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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0306**

Deborah N. Ojogwu,
Relator,

vs.

US Bank National Association,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 27, 2009
Affirmed
Stauber, Judge**

Department of Employment and Economic Development
File No. 10388-3

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Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On certiorari appeal from the decision of the unemployment law judge (ULJ) that relator was ineligible to receive unemployment benefits because she had been discharged for employment misconduct, relator argues that the record does not support the ULJ's finding that she was discharged for employment misconduct. We affirm.

FACTS

On September 1, 2006, relator Deborah Ojogwu began working full time at respondent US Bank as a senior trust research specialist. Because relator was consistently late for work in early 2007, relator's schedule was adjusted on April 1, 2007, to permit relator to start work at 8:00 a.m. According to operations manager Julie McGowan, relator was informed that "if you're not at your work station at 8:00 a.m., you are tardy." Relator subsequently went on short-term disability on April 22, 2007, but after she returned in June 2007, relator was late for work at least five times between June 11, 2007, and July 11, 2007. After relator came to work late on July 16, 2007, relator emailed McGowan asking her if her start time could be changed to 8:30 a.m. McGowan denied relator's request and noted that "[a]s we have discussed, this issue needs immediate and continued improvement or further disciplinary steps, up to and including termination may be taken."

On August 7, 2007, management sent relator an email stating that a new cubicle was found for relator, and that relator should start moving her belongings to the new area at 3:00 p.m. Shortly after 3:00 p.m., relator's immediate supervisor Kelly McKay asked

relator to start moving to her new cubicle. According to McKay, relator told McKay “no, I’m not moving,” and that she was in the middle of writing an email and that she would move when she was done with the email. When McKay explained to relator that she needed to move immediately, relator replied “Kelly, do you want to spank me?” According to McKay, relator then stated “go get your teacher, I’m not moving.”

McKay reported the incident to her manager, and on August 9, 2007, relator was discharged for tardiness and insubordinate and inappropriate behavior. Relator subsequently established a benefit account with respondent Minnesota Department of Employment and Economic Development (DEED), and a department adjudicator initially determined that relator was discharged for reasons of employment misconduct and, therefore, disqualified from receiving benefits. Relator appealed that determination and, following a de novo hearing on the matter, the unemployment law judge (ULJ) reached the same conclusion. Relator then filed a request for reconsideration with the ULJ, who affirmed the decision that relator was discharged for employment misconduct. This certiorari appeal followed.

D E C I S I O N

This court 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 decisions are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4), (5) (Supp. 2007). 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 Env'tl. 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) (Supp. 2007). “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). This court defers to the ULJ’s credibility determinations and findings of fact. *Yswsf 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 this court reviews 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 a 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) (Supp. 2007).

Here, the ULJ found that relator's conduct constituted employment misconduct because relator's "insubordination, inappropriate behavior, and tardiness . . . display[ed] clearly a serious violation of the standards of behavior that US Bank had the right to reasonably expect of its employee." Specifically, the ULJ found that relator had "problems with tardiness" and that she "displayed an inappropriate attitude towards McKay on many occasions." Thus, the ULJ concluded that relator was ineligible to receive unemployment benefits.

Relator challenges the ULJ's decision on the basis that the record does not support the ULJ's findings that she was discharged for employment misconduct. But McGowan and McKay testified that relator was late for work on numerous occasions, including at least six times after relator's start time was moved to 8:00 a.m. Testimony also reflects that relator was warned about her consistent tardiness, and the warning contemplated discharge if not corrected. The record further reflects that relator displayed a poor attitude toward her supervisors, and when asked to move to a different cubicle on August 7, 2007, relator engaged in insubordinate and inappropriate behavior. If believed, McKay and McGowan's testimony, along with the other evidence in the record, demonstrates that relator was discharged for employment misconduct. *See Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App. 1984) (stating that "continued tardiness, combined with several warnings, evidences disregard by the employee of the employer's interests . . . [and] is a violation of the standards of behavior which the employer ha[s] a right to expect from its employees"); *see also Sandstrom v. Douglas Mach. Corp.*, 372

N.W.2d 89, 91 (Minn. App. 1985) (stating that the “general rule is that if the request of an employer is reasonable and does not impose an unreasonable burden on the employee, a refusal will constitute misconduct”).

Relator argues that the record does not support a finding of employment misconduct because McGowan and McKay lied about her tardiness. We disagree. The ULJ specifically rejected relator’s contention that McGowan and McKay were lying, stating that:

The more credible evidence shows that they were not lying. McGowan testified that she was not concerned about the outcome of the unemployment case. McGowan and McKay did not have a significant stake in this case. [Relator] did face a significant gain or loss if the case was decided a certain way. . . . The testimony of McKay and McGowan was credible and the facts do support a finding of employment misconduct.

When, as here, “the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision the unemployment law judge must set out the reason for crediting or discrediting that testimony.” Minn. Stat.

§ 268.105, subd. 1(c) (Supp. 2007). The ULJ, which explained his credibility determinations as required, is in the best position to assess credibility, and we will not second-guess those judgments. *Lamah v. Doherty Employment Group, Inc.*, 737 N.W.2d 595, 601 (Minn. App. 2007). Moreover, relator conceded at the de novo hearing that she was tardy on a number of occasions. Therefore, the record supports the ULJ’s findings that relator was discharged for employment misconduct.

Finally, relator contends that the ULJ erred in concluding that she was ineligible to receive benefits because her employer discriminated against her. But there is nothing in the record supporting relator's claim that her employer engaged in discriminatory conduct. As noted above, relator's conduct constituted employment misconduct; relator's assertions that her employer engaged in discriminatory conduct boils down to credibility, and the ULJ specifically found relator's testimony to be incredible. Thus, the ULJ properly concluded that relator was ineligible to receive unemployment benefits.

Affirmed.