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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0433**

Lisa A. Keegan,
Relator,

vs.

Thrifty Drug Stores Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent

**Filed February 17, 2009
Affirmed
Collins, Judge***

Department of Employment and Economic Development
File No. 384473-4

Lisa Keegan, 901 West Cavour Avenue, Fergus Falls, MN 56537 (pro se relator)

Thrifty Drug Stores, 6901 East Fish Lake Road, #118, Maple Grove, MN 55369
(respondent)

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MN 55101 (for respondent department)

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

* 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UNPUBLISHED OPINION

COLLINS, Judge

Relator challenges the decision of the unemployment law judge (ULJ) that relator is ineligible to receive unemployment benefits because she engaged in employment misconduct, arguing that (1) her request for reconsideration was not untimely; (2) termination of her employment was in retaliation for requesting information about filing a grievance; and (3) she did not commit employment misconduct. We affirm.

D E C I S I O N

Relator Lisa Keegan was discharged from her position as a pharmacy technician at Thrifty Drug Stores (Thrifty) for repeated tardiness and unprofessional behavior. After an initial determination of ineligibility by the department of employment and economic development adjudicator, Keegan appealed and a hearing was conducted by the ULJ, who then determined that Keegan is ineligible to receive unemployment benefits because she had been discharged for employment misconduct. The ULJ affirmed the determination on reconsideration, and this certiorari appeal followed.

When reviewing the decision of a ULJ, this court may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the

entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (Supp. 2007).

Timeliness of Request for Reconsideration

Keegan first argues that her request for reconsideration was not untimely. Because the ULJ recognized that Keegan had been given incorrect information about the filing deadline and because the ULJ considered the request on its merits, this issue is moot.

Retaliation

Keegan next argues that the termination of her employment was in retaliation for requesting information about filing a grievance. But Keegan did not raise this issue at the evidentiary hearing before the ULJ.

In deciding a request for reconsideration, the unemployment law judge must not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing conducted under subdivision 1.

The unemployment law judge must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence[.]

Minn. Stat. § 268.105, subd. 2(c) (Supp. 2007).

The first time Keegan alluded to having sought information on the grievance procedure is in her letter to the ULJ regarding her request for reconsideration. In the letter, Keegan states that on August 8, 2008, “I asked [the manager] whom in corporate to file grievance [with]. That was a big mistake, as the grievance I was going to file was on

[the manager] himself. I found out by [a coworker] that [the manager] called him 08/28/08 regarding terminating me.” This is the only evidence presented relative to Keegan’s belated assertion that she was discharged in retaliation for wanting to file a grievance, and Keegan offers no reason for failing to raise the issue at the evidentiary hearing. In deciding Keegan’s request for reconsideration the ULJ found that “Keegan has not shown there is evidence that was not submitted at the evidentiary hearing that would likely change the outcome or that she had good cause for not previously submitting it.”

Thus, the ULJ concluded that an additional evidentiary hearing was not called for and that reconsideration was not warranted on this ground. In light of the dispositive conclusion drawn from the following analysis of Keegan’s employment misconduct, we agree.

Employment Misconduct

An applicant is ineligible to receive unemployment benefits if the applicant was discharged for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). Employment misconduct is “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.” *Id.*, subd. 6(a) (Supp. 2007). Whether an employee has committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Findings of fact are viewed in the light most favorable to the ULJ’s decision and are upheld if supported by

substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5); *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether the employee's act constitutes employment misconduct rendering the employee ineligible to receive benefits is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804; *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. App. 2007).

According to an August 2006 performance evaluation, Keegan was late for work more than 25 times in the previous year. After being warned both orally and in writing several times, she continued to be late for work until the termination of her employment in late August 2007. “[C]ontinued tardiness, combined with several warnings, evidences disregard by the employee of the employer’s interest. It is a violation of standards of behavior which the employer [has] a right to expect of its employees.” *Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App. 1984). Keegan concedes that she was often late, stating: “I am not contesting the fact that I [was] tardy for work, as I was,” but she argues that Thrifty permitted her to become accustomed to coming in late and told her that she would never be discharged for it. However, there were several written and oral warnings to the contrary, including, as stated in her most recent performance review in July 2007, “I will no longer tolerate your tardiness—you’ve received a letter of reprimand months ago [and] haven’t improved.” Instead of changing her behavior immediately, Keegan responded that she would do so only when her “scheduled hours were accommodated,” apparently referring to times when Keegan voluntarily worked late. This statement confirms that Keegan was purposefully late, which is exactly the

disregard of the employer's interests that falls below the standards of behavior an employer is entitled to demand from its employees. *Evenson*, 344 N.W.2d at 883.

After finding that Keegan's "tardiness was excessive both in frequency and degree" and that there were "occasions in which Keegan left work without permission," the ULJ concluded that "the tardiness and absentee issues alone in this case are sufficient to establish employment misconduct."

Regarding the allegation of unprofessional conduct, Keegan argues that Thrifty did not prove the "final incident," referring to an argument that Keegan had with one of the pharmacists. However, "[a]n applicant's entitlement to unemployment benefits must be determined based upon that information available without regard to any burden of proof." Minn. Stat. § 268.069, subd. 2 (Supp. 2007).

The evidentiary hearing is conducted as an evidence-gathering inquiry rather than an adversarial proceeding. Minn. Stat. § 268.105, subd. 1(b) (Supp. 2007). The pharmacist testified about the incident, as did the supervisor who had been told that a coworker had almost called the police because the confrontation had been "so extreme." During her performance review in July 2007, Keegan was advised that she should treat pharmacists as her superiors and that she needed to improve her ability to work with others. Keegan also was instructed that there should be "no more outbursts—if you have a problem discuss it with me. I want that to be a thing of the past." In response to this critique, Keegan threw the papers at her supervisor and left the workplace with seven hours remaining on her shift.

Based on the record before us, Keegan's excessive tardiness and unprofessional behavior amply support the ULJ's determination that Keegan engaged in employment misconduct, and Keegan is therefore ineligible to receive unemployment benefits.

Affirmed.