STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1363

Roberto Ponce,
Relator,

vs.

Marsden Building Maintenance, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 5, 2011
Affirmed
Harten, Judge*

Department of Employment and Economic Development
Agency File No. 24625226-3

Laura M. Thomas, John K. Harting (certified student attorney), University of Minnesota Civil Practice Clinic, Minneapolis, Minnesota (for relator)

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 Connolly, Presiding Judge; Ross, Judge; and Harten, Judge.

* Retired judge of the Minnesota Court of Appeals, serving 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

HARTEN, Judge

Relator challenges the determination of the unemployment law judge (ULJ) that relator was discharged for misconduct and is ineligible for benefits. Because relator's failures to phone in on three successive days when he missed work constituted misconduct, we affirm.

FACTS

Relator Roberto Ponce began employment as a custodian for respondent Marsden Building Maintenance LLC (Marsden) in 2003. His shift was from 6:00 a.m. to 2:30 p.m. Marsden had two policies in regard to employee illness. First, employees who would be absent were required to call in before the start of their shift and leave a voicemail message notifying the supervisor of their absence. Second, employees absent three or more days due to illness were required to bring a note from a doctor.

On his last day at work, Friday, 22 January 2010, relator became ill. At 5:00 a.m. the following Monday, 25 January, relator's wife called Marsden and informed the supervisor that relator would be out sick and was seeing a doctor. Relator went to the emergency room with a fever, rash, and hives. He received a prescription and a doctor's note saying he should not work between Monday, 25 January, and Monday, 1 February.

Relator called in sick on Tuesday, 26 January, to say he would be out that day and three times on Wednesday, 27 January, to say he would be out that day. He did not call in on Thursday, 28 January, Friday, 29 January, or Monday, 1 February. On Tuesday, 2 February, he called at 2:30 p.m. and was told he had been terminated. Marsden also sent

relator a letter saying his employment was a "voluntary termination" for "[f]ailing to call and show up to work as schedule[d] on 1/28/10, 1/29/10 and 2/01/10" and "[f]ailure to provide a doctor's release that is requested and required for [his] return to work after being off for three or more days."

Relator applied for unemployment benefits. A DEED representative determined that relator was eligible for benefits after finding that "[Marsden] discharged [relator] . . . for alleged failure to provide [Marsden] with a medical statement to document an absence . . . . However, [relator] did provide [Marsden] with a medical statement. [Relator's] actions were not employment misconduct."

Marsden appealed. A telephone hearing before a ULJ ensued during which a Marsden account manager (AM) testified that

> [o]n January 25th at 5:00 a.m. . . . the woman that we know as [relator's] wife called in and said that he was going to see the doctor and would be out sick on the 25th. On the 26th [relator] called in at 11:00 a.m., and left a message saying he was out sick. On the 27th he called in at 3:15 a.m., 8:16 a.m., and 10:55 a.m., saying that he was out sick. Then there was no call on the 28th, no call on the 29th, no call on the 1st.

The AM also testified that relator had not previously said that he would be out on 28 January, 29 January, or 1 February. To the contrary, relator testified that he had called in every day.

The ULJ determined that

> [relator] testified that he called in prior to his shift every day that he was absent. However, he also testified that he only called once on February 2, that this was in the afternoon, and that he spoke to [the AM] at that time. [Relator] was scheduled to work on February 2, but he did not call in until

> well after his start time of 6:00 a.m. Further, [the AM] testified as to the specific times [relator] called in his absences, and the dates on which he called; [she] testified also that [relator] did not call on January 28, 29, and February 1. [Relator] further had difficulty providing specific information regarding whether he called in on February 1 or 2, even though he insisted he called in every day before his shift; he also testified that he did not recall which days [the AM] referred to when she told him he was discharged. Because of the details the [AM] was able to provide as to [relator's] calls, and because of the inconsistencies in [relator's] testimony and the lack of detail he was able to offer, [the AM's] testimony is more reliable than [relator's.]

The ULJ determined that relator had committed misconduct, was ineligible for benefits, and had been overpaid $2,328. In response to relator's request for reconsideration, the ULJ affirmed his prior decision. Relator now argues that his failures to call in before his absence on 28 and 29 January and 1 February were not misconduct.[1]

D E C I S I O N

Standard of Review

> Whether an employee committed employment misconduct is a mixed question of fact and law. Whether the employee committed a particular act is a question of fact. We view the ULJ's factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ. In doing so, we will not disturb the ULJ's factual findings when the evidence substantially sustains them. But whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo.

Skarhus v. Davanni's Inc., 721 N.W.2d 340, 344 (Minn. App. 2006) (citations omitted).

[1] Although relator argued to the ULJ that he had in fact called in every day that he was absent, he does not make that argument on appeal.

Absence from work because of illness, with proper notice given to the employer, is not employment misconduct. Minn. Stat. § 268.095, subd. 6(b)(7) (Supp. 2009). But "[a]n employer has the right to establish and enforce reasonable rules governing absences from work [and r]efusing to abide by an employer's reasonable policies generally constitutes disqualifying employment misconduct." *Wichmann v. Travalia & U.S. Directives, Inc*. 729 N.W.2d 23, 28 (Minn. App. 2007) (citations omitted). Relator's testimony shows that he knew both Marsden's policy on calling in and the reason for that policy: "[Y]ou call in and you say that you're not coming in so they can get somebody else to do your job." His failure to comply with that policy was misconduct.

Relator argues that his failures to call in were "conduct an average, reasonable employee would have engaged in under the circumstances." *See* Minn. Stat. § 268.095, subd. 6(b)(4) (2010) (excluding such conduct from the definition of misconduct). He relies on *Hanson v. Crestliner Inc.*, 772 N.W.2d 539, 543-44 (Minn. App. 2009) (employee absent from work because he needed to be with his mother, who had been unexpectedly hospitalized, did not commit misconduct by not calling in because an average, reasonable employee would have engaged in the same conduct under the circumstances). But *Hanson* is distinguishable. Relator was not responding to a medical emergency: he, nor his wife, was able to call in on the first three days of his six-day absence, and he then failed to call in not just one day, but three consecutive days. His reliance on *Hanson* is misplaced.[2]

[2] Relator also argues that Marsden had "proper notice" of his absence due to illness within the meaning of Minn. Stat. § 268.095, subd. 6(b)(7), and that his conduct was due

The ULJ lawfully determined that by failing on three successive workdays to comply with his employer's policy requiring absent employees to call in before the start of the shift, relator committed employment misconduct and is therefore ineligible for unemployment benefits.

Affirmed.

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to inadvertence or incapacity. *See* Minn. Stat. § 268.095, subd. 6 (b)(2), (5) (Supp. 2009) (excluding conduct that is a consequence of inadvertence and conduct that is a consequence of incapacity from misconduct). But he offers no support for these arguments other than unpublished opinions of this court, which have no precedential value. *See* Minn. Stat. § 480A.08, subd. 3 (2008) (providing that unpublished opinions by the court of appeals are not precedential). This court does not address allegations unsupported by legal analysis or citation. *Ganguli v. University of Minnesota*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994).