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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0696**

Cherie L. Baker,
Relator,

vs.

National Marrow Donor Program,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 17, 2014
Affirmed
Worke, Judge**

Department of Employment and Economic Development
File No. 30547434-3

Cherie L. Baker, St. Paul, Minnesota (pro se relator)

National Marrow Donor Program, Minneapolis, Minnesota (respondent employer)

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

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Relator challenges an unemployment-law judge (ULJ) decision that she is ineligible for unemployment benefits because she committed misconduct by being excessively tardy for work. We affirm.

FACTS

Relator Cherie L. Baker was discharged for excessive tardiness from her position as a contact representative at respondent National Marrow Donor Program (NMDP). Baker sought unemployment benefits, and a ULJ held a hearing at which Baker and Sarah Snyder, a human resources strategic business partner for NMDP, testified. The ULJ also received documentary evidence including a list of Baker's absences and NMDP's attendance policy.

Snyder testified that NMDP's written attendance policy prohibited excessive tardiness and required employees to give at least one half hour of advance notice before a work absence or tardiness. Snyder stated that Baker's excessive tardiness and absences led to her dismissal: on September 13, 2012, NMDP gave Baker a written warning about her unsatisfactory work attendance; preceding the warning, Baker had been tardy 14 times during 21 work shifts; following the warning, Baker was tardy four of 11 work shifts, and NMDP gave Baker an oral warning. According to Snyder, when Baker, whose start time was 10 a.m., called in at 9:57 a.m. on November 20, 2012, to say that she would be fifteen minutes late, and arrived between 10:15 a.m. and 10:30 a.m., NMDP decided to dismiss her.

Baker testified that she was aware of NMDP's attendance policy, and knew that she must be on time and should arrive early to be ready to take calls when her shift started. But she disagreed with NMDP's characterization of her start times as late because she claimed that NMDP's multi-layered log-in system delayed the log-in process. She also testified that she routinely had problems logging-in, so that by the time she was able to log-in, she was considered tardy even though she had arrived to work on time; she stated that her manager denied her request to credit her start time as when she began logging in, rather than when log-in was completed. She also identified several personal reasons for being unable to start work on time.

The ULJ found that "[t]he evidence shows Baker either knew or should have known that her job was in jeopardy due to her tardiness" and that "[w]hile some of Baker's tardiness may have been due to system issues, it is more likely than not that the majority of the tardiness was not due to system issues." The ULJ also noted that on her last day of employment, Baker called in only three minutes before her scheduled start time to state that she would be fifteen minutes late but arrived between 15 and 30 minutes late; the ULJ deemed this conduct "negligent," given her prior warnings. The ULJ concluded that Baker was discharged for employment misconduct and is ineligible to receive unemployment benefits. Upon Baker's motion for reconsideration, the ULJ affirmed his or her decision, and this certiorari appeal followed.

DECISION

This court may alter a ULJ's decision if the substantial rights of the relator were prejudiced because, among other reasons, the ULJ's decision is unsupported by

substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5) (2012). An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). “Employment misconduct” is “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2012). Refusal to comply with an employer’s reasonable policies amounts to disqualifying misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn.2002). An employee’s excessive tardiness and absences amount to misconduct when they violate an employer’s reasonable policies. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 316–17 (Minn. 2011) (noting that employee handbook stated employer’s expectation that employees be on time to work and employer’s strong policy against absenteeism).

“Whether an employee committed employment misconduct is a mixed question of fact and law.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). “Whether the employee committed a particular act is a question of fact.” *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). “Factual findings are reviewed in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ, and will not be disturbed when the evidence substantially sustains them.” *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 822 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010); *see also Nichols v. Reliant Eng’g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006)

(stating that this court defers to ULJ's determinations on conflicting evidence). Whether a particular act constitutes disqualifying misconduct is a question of law subject to de novo review. *Stagg*, 796 N.W.2d at 315.

Baker argues that the majority of her instances of tardiness were due to NMDP's faulty computer log-in system, that she informed NMDP of the problems and the company acknowledged them, and that she was not "made . . . fully aware that termination was the next step" for her.

We conclude that substantial evidence supports the ULJ's decision that Baker's conduct constituted employment misconduct. NMDP had a clearly defined employment policy that required employees to be to work on time. *See id.* at 316-17 (upholding tardy employee's dismissal when employee handbook provided that employer expected employees to be on time and stated strong policy against absenteeism). This policy was reasonable in light of NMDP's stated need to service donors and respond to questions and inquiries. The evidence also amply demonstrates that Baker knowingly violated NMDP's policy. Even after being warned twice about her excessive tardiness, Baker called in only three minutes before her scheduled start time on her last day of work. This conduct was sufficient to support her dismissal for misconduct. *See Schmidgall*, 644 N.W.2d at 806 (stating that "an employee's decision to violate knowingly a reasonable policy of the employer is misconduct"); *see also Hanson v. Crestliner Inc.*, 772 N.W.2d 539, 543 (Minn. App. 2009) ("Generally, a single absence without permission from the employer may amount to misconduct."); *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 206 (Minn. App. 2004) ("The general rule is that if the request of the employer is reasonable and

does not impose an unreasonable burden on the employee, the employee's refusal to abide by the request constitutes misconduct."), *review denied* (Minn. Mar. 30, 2004).

While Baker asserts that she was "not [made] fully aware that termination was the next step," an employee may be denied unemployment benefits for engaging in misconduct, even when the employer did not follow its progressive discipline policy. *See Stagg*, 796 N.W.2d at 316 (concluding that an employee's violations of the employer's absenteeism and tardiness policy amounted to employment misconduct even though employer did not apply its progressive discipline policy). In addition, while Baker credits most of her tardiness to log-in problems, the ULJ rejected that testimony, finding that the majority of Baker's incidences of tardiness were not for that reason. *See Nichols*, 720 N.W.2d at 594 (deferring to ULJ's determinations on conflicting evidence).

Affirmed.