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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-422**

Kray Burkart,
Relator,

vs.

Wisconsin Employment Security Division Combined Wage Claims,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 11, 2011
Affirmed
Lansing, Judge**

Department of Employment and Economic Development
File No. 23681285-3

Anne M. Loring, Minneapolis, Minnesota (for relator)

Bosch Packaging Technology Inc., New Richmond, Wisconsin (respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Huspeni, Judge.*

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

LANSING, Judge

Kray Burkart appeals, by writ of certiorari, an unemployment law judge's determination that he is ineligible for unemployment benefits. Substantial evidence supports the findings that Burkart's failure to keep his employer informed of the status of his short-term disability leave amounted to employment misconduct, and Burkart did not show good cause for failing to attend the hearing. Accordingly, we affirm.

F A C T S

Bosch Packaging Technology, Inc. employed Kray Burkart as a mechanical engineer from October 2008 to September 2009. When Bosch hired Burkart, he suffered from a pre-existing medical condition. Symptoms resurfaced in May 2009, and Burkart's doctor recommended workplace restrictions. Bosch accommodated the restrictions. In May 2009 Burkart began to develop absenteeism issues, and on July 23 Bosch issued a written warning to Burkart. After the warning, Burkart applied for short-term disability leave, was approved, and began a month-long leave on July 31.

During a telephone conversation in mid-August, Bosch told Burkart that he needed to complete a "Return to Work" form in preparation for his return to work. Burkart said that his leave had been extended through September 15, and that following a medical

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

appointment on that date he would get the form to Bosch. Bosch did not receive the form on September 15, and Burkart did not contact them. On September 16 Burkart did not report to work as expected. When Bosch contacted Burkart that day, Burkart explained that he had missed his medical appointment but had an appointment scheduled for September 17 and expected to return to work on September 18. Bosch asked Burkart to call after his appointment and to bring the “Return to Work” form when he reported to work on September 18. During the telephone conversation, Burkart requested that Bosch fax the form directly to Burkart’s doctor, and Bosch complied with his request.

Burkart did not call Bosch after his appointment and Bosch never received a “Return to Work” form from Burkart or his doctor. On September 18 Burkart did not appear for work. During the following weeks, Burkart did not respond to Bosch’s phone calls or messages. Bosch mailed Burkart a certified letter on September 22 informing him that if he did not return to work by September 25 his employment would be terminated. This letter was later returned to Bosch after failed delivery attempts by the postal services.

Bosch did not have any contact with Burkart until September 30, when Burkart called the company. Bosch returned Burkart’s call that day and informed him that his employment had been terminated for failing to keep the company informed about his medical leave.

Burkart applied for and received unemployment benefits from the Minnesota Department of Employment and Economic Development. Bosch brought an administrative appeal from the department’s determination and, at the evidentiary

hearing, Bosch's director of human resources appeared on behalf of Bosch. Burkart did not participate.

The unemployment law judge (ULJ) reversed the department's determination of eligibility, concluding that Burkart's failure to keep Bosch informed of his medical condition and leave constituted employment misconduct. Burkart filed a request for reconsideration in which he asserted that he did not participate in the hearing because he was not aware of it. The ULJ affirmed the ineligibility determination, finding that Burkart's failure to participate was not based on good cause. Burkart petitions for review on three grounds: substantial evidence does not support the ULJ's finding that his actions amounted to employment misconduct, he had good cause for not participating in the hearing, and the ULJ failed to make credibility findings.

D E C I S I O N

On certiorari appeal, we review the ULJ's decision 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 whole record. Minn. Stat. § 268.105, subd. 7(d) (2008). Substantial evidence is “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

I

A discharge for employment misconduct results in ineligibility for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). To qualify as employment misconduct, the conduct must be “intentional, negligent, or indifferent conduct” that clearly conveys either “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, subd. 6(a)(1), (2) (2008).

Whether an employee performed or failed to perform a specific act is a question of fact. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We view a ULJ’s findings of fact in the light most favorable to the decision and will sustain them if they are supported by substantial evidence. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether an employee’s conduct constitutes misconduct is a question of law that we review de novo. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

An employer has the right to expect its employees to follow “reasonable policies and requests.” *Id.* Failing to comply with reasonable policies and requests generally qualifies as employment misconduct. *Id.* Bosch has a right to expect that its employees report to work and comply with reasonable policies about absenteeism. *See Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007) (recognizing that “employer has the right to establish and enforce reasonable rules governing absences”).

The ULJ concluded that Bosch had reasonable policies for absenteeism and that Burkart failed to comply with the policies by not informing Bosch of his medical status

between September 16 and 30. This determination is supported by substantial evidence. Burkart did not report to work on September 16 as expected and did not contact Bosch about not returning to work on that date. When Bosch called Burkart that day, he said he missed his appointment but had rescheduled for the following day, September 17. Burkart also said that he expected to be released from his medical leave and to report for work on September 18 with the “Report to Work” form. On September 18, however, Burkart did not return to work or contact Bosch.

Between September 16 and September 30 Burkart did not communicate with Bosch and did not respond to Bosch’s efforts to reach him. Bosch left Burkart messages on September 18 and 21 requesting that he call with an update on his return-to-work status. Burkart did not answer these calls or return the messages. Additionally, Bosch sent a certified letter to Burkart on September 22, which was eventually returned to Bosch after three failed delivery attempts. The letter stated that Burkart was expected to report to work on September 25, otherwise his employment would be terminated.

Bosch did not have contact with Burkart until September 30, when Burkart called Bosch. Burkart left a message inquiring about a mail-delivery notification he had received and stating that he would be on leave until October 16. Bosch returned his call that day and explained that Burkart’s employment had been terminated for failing to keep the company updated about his medical condition and disability leave.

The record provides substantial evidence that supports the ULJ’s conclusion that Burkart exhibited a lack of concern for his employment and failed to adhere to Bosch’s

reasonable policies and work expectations. On this evidence, the ULJ properly concluded that Burkart's conduct amounted to employment misconduct.

Burkart challenges the ULJ's finding that he "disregarded" Bosch's calls and messages, asserting that he did not know that Bosch was trying to reach him because he did not receive the messages. Factual findings that are sustained by the evidence will not be reversed. Minn. Stat. § 268.105, subd. 7(d). The ULJ's finding that Bosch attempted to reach Burkart over a two-week period and that Burkart would have known about these attempts is supported by substantial evidence.

Burkart also asserts that he did not fail to do what Bosch requested because Bosch did not ask him to call. But the ULJ found that Bosch made multiple requests for him to call and that it was company policy to keep the employer informed of the employee's medical status. The ULJ also noted that even if Burkart believed his doctor would fax Bosch the form required to extend his leave, Burkart should have personally followed up to ensure Bosch had received the form. The ULJ's finding that Bosch requested Burkart to communicate with the company is supported by substantial evidence.

II

We will reverse a ULJ's decision not to hold an additional hearing only for an abuse of discretion. *Skarhus*, 721 N.W.2d at 345. If a petitioner has shown good cause for not participating in the first hearing, a ULJ must order an additional evidentiary hearing. Minn. Stat. § 268.105, subd. 2(d) (2008). "Good cause" is "a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing." *Id.*

Burkart filed a request for reconsideration alleging that he did not participate in the hearing because he was not aware of it. After considering the request, the ULJ determined that Burkart did not establish good cause and affirmed the decision. Although Burkart contends that he was not aware of the hearing, he does not deny receiving the notification letter sent by the department in compliance with Minn. Stat. § 268.105, subd. 1(a) (2008). The district court found that the letter provided Burkart with proper notice by informing him of the date and time of the hearing and the number at which the ULJ would call him. We will not reverse factual findings if they are substantially sustained by evidence. Minn. Stat. § 268.105, subd. 7(d). Because substantial evidence supports the ULJ's determination that Burkart did not have good cause to miss the hearing, it was not an abuse of discretion for the ULJ to decline to hold an additional hearing.

III

A ULJ is required to identify the reasons for crediting or discrediting testimony “[w]hen the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision.” Minn. Stat. § 268.105, subd. 1(c) (2008). If a ULJ fails to make the required credibility determinations, we remand for additional findings that satisfy the statute. *Wichmann*, 729 N.W.2d at 29.

Burkart contends that the ULJ failed to make credibility findings required by Minnesota Statutes section 268.105. We conclude that on this record the statute's requirement to make credibility findings is not triggered. The only witness who testified at the hearing was Bosch's director of human resources. Her testimony related to

documents, not to perceptions or judgments about Burkart's conduct. First, and most important, independent from the human resources director's testimony, documents in the record substantially support all of the ULJ's findings. Second, the human resources director's credibility was not an issue: there was no conflicting testimony and her testimony was consistent with Bosch's internal documents in the record. The ULJ, therefore, did not weigh the credibility of conflicting testimony or make credibility determinations. Because on this record credibility determinations were not significant to the determination, we conclude that it was not necessary for the ULJ to make specific credibility findings.

Affirmed.