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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1526**

Diana Plante,
Relator,

vs.

Target Corporation,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 15, 2010
Affirmed
Lansing, Judge**

Department of Employment and Economic Development
File No. 22410764-3

Diana L. Plante, Roseville, Minnesota (pro se relator)

Target Corporation, c/o Barnett Associates Inc., Garden City, New York (respondent)

Lee B. Nelson, Britt K. Lindsay-Waterman, Minnesota Department of Employment and
Economic Development, St. Paul, Minnesota (for respondent Department of Employment
and Economic Development)

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

UNPUBLISHED OPINION

LANSING, Judge

Diana Plante appeals, by writ of certiorari, an unemployment law judge's determination that she is ineligible for benefits because she violated her employer's absence-notification policy. Substantial evidence supports the determination that Plante's failure to call in or show up for three consecutive shifts constituted employment misconduct, and we therefore affirm.

FACTS

Target Corporation employed Diana Plante as a cashier thirty to forty hours a week beginning in February 2007. Plante suffered from health problems and received several warnings for poor attendance throughout 2008. Target has a written attendance policy that provides, among other terms, that three consecutive absences, without notice from the employee, is considered job abandonment and is grounds for discharge.

In November 2008 Plante was given a final warning for her attendance and agreed to a corrective-action plan. Plante's health problems continued and she requested a leave of absence. Target approved the leave, and Plante agreed that it would begin on February 22, 2009 and end on May 1, 2009.

Plante was scheduled to work on February 15, 16, 19, 20, and 21 before beginning her leave. On February 15, she called a supervisor to say that she was too sick to come in that day. Plante called in sick for her shift on February 16 as well. Plante did not call in or show up for her last three scheduled shifts. When Plante went to her workplace in

April 2009 to get her post-leave schedule, a human-resources employee told Plante that her position had been terminated for job abandonment.

Plante applied for unemployment benefits and the Minnesota Department of Employment and Economic Development initially concluded that she was eligible because her absences were “not avoidable, and not preventable by reasonable planning.” Target appealed the determination.

At the evidentiary hearing before an unemployment law judge (ULJ), Plante’s direct supervisor relied on Target’s written policy that three absences without notice constitute job abandonment and provide grounds for discharge. Plante testified that when she called in sick on February 16, she told another supervisor that she “wasn’t sure if [she] was going to be in for [her] last two shifts.” Plante acknowledged that she did not call in on February 19 or 20. She explained that she left a note for her direct supervisor requesting that her leave start one day early—on February 21 instead of February 22. Plante said that, based on the note, she should not have been scheduled to work on February 21.

The supervisor who spoke with Plante on the phone on February 16 testified that he knew she was having attendance problems and that he wanted to specifically confirm that she could come in for her remaining shifts. He stated that Plante told him that she thought she could. The supervisor also testified that he reminded Plante that she needed to call in on those days if she was not able to work. Plante’s direct supervisor testified that she would have been working in the store when Plante delivered the note, but she never received any note about a change to Plante’s leave. Plante stated that she preferred

to leave notes for her supervisor rather than talk to her directly and that she did not have a copy of the note.

The ULJ determined that Plante did not abandon her job but was discharged on April 11, 2009, for violating Target's attendance policy. He concluded that Plante was ineligible for unemployment benefits because the attendance-policy violation constituted employment misconduct. Plante filed a request for reconsideration, and the ULJ denied the request and affirmed the decision. Plante appeals by writ of certiorari.

D E C I S I O N

We review a ULJ's decision on unemployment benefits to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (2008). Based on that review, we may affirm, reverse, or modify the ULJ's decision, or remand the case for further proceedings. *Id.*

On appeal, Plante challenges Target's assertions that she abandoned her job on February 21, 2009. The ULJ agreed that Plante did not intend to end her employment when she failed to show up for her shifts on February 19, 20, and 21. The ULJ concluded that Plante's lack of intent meant that she did not quit her job. *See* Minn. Stat. § 268.095, subd. 2(a) (2008) (defining "quit" as occurring if "the decision to end the employment was, at the time the employment ended, the employee's").

The ULJ instead determined that Plante was discharged on April 11, 2009, when she was told her employment was terminated. *See* Minn. Stat. § 268.095, subd. 5(a)

(2008) (defining “discharge” as occurring when “any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity”). Because Plante believed she was on leave and Target did not communicate with her about her employment status until Plante went into her workplace in April, the record supports the conclusion that the termination date was April 11, 2009.

Plante’s central challenge is to the ULJ’s determination that she was discharged for employment misconduct. 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 the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a) (2008). Plante contends that her absence did not amount to misconduct.

“[A]bsence because of illness or injury with proper notice to the employer” is not employment misconduct. *Id.* But an “employer has a right to expect an employee to work when scheduled.” *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984), *superseded by statute on other grounds*, Minn. Stat. § 268.095, subd. 6(e) (Supp. 2007). And an employer may establish and enforce reasonable rules governing employee absences. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). “[R]efusing to abide by an employer’s reasonable policies” generally constitutes employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

The determination of whether an employee performed the act alleged to be employment misconduct is a question of fact. *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19-20 (Minn. App. 2003). Factual findings are reviewed in the light most favorable to the ULJ's decision and will be sustained if substantial evidence supports the decision. Minn. Stat. § 268.105, subd. 7(d); *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). Determining whether an act amounts to employment misconduct is a question of law, which we review de novo. *Risk*, 664 N.W.2d at 20. We defer to the ULJ's assessment of credibility and resolution of conflicting testimony. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

The record supports the ULJ's finding that Plante failed to call in or show up for her shifts on February 19, 20, and 21. Plante conceded that she did not call her employer in advance before missing her shifts on February 19 and 20. Plante argues on appeal that she told her employer that she would not be in for these shifts when she called on February 16. She also contends that she submitted a note changing her leave of absence to start on February 21 and should not have been expected to work that day. Her supervisors dispute both of these assertions.

When the credibility of a witness in the evidentiary hearing significantly affects the outcome of the ULJ's decision, the ULJ "must set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2008). The ULJ met this requirement when he stated in the findings that Plante's testimony was not corroborated by her previous written submissions. Although Plante argues that she notified her employer of her absences, the record indicates that Plante submitted answers in the

unemployment insurance request for information stating that she did not call in or show up for her last three shifts. In her testimony, Plante stated that she told a supervisor that she “wasn’t sure” if she would be able to work her final shifts. The ULJ noted that, in contrast, the documents submitted by the employer did corroborate the testimony of Plante’s two supervisors. The ULJ sufficiently stated his reasons for crediting the supervisors over Plante and we defer to this assessment.

The record establishes that Plante had serious medical issues that resulted in her absence from work. It is not the absences, however, but the failure to provide proper notice of the absences that caused the discharge. Plante does not dispute that Target’s attendance policy considers three consecutive absences, without notice, to be grounds for discharge and that this employment policy is reasonable. *See Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986) (holding that employee’s absence without notice, in some circumstances, can amount to misconduct when it happens only once) *cf.* Minn. Stat. § 268.095, subd. 6(a) (stating that single incident is not employment misconduct absent significant adverse impact on employer). Deferring to the ULJ’s credibility determinations, which are supported by specific reasons, we conclude that substantial evidence supports the ULJ’s decision that Plante displayed a serious violation of the employer’s reasonable expectations when she did not call in or show up for three consecutive scheduled shifts.

Affirmed.