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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A06-2186**

Cathy E. Bassett,  
Relator,

vs.

LCS Lawn Service Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed January 8, 2008  
Affirmed  
Muehlberg, Judge\***

Department of Employment and Economic Development  
File No. 11249 06

Cathy E. Bassett, 1137 Woodbridge Street, St. Paul, MN 55117 (pro se relator)

LCS Lawn Service Inc., 680 Hale Avenue North, Oakdale, MN 55128 (respondent employer)

Lee B. Nelson, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, MN 55101 (for respondent department)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Muehlberg, Judge.

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**MUEHLBERG**, Judge

Relator challenges the decision by the unemployment law judge (ULJ) that she was disqualified from receiving unemployment benefits because she had been discharged for excessive absences. Relator contends that (1) she was excused from work for every day that she was absent and followed company policy in reporting her absences; (2) domestic abuse provides a good reason for her absence; and (3) she was improperly denied subpoenas to access phone records. We affirm.

### FACTS

Relator Cathy Bassett was employed as an administrative assistant for respondent, LCS Lawn Service, Inc. (LCS), a residential lawn care company. Because she was absent from her position for five consecutive days without permission from LCS, relator was discharged for employment misconduct.

Shortly thereafter, relator established an unemployment benefits account with the Minnesota Department of Employment and Economic Development (DEED). A department adjudicator determined relator was not disqualified from receiving benefits because she was discharged for undisclosed reasons. LCS appealed the determination and a de novo hearing was held.

At the hearing, relator testified that her failure to report for work for an entire work week (Monday through Friday) was the result of an unfortunate sequence of events beyond her control. She testified that she did not report to work on Monday, July 16, 2006, because her car was missing. Her son had left the car in a parking garage over the

weekend and could not recall where he had parked it. Relator called Jeff Meyer, the branch manager, to inform him that she was unable to work that day, but would report for work on Tuesday. Meyer was unavailable so she left the message with a co-worker.

Relator located her car Monday afternoon, but Tuesday morning her estranged husband allegedly stopped by her home and “terrorized” her. Because she was emotionally distraught after the incident, relator left a voicemail message for Meyer informing him that she would not be able to work that day due to “personal problems,” but would report for work on Wednesday. Relator testified that she went to the St. Paul police department later that day to file a complaint against her husband.

On Wednesday, at the advice of her attorney, relator sought a restraining order against her husband. Before seeking the order, relator left a voice message for LCS that she was unable to work that day because she was having a “personal crisis,” but would be at work on Thursday. Relator testified that early Tuesday night her husband took her car without permission. She claimed that she called LCS immediately after discovering that her car was missing and left a message stating that she needed to take the rest of the week (Thursday and Friday) off because she “didn’t know what was going on.”

Relator did not call LCS the next day; however, she testified that both Meyer and LCS President John Turnbull left messages for her on Thursday. Turnbull’s message informed relator that she was required to report to the office on Friday to pick up her check and discuss the circumstances of her absence. Relator returned Meyer’s call on Friday morning because she allegedly did not receive the message until late Thursday

evening. Relator told Meyer that she was unable to meet with him and Turnbull on Friday because she had not recovered her car. Relator was subsequently terminated.

Meyer and Turnbull testified on behalf of LCS.<sup>1</sup> Meyer testified that during the relator's week-long absence, he made numerous unsuccessful attempts to contact her by phone. Specifically, Meyer testified that he called and left messages Monday, Wednesday, and Thursday on her home and cell phone requesting that she call him to discuss her absence. Relator never returned the calls. On Friday afternoon, Meyer called relator and told her that not having a car was an unsatisfactory excuse for missing work because she could have arranged for alternate transportation. Meyer was not comfortable with her returning to work because he felt that she had misled him.

Similarly, Turnbull testified that he called relator on her home and cell phones on Wednesday and Thursday and told her to be at work on Friday to discuss her absence. In his messages, Turnbull said that "one or two days [of absence] were understandable, three days needed an explanation, and four days was unacceptable." Meyer and Turnbull agreed that relator's absence was "significant enough to not require her presence any longer." Turnbull explained that, because LCS is a small company, her absence had a significant adverse affect on LCS's business operations. Contrary to relator's testimony that her husband took her car on Wednesday night, Turnbull testified that relator called him on Tuesday to report that her car was missing. Meyer also noted that he drove by relator's home on Wednesday and noticed her car parked in the driveway.

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<sup>1</sup> The majority of Meyer and Turnbull's testimony is missing from the record. The tape recorder cut out for approximately twenty-five minutes during the hearing. The account of their testimony was taken from the ULJ's statement of proceedings.

The ULJ determined that credible testimony from Turnbull and Meyer established that their repeated calls to relator on Monday, Wednesday and Thursday of the week in question were not returned and that relator's husband took her vehicle on Tuesday. The findings also indicate that, although "the circumstances may have created hardships for [relator], she was unable to offer any satisfactory explanation" for her absences. The ULJ concluded that these absences, which adversely affected LCS's business operations, constituted employee misconduct and disqualified relator from receiving unemployment benefits. Relator moved for reconsideration, but the ULJ affirmed the decision. This certiorari appeal followed.

## D E C I S I O N

### I.

The ULJ's determination must be affirmed unless the decision derives from unlawful procedure, relies on an error of law, is unsupported by substantial evidence, or is arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (Supp. 2005). An applicant for unemployment benefits is disqualified if "the applicant was discharged because of employment misconduct." Minn. Stat. § 268.095, subd. 4(1) (Supp. 2005). Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). But whether the act committed by the employee constitutes employment misconduct is a question of law reviewed de novo. *Id.*

We review factual findings in the light most favorable to the decision and will not disturb them as long as there is evidence that reasonably tends to sustain those findings. *Schmidgall*, 644 N.W.2d at 804. “Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006).

Minnesota law defines employee misconduct 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 the 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) (2004).

Here, relator disputes both the factual findings and legal determinations of the ULJ. First, relator claims that the evidence clearly demonstrates that Meyer and Turnbull acquiesced to her absence because they first inquired about her time away from work on Thursday. Although relator’s own testimony supports her assertion, Meyer and Turnbull both testified that relator failed to return phone calls they had placed to her home and cell phone on Tuesday and Wednesday. This is an issue of credibility, which cannot be

disturbed on appeal. *Skarhus*, 721 N.W.2d at 345. Thus, the ULJ's factual findings on this issue are not erroneous.

Next, relator argues that her failure to report for work did not constitute unemployment misconduct because she did not violate LCS's "no call/no show" policy. But the ULJ's determination is not premised on a violation of LCS rules. In fact, the ULJ found that relator did not violate LCS rules. Instead, the finding of employment misconduct was based on her unilateral decision to "absent herself from work for a week for personal reasons." Absenteeism has been recognized as evidence of misconduct and even a single unexcused absence may constitute misconduct. *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986).

After examining the circumstances surrounding relator's absence, we conclude that her conduct constitutes employment misconduct. On a few of the days in question, relator did leave voice messages with co-workers or management informing them that she would not be reporting for work. But her absence was not authorized by LCS, and the time she missed on account of her missing vehicle supports the ULJ's decision. Though the loss of her car was unfortunate and inconvenient, relator initially discovered that her son had misplaced her vehicle during the weekend preceding her week-long absence, yet she did not attempt to arrange substitute transportation to work on Monday. Only a day later, after her husband took her car Tuesday evening, she again did not arrange for transportation to work for the remainder of the week. Relator also failed to return any of her supervisor's calls requesting an explanation for her absence. Although the findings

indicate that relator's car was taken by her husband on Tuesday, Meyer testified that he drove by her home on Wednesday and noticed her vehicle parked in the driveway.

Relator's behavior constitutes employment misconduct toward her employment that no reasonable employee would have engaged in under the circumstances. A dedicated employee who was concerned about jeopardizing her job would have found alternative means of transportation such as a bus, taxi, or a ride from a co-worker, friend, or family member, and would have also stayed in close contact with her employer to communicate her honest reasons for missing work.

Substantial evidence supports the ULJ's finding that relator's conduct also violated the standards of behavior LCS had the right to reasonably expect from relator. As a small business with limited personnel, relator knew that LCS depended on her for all of their administrative needs. As Turnbull testified, performance of relator's duties was "essential to [LCS's] day-to-day operations, and to have nobody answer the telephones and nobody to enter the payments and nobody to enter all the daily work is a very large inconvenience. Being a smaller business, we didn't have another person that could do her duties every day."

Relator alternatively argues that her absence from work does not disqualify her from unemployment benefits because she was the victim of domestic abuse. "Conduct that was a result of the applicant . . . being a victim of domestic abuse . . . is not employment misconduct." Minn. Stat. § 268.095, subd. 6(c) (2004). In order to fall within this exception, the applicant must provide evidence of "physical harm, bodily harm, or assault," or "the infliction of fear of imminent physical harm, bodily injury, or

assault” that is committed by one family member against another. Minn. Stat. § 518B.01, subd. 2(a)(1), (2) (2004). Although we are sensitive to allegations of domestic abuse, this exception does not entitle relator to relief. The record indicates that relator was absent for an entire work week, yet she spent only a fraction of that time filing a complaint and obtaining a restraining order against her husband. She has not offered any reasonable excuse for the remainder of her absence.

## **II.**

Relator contends that she was improperly denied a subpoena to obtain phone records. She argues that these records are essential to support her claim that Meyer and Turnbull never called her during the week in question. Subpoenas are available to compel the production of evidence in an unemployment benefit proceeding upon a showing of necessity. Minn. R. 3310.2914, subp. 1 (2005). On reconsideration, the ULJ denied relator’s request because she (1) failed to request a subpoena before the hearing; (2) presumably had her cell phone records which detailed calls made and received; and (3) failed to demonstrate that the records would conclusively establish whether the calls were made. The ULJ’s decision was appropriate. There is no indication that relator was confused or did not understand the nature of the proceedings. It also does not appear that the lack of records compromised the integrity of this proceeding. Relator was given ample opportunity to raise issues and present evidence, but she did not complain or otherwise notify the ULJ that she wanted access to additional evidence until after she received the unfavorable decision.

**Affirmed.**