STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0459

Vickie L. Hoffman,
Relator,

vs.

Minnesota Mining & Mfg. Co.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 29, 2008
Affirmed
Wright, Judge

Minnesota Department of Employment and Economic Development
File No. 14175 06

Vickie L. Hoffman, 119 South State Street, New Ulm, MN 56073 (pro se relator)

Minnesota Mining & Manufacturing Company, 1700 North Minnesota Street, New Ulm, MN 56073 (respondent)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, 1st National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, MN 55101 (for respondent department)

Considered and decided by Wright, Presiding Judge; Klaphake, Judge; and Poritsky, 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.

U N P U B L I S H E D O P I N I O N

WRIGHT, Judge

Relator challenges the determination of the unemployment law judge that she was discharged for employment misconduct and, therefore, is disqualified from receiving unemployment benefits. We affirm.

FACTS

Relator Vickie Hoffman was discharged from employment because she violated the written attendance policy of respondent-employer Minnesota Mining & Manufacturing Company (3M). Under this policy, employees accumulate points for failure to report when scheduled to work. For a partial-day absence, defined as an absence of four hours or less, an employee accumulates one-half point. An employee accumulates one point for a full-day absence, with successive consecutive absences adding one-half point each. But multiday medical-related absences may be capped at one-and-one-half points if supported by appropriate documentation. An absence without leave (AWOL) results in two points for each missed shift. An employee who accumulates six points during any rolling 12-month period is subject to termination.

Before termination of her employment, Hoffman worked at 3M's New Ulm plant on rotating shifts of 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., or 11:00 p.m. to 7:00 a.m. Although shifts typically were assigned for weekdays, mandatory overtime shifts could be scheduled on weekends. Every other weekend, an employee was on call for scheduled weekend overtime; and 3M typically posted scheduled overtime shifts, if any, on the Wednesday immediately preceding the weekend shift. If an employee was

scheduled for a weekend shift but did not want to work, 3M permitted the employee to arrange for a coworker to cover that shift in lieu of using earned vacation time. If the employee could not find someone to cover, the employee could obtain the assistance of a supervisor to secure coverage. In any event, the employee was required to call 3M if the employee planned to be absent from a scheduled overtime shift. Failure to do so resulted in the absent employee receiving two points for an AWOL.

Hoffman took approved vacation from Wednesday, August 2, to Friday, August 4, 2006. Because Hoffman was aware that she was on call for any scheduled overtime shifts on the weekend of August 5 through 6, and she wanted to take off those days as well, she attempted to find a weekend replacement by posting a note on the schedule board. She received no response, and 3M did not contact her to work the overtime shifts. Hoffman, therefore, assumed that either there were no weekend shifts or that someone had volunteered to cover hers. Hoffman acknowledged that, although it was her responsibility to know whether she was scheduled for weekend work, she made no effort to determine whether she was needed.

During Hoffman's vacation, 3M posted the weekend shifts, and she was scheduled to work both days. The shifts were not covered, and Hoffman did not have permission to miss them. Because Hoffman neither reported for work nor called to advise 3M of her whereabouts, she earned four points—two for each shift in which she was AWOL. Without any other points, these four points would have resulted in a written warning rather than employment termination. But when these points were added to the points Hoffman had already accumulated, she had accrued 6.5 points within a 12-month period.

As a result, 3M terminated Hoffman's employment for violating its corporate attendance-control policy.

Hoffman established an unemployment benefits account with the Minnesota Department of Employment and Economic Development (the department). A department adjudicator determined that 3M discharged Hoffman for reasons other than employment misconduct and concluded that she qualified for unemployment benefits. 3M appealed this determination. Following a de novo hearing, an unemployment law judge (ULJ) reversed the initial determination and found that Hoffman is disqualified from receiving unemployment benefits because she was discharged for employment misconduct. The ULJ subsequently denied Hoffman's motion for reconsideration, and this certiorari appeal followed.

D E C I S I O N

Hoffman challenges the ULJ's determination that she was discharged for employment misconduct. Whether an employee was discharged for employment misconduct presents a mixed question of law and fact. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. App. 2007). Whether the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). The ULJ's factual findings will not be disturbed on appeal if "the evidence substantially sustains them." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether a particular act constitutes employment misconduct, however, presents a question of law, which we review de novo. *Id.*

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). "Employment misconduct" is "intentional, negligent, or indifferent conduct" that clearly displays a serious violation of the standards of behavior that an employer has a right to expect of the employee or that clearly displays a lack of concern for the employment. *Id.*, subd. 6(a) (2006). An employee's conduct is intentional if it is "deliberate and not accidental." *Houston v. Int'l Data Transfer Corp*., 645 N.W.2d 144, 149 (Minn. 2002) (citation omitted).

Hoffman acknowledged that she was responsible for finding a substitute if she intended to be absent from a scheduled weekend shift. And she admitted knowing that she was on call if 3M scheduled any weekend shifts on August 5 or 6. Despite this knowledge, Hoffman neither checked whether any weekend shifts were scheduled nor confirmed coverage for them if they were scheduled. Moreover, it is undisputed that Hoffman did not speak with her supervisor to request permission to be absent if a substitute was not available. Thus, there is substantial evidentiary support for the ULJ's finding that Hoffman's conduct was intentional. And when the ULJ's factual findings are viewed in the light most favorable to the decision, *Skarhus*, 721 N.W.2d at 344, the evidence also supports an implicit finding that Hoffman's conduct constitutes indifference to her employment responsibilities.

We next consider the ULJ's determination that Hoffman's absence without permission from her supervisor and without a substitute "displays clearly a serious disregard of the interests of [3M] and the standards of behavior that [3M] had a right to

expect of her as an employee." "An employer has the right to establish and enforce reasonable rules governing absences from work." *Wichmann*, 729 N.W.2d at 28. It is reasonable for an employer to require employees to give notice if they will be absent. *See Winkler v. Park Refuse Serv., Inc.*, 361 N.W.2d 120, 123 (Minn. App. 1985) (stating that employer reasonably can expect employee to keep employer apprised of whereabouts). "Without this information, an employer cannot adequately plan its staffing needs." *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986) (quotation omitted). The provisions of the 3M employment policy implicated here constitute reasonable rules governing employee absences.

Hoffman argues that 3M failed to perform its duty to inform her that she would be required to work on August 5 or 6. She contends that 3M knew that she would be on scheduled vacation when any weekend shifts would be posted and, although her supervisor saw Hoffman's note advising of her vacation and directing anyone who wanted to cover her overtime shift to speak to the supervisor, Hoffman's supervisor failed to call and inform her that the shift was not covered. But without any evidence establishing that 3M had such a duty to inform Hoffman, this argument is unavailing.

Because it is a reasonable expectation that an employee will notify the employer of an absence, the employee ordinarily bears the risk of lack of communication or miscommunication. *See, e.g., Psihos v. R & M Mfg.*, 352 N.W.2d 849, 850 (Minn. App. 1984). *But see Sticha v. McDonald's*, 346 N.W.2d 138, 140 (Minn. 1984) (holding that employee's requested absence for grandfather's funeral, which was actually the day after what employee requested, was good-faith error in judgment because employee

considered wake to be part of the "funeral"). In *Psihos*, we affirmed a determination of employment misconduct when the employee was discharged for going home for lunch mid-shift. 352 N.W.2d at 850. The employee had asked another employee, who occasionally acted as a supervisor, to find someone to cover for him. *Id.* But the employee did not request or receive permission to leave from his actual supervisor. *Id.* We held that the fact-finder reasonably could conclude that the employee committed employment misconduct by announcing his departure and leaving without permission. *Id.*

Here, the ULJ found that there was "insufficient evidence that the group leader or supervisor owed any duty to Hoffman to contact her if a substitute failed to appear to work [her] scheduled shift." Hoffman knew that any shift for which she might be scheduled on August 5 or 6 was mandatory, and she acknowledged that it was her responsibility to find a substitute if she intended to be absent. The ULJ correctly concluded that Hoffman's "blatant disregard" of 3M's attendance and substitution policies and procedures was a serious violation of the standard of behavior 3M reasonably expects of its employees. Because she was discharged for employment misconduct, Hoffman is disqualified from receiving unemployment benefits.

Affirmed.