota Department of Employment and Economic Development (DEED) issued a determination of ineligibility. Relator sought a hearing before a ULJ. At the hearing, relator testified that she was responsible for transporting special-needs students to school and that she was assisted by an aide, who rode with her and helped the students off the bus. Each day, after relator dropped the students off, she was required to complete a walkthrough of her bus to ensure that it was empty before she proceeded to her next route.

Relator was dismissed from employment because she twice left a child on the bus after she failed to complete the required walkthrough. The first incident occurred in February 2013. Relator testified that, on that day, her aide and two teachers assisted the children while she entered the school to use the bathroom. She indicated that she did not

perform the walkthrough when she returned because she believed that the aide and teachers would confirm that the bus was empty. When relator returned to the garage, she discovered that one child remained on the bus. Following that incident, relator's supervisor informed her that any similar violations would result in her discharge from employment. Her supervisor also emphasized that it was the driver's responsibility, and not the aide's, to ensure that the bus was empty before leaving the school. Relator received, but never served, a three-day suspension for this violation.

The second incident occurred approximately one year later. Relator testified that she was late that day because of a snowstorm, that she was responsible for helping the children in wheelchairs exit the bus, and that her aide was responsible for assisting the other children. Relator stated that, after her aide informed her that all of the children had exited the bus, she went inside to use the restroom and did not conduct the walkthrough when she returned because she was running late for her next route. After she left the school, relator's dispatcher notified her that a child might still be on the bus. Relator pulled over, conducted a brief walkthrough and discovered the child asleep in one of the back seats. She completed her route and then returned the child to school. Relator testified that she was very upset after that incident "because I already knew that I was going to lose my job." Relator was placed on administrative leave and dismissed from employment shortly thereafter.

The ULJ found relator's testimony to be credible, but issued a decision determining that relator was ineligible for unemployment benefits because she had been

discharged for employment misconduct. The ULJ affirmed her decision on reconsideration. This certiorari appeal follows.

D E C I S I O N

We review a ULJ's decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusions, or decision are unsupported by substantial evidence in view of the record as a whole or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2014). Substantial evidence is "(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). An employee who is discharged because of employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2014). "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) (2014). Employment misconduct does not include inefficiency or inadvertence, simple unsatisfactory conduct, poor performance because of inability or incapacity, or good-faith errors in judgment. *Id.*, subd. 6(b) (2014).

Relator argues that the ULJ erroneously concluded that her conduct constituted employment misconduct and rendered her ineligible for unemployment benefits. Whether an employee committed employment misconduct is a mixed question of fact and

law. *Stagg v. Vintage Place*, 796 N.W.2d 312, 315 (Minn. 2011). Whether the employee committed a specific act is a fact question, which we review in the light most favorable to the decision and affirm if supported by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether the employee's actions rise to the level of employment misconduct is a question of law, which we review de novo. *Stagg*, 796 N.W.2d at 315.

Relator asserts that, because she had good reason to believe that the aide and teachers would ensure that the children exited the bus and because she performed a "visual inspection" of the bus interior, her failure to complete the walkthrough constituted only "ordinary negligence," which she argues does not rise to the level of employment misconduct. We are not persuaded. Employers possess the right to expect their employees to abide by their reasonable policies and requests. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). And the conduct of a person's co-workers "is not a valid defense to a claim of misconduct." *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986). Here, relator testified that she was aware of the walkthrough policy and understood the importance of compliance with that policy. She also testified that her employer emphasized to her after the first incident that it was her responsibility, and not the aide's, to complete the walkthrough. Despite that knowledge, relator admitted that she purposefully chose not to complete the walkthrough on two occasions. Her conduct demonstrated deliberate disregard for her employer's interests and could have endangered the safety of the children on her bus. We therefore

conclude that the ULJ correctly determined that relator's actions constituted employment misconduct.

Relator also argues that her employer did not consider her violations to be serious because the employer did not enforce the three-day suspension after the first incident and did not meaningfully participate in the hearing before the ULJ. But "an employee's expectation that the employer will follow its disciplinary procedures has no bearing on whether the employee's conduct violated the standards the employer has a reasonable right to expect or whether any such violation is serious." *Stagg*, 796 N.W.2d at 316. Moreover, the record demonstrates that the school district did consider relator's violations to be serious. The school district warned relator that she would lose her job if she committed any additional violations. She admitted that she understood the seriousness of her violations and testified that she became very upset after the second incident because she knew that she was likely to lose her job.

Likewise, the employer's failure to participate in the hearing has no bearing on whether relator's conduct was a serious violation of the standards of behavior reasonably expected by the school district. The determination of a person's eligibility for unemployment funds is made with the information available, without regard to a burden of proof. Minn. Stat. § 268.069, subd. 2 (2014). Because unemployment benefits are paid from state funds, DEED is the primary responding party in an unemployment benefits proceeding and bears the responsibility for "the proper payment of unemployment benefits regardless of the level of interest or participation by . . . an employer in any determination or appeal." *Id.*; *see also Rasidescu v. Comm'r of Econ.*

Sec., 644 N.W.2d 504, 506 (Minn. App. 2002) (stating that an employer's failure to challenge employee's eligibility for benefits has no bearing on whether benefits are paid), *review denied* (Minn. July 16, 2002). Thus, the ULJ properly considered the nature of relator's conduct, and not the level of participation by the school district, in determining whether relator's actions constituted employment misconduct.

Finally, relator argues that her conduct involves a single act and that this factor should weigh against the ULJ's determination that she committed employment misconduct. The fact that an employee is discharged for conduct involving only a single incident is not dispositive of the issue of a person's eligibility for unemployment benefits. Minn. Stat. § 268.095, subd. 6(d) (2014). But it is "an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct under [the law]." *Id*. Relator contends that, because the employer did not enforce the three-day suspension for the first violation, the employer condoned that incident and waived its right to discharge her for it. She maintains that, because of that waiver, the first incident cannot be characterized as misconduct.

"An employer's condonation of an employee's wrongful conduct is a mitigating factor which may cause the employer to waive its right to discharge the employee on the basis of such misconduct." *Bautch v. Red Owl Stores, Inc.*, 278 N.W.2d 328, 331 (Minn. 1979). But an employer is not required to suspend or even warn an employee before discharging her for employment misconduct. *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981). The employee's behavior as a whole should be considered when determining her eligibility for unemployment benefits. *Drellack v. Inter–Cnty. Cmty.*

Council, Inc., 366 N.W.2d 671, 674 (Minn. App. 1985). Here, the record does not demonstrate that the employer condoned or disregarded relator's first violation or that relator believed that the violation was excused. As discussed above, relator testified that she understood the importance of the walkthrough policy and admitted that, based on the warning that she received, she expected to be dismissed from employment after the second incident. There is no indication that the employer disregarded other employees' violations of the same policy or that the employer's enforcement of that policy was otherwise inconsistent. *Cf. Bautch*, 278 N.W.2d at 331 (concluding, in wrongful termination action, that jury could consider whether employer condoned employee's violation of posted policy by failing to discipline other employees for violation of that policy). The ULJ correctly considered both incidents in determining that relator's conduct constituted employment misconduct. Because substantial evidence supports the ULJ's determination, we conclude that the ULJ did not err by concluding that relator was ineligible for unemployment benefits.

Affirmed.