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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0731**

Linda Richards,
Relator,

vs.

Wal-Mart Associates, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 13, 2014
Affirmed
Bjorkman, Judge**

Department of Employment and Economic Development
File No. 30387401-3

Linda Richards, Burnsville, Minnesota (pro se relator)

Wal-Mart Associates, Inc., c/o CT Corporation System, Inc., Minneapolis, Minnesota
(respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that she is ineligible for benefits because she was discharged for employment misconduct after violating her employer's break policy. We affirm.

FACTS

Relator Linda Richards worked at respondent Wal-Mart Associates, Inc. from May 23, 2008, until October 31, 2012, as a customer-service associate. Richards received two 15-minute breaks per shift when working for more than six hours. Her supervisor told her when to take a break, and the two 15-minute breaks could not be combined. Between November 2011 and September 2012, Richards received three warnings for violating Wal-Mart policies by putting a game on hold during her shift and processing money grams incorrectly. Richards was told in September 2012, that any additional disciplinary incidents would result in termination.

On October 16, Richards started her first break at 2:05 p.m. She did not return to work after 15 minutes because she had a mandatory employee meeting at 2:30 p.m. Richards began her second break at 6:52 p.m. and did not return until 7:23 p.m., more than 30 minutes later. On October 24, Operations Assistant Manager Brad Arett saw Richards take a 28-minute break from 1:00 p.m. until 1:28 p.m. Wal-Mart's in-store video footage confirmed Richards's extended breaks on both dates and revealed no legitimate reason (such as stopping to assist a store customer) for the excessive breaks. On October 31, Richards was discharged.

Richards applied to respondent Minnesota Department of Employment and Economic Development (DEED) for unemployment benefits. DEED determined that Richards is ineligible for benefits, and Richards appealed. After a hearing,¹ the ULJ determined that Richards was discharged because of employment misconduct for not following Wal-Mart's break policy. On reconsideration, the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

We review a ULJ's decision to determine whether a party's substantial rights were prejudiced because the findings, inferences, conclusion, 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) (2012). Whether Richards engaged in conduct that makes her ineligible for unemployment benefits is a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether an employee committed the act is an issue of fact, which we review for substantial evidence, but whether the act constitutes employment misconduct is a legal question that we review de novo. *Id.*; see also Minn. Stat. § 268.105, subd. 7(d).

I. Substantial evidence supports the ULJ's finding that Richards was discharged for violating Wal-Mart's break policy.

On appeal, we review the ULJ's factual findings in the light most favorable to the decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We defer

¹ The hearing was rescheduled at Wal-Mart's request because Richards produced several exhibits on the morning of the hearing.

to the ULJ's credibility determinations, and will not disturb findings that are supported by substantial evidence. *Id.*

The ULJ found that Richards was discharged for taking breaks on October 16 and October 24 that exceeded the permitted duration. Richards acknowledged that she was aware of Wal-Mart's break policy, had been warned after violating other company policies, and knew that she would be discharged for her next violation. Richards could not recall the circumstances surrounding the October 16 evening break. In-store video reveals Richards took a 31-minute break during which she made a purchase, used the restroom, and sat in the break room. As to the October 24 break, Richards agrees that she worked that day but does not recall the precise timing of her breaks, stating only that she did not begin her break at 1:00 p.m. Arrett testified that he saw Richards in the break room for 28 minutes. This time frame was confirmed by in-store video. The ULJ expressly credited Arrett's testimony because he provided "detailed accounts of what Richards did during her break on October 16, 2012 and he witnessed Richards taking a long break on October 24, 2012." In sum, substantial evidence supports the ULJ's determination that Richards was discharged for violating Wal-Mart's break policy.

II. Richards's conduct constitutes employment misconduct.

An employee is ineligible for unemployment benefits if she is discharged for employment misconduct, which is any "intentional, negligent, or indifferent conduct," on or off the job that displays "a serious violation of the standards of behavior the employer has the right to reasonably expect" or "a substantial lack of concern for the employment." Minn. Stat. § 268.095, subds. 4(1), 6(a) (2012). It is well-settled that an employer has the

right to expect an employee to abide by the employer's rules and policies. *See, e.g., Skarhus*, 721 N.W.2d at 344. A "pattern of failing to follow policies and procedures" is misconduct that disqualifies an employee from receiving unemployment benefits. *Gilkeson v. Indus. Parts & Serv., Inc.*, 383 N.W.2d 448, 452 (Minn. App. 1986).

Richards argues that her actions are not misconduct because she did not intend to violate company policy. But employment misconduct need not be intentional; it can be negligent or indifferent conduct. Minn. Stat. § 268.095, subd. 6(a). Richards's violations of the break policy show a serious violation of Wal-Mart's expectations. *See Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App. 1984) (holding that repeated tardiness despite several warnings constitutes misconduct). Employers reasonably rely on their employees to work their scheduled shifts. This is particularly true where, as here, the employee works directly with customers. It is reasonable for Wal-Mart to expect its employees, particularly customer-service representatives like Richards, to follow its break policies to ensure that work shifts are covered and customer needs are met. *See Stagg*, 796 N.W.2d at 317 (concluding that employee committed misconduct by failing to follow absenteeism and tardiness policy); *McKee v. Cub Foods, Inc.*, 380 N.W.2d 233, 236 (Minn. App. 1986) (concluding that employee committed misconduct by leaving a shift before clocking out without approval from her manager). And requiring Richards to limit her breaks to the scheduled 15 minutes did not impose an unreasonable burden on her. *See Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985) (stating that failure to comply with employer's request is misconduct if request is reasonable and imposes no unreasonable burden). Because violating Wal-Mart's break

policy is serious and displays a lack of concern for the employment, we conclude that Richards committed employment misconduct.

III. Richards received a fair hearing.

A ULJ conducts hearings as an “evidence gathering inquiry” and “shall ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b) (2012). Richards argues that her hearing was unfair because the ULJ (1) limited her testimony and did not let her ask questions, (2) did not consider her arguments, and (3) exhibited bias by making credibility determinations in Wal-Mart’s favor.² We disagree. First, the record shows Richards testified during the hearing and the ULJ helped her question Wal-Mart’s representative. What Richards characterizes as being interrupted and “cut off” by the ULJ reflects what often happens in a telephone hearing with multiple parties. Second, there is no indication that the ULJ did not consider Richards’s testimony and exhibits to evaluate her arguments. Third, the ULJ was required to credit either Wal-Mart or Richards’s testimony. *See* Minn. Stat. § 268.105, subd. 1(c) (2012); *Skarhus*, 721 N.W.2d at 345. Contrary to Richards’s assertion, the ULJ did not “simply believe” Arett’s testimony. As noted above, the ULJ made detailed credibility findings.

Next, Richards argues that she was not permitted to subpoena necessary documents. *See* Minn. Stat. § 268.105, subd. 4 (2012). On the day the hearing was first

² Richards also argues that Wal-Mart was not required to prove its assertions. This argument fails because employment misconduct in unemployment appeals is determined without regard to any common-law burden of proof. Minn. Stat. § 268.069, subd. 2 (2012).

scheduled, Richards told the ULJ that there was some “information that Wal-Mart has” that she wanted Wal-Mart to provide. The ULJ told her that they could discuss whether there was information she wanted to subpoena during the rescheduled hearing. Richards did not renew her request for a subpoena. Accordingly, this argument is waived. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Affirmed.