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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1007**

Laurie Kiely,
Relator,

vs.

Dolphin Fast Food, Inc., DTD 091585,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 4, 2013
Affirmed
Peterson, Judge**

Department of Employment and Economic Development
File No. 29185038-3

Laurie A. Kiely, Elk River, Minnesota (pro se relator)

Dolphin Fast Food, Inc., DTD 091585, Minneapolis, Minnesota (respondent employer)

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

Considered and decided by Cleary, Presiding Judge; Peterson, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

This certiorari appeal is from a decision of an unemployment-law judge (ULJ) determining that relator is ineligible for unemployment benefits because she was discharged for employment misconduct. We affirm.

FACTS

Relator Laurie Kiely worked part-time for respondent-employer Dolphin Fast Foods, Inc., DTD 091585, from September 15, 2011, through December 23, 2011. The employer's work week runs from Friday through Thursday; a schedule of the employees' assigned hours is posted each week on Tuesday, for the week beginning on that Friday. Employees are responsible for knowing their own schedules. When relator began her employment, the employer provided her with an employee handbook that sets forth the employer's policies; included in this handbook are specific guidelines about attendance, tardiness, and absences.

Relator was tardy for work on October 11, 12, and 24, 2011, and on November 9, and 23, 2011. On November 7 and 8, relator, who had been placed on light duty, was a no-call/no-show for her scheduled shifts. Relator received and signed a written warning on November 9, recommending that she pay closer attention to her schedule and threatening suspension if her attendance did not improve. Relator called in absent on November 25 and 30, 2011; on December 1, 2011, she received a second written warning and was suspended for two weeks for violating the attendance policy.

While suspended, relator requested to have December 23, 2011, off work. Because other employees had made earlier requests, the employer denied the request, but did not personally inform relator. Instead, relator was placed on the work schedule for December 23. Relator returned to work on December 20 and was scheduled to work on December 21 and 22. The schedule for the following week, December 23 through December 29, was posted on Tuesday, December 20. This schedule assigned relator to work on December 23. Relator was a no-call/no-show for December 23. The employer discharged relator for violating the attendance policy.

At a March 12, 2012 hearing before a ULJ to determine whether relator was eligible to receive unemployment benefits, the employer did not submit a copy of the December 23 schedule. The ULJ held the record open until March 21 to allow the employer to submit the schedule. The employer submitted a copy of the schedule to the ULJ and e-mailed a copy to relator on March 12, 2012; the ULJ received his copy on March 13, but relator claimed that she never received the schedule. The ULJ determined that relator had been discharged for employment misconduct and that she was ineligible to receive unemployment benefits. This decision was affirmed on reconsideration; the ULJ noted that, although relator did not receive the schedule, the employer sent it to the e-mail address that she provided, and her failure to receive it did “not negate the evidence provided by the employer.” This certiorari appeal followed.

DECISION

We may reverse or modify a ULJ’s decision if a relator’s substantial rights have been prejudiced because the findings, inferences, conclusion, or decision are made upon

unlawful procedure, affected by an error of law, or not based on substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d)(3)-(5) (2010). “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). We review whether the employee committed a particular act as a question of fact, but consider whether the act constitutes employment misconduct as a question of law. *Id.* The ULJ’s findings of fact are viewed in the light most favorable to the decision, and the findings will not be disturbed if the evidence substantially supports them. *Id.*

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). “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) (2010). 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 are 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).

As in *Stagg*, the employer here had clearly defined policies about tardiness, absences, and an employee’s responsibility to be aware of the work schedule. The

employer's attendance-and-tardiness policy states: "When employees do not report to work or are late, it places an extra burden on Team Members. Excessive absenteeism or tardiness, regardless of the reason, makes it difficult for the restaurants to run smoothly." Relator's repeated tardiness and absences violated the employer's reasonable attendance policies and are employment misconduct; the ULJ's determination of ineligibility is supported by substantial evidence and is not an error of law.

Relator contends that the hearing was made upon unlawful procedure because she did not receive by e-mail a copy of the December 23 schedule. *See* Minn. R. 3310.2921 (2011) (stating that, upon request, a party must be provided with a copy of any document accepted into evidence). The employer submitted the evidence to the ULJ and confirmed that the evidence was sent to relator's e-mail. Relator does not challenge the accuracy of the document that the ULJ received; in a letter to the ULJ, she stated, "It is my opinion that maybe they don't have their records on hand, to back up their statements." A party appealing a decision has the burden of demonstrating not only error, but also prejudice. *Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006-OA1*, 775 N.W.2d 168, 178 (Minn. App. 2009), *review denied* (Minn. Jan. 27, 2010); *see also* Minn. Stat. § 268.105, subd. 7(d) (providing for reversal or modification of ULJ's decision if petitioner's substantial rights may have been prejudiced). Relator has not demonstrated that she was prejudiced because she did not receive a copy of the schedule.

Affirmed.