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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1497**

Stephanie Nelson,
Relator,

vs.

Best Assets, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 20, 2011
Affirmed
Minge, Judge**

Department of Employment and Economic Development
File No. 23796273-6

Stephanie Nelson, St. Paul, Minnesota (pro se relator)

Best Assets, Inc., Sugarland, Texas (respondent employer)

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

Considered and decided by Stoneburner, Presiding Judge; Minge, Judge; and
Willis, Judge.*

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

UNPUBLISHED OPINION

MINGE, Judge

Relator challenges the findings of an unemployment law judge (ULJ) that she was fired for employment misconduct and therefore not eligible for unemployment benefits. Relator argues that the facts do not support the ULJ's decision and that the ULJ should have held an additional evidentiary hearing to consider new evidence. Because there is substantial evidence to support the ULJ's determination and the additional evidence submitted by relator does not address the basis for the ULJ's decision, we affirm.

FACTS

Relator Stephanie Nelson worked as a record specialist for respondent Best Assets, Inc. from September 2006 until October 2009. Nelson was expected to work weekdays from 8:30 a.m. to 5:30 p.m. Her computer terminal recorded when she clocked in for work. The company's policy for tardiness and attendance, set forth in the employee handbook, states that if an employee is more than 15 minutes late to work for three days or more in a period of one month, the employee is subject to disciplinary action. Six unapproved absences in a six-month period can also result in disciplinary action. Best Assets' normal practice is to issue an employee two warnings and then terminate the employee if there are any further infractions.

Nelson's manager first discussed excessive tardiness with her in February 2009 and advised her that she needed to improve. She received her first written warning for

tardiness on April 10, 2009.¹ The warning stated that Nelson had been late by more than 15 minutes on 36 occasions since January of that year, that she needed to immediately improve her attendance, and that if she did not improve she faced further disciplinary action, including termination. Nelson admitted to the majority of the incidents and testified that she called her supervisor whenever she was late. She attributed approximately 70% of the incidents to health problems and the rest to appointments, car trouble, traffic, and missing her bus. Nelson has several medical conditions, including high blood pressure and uterine fibroids.

In May 2009, Nelson requested leave pursuant to the Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601 (2006). On May 28, 2009, Best Assets granted her provisional leave of 15 days and told her to obtain certification from a health-care provider to finalize the FMLA leave. Nelson never provided any certification, and therefore Best Assets denied her request for FMLA. She testified that she was initially unable to obtain a doctor's signature because the doctor had been out of town and she also testified that, not having health insurance, the cost of an office visit to obtain the certification exceeded what she could afford.

Although Best Assets offered Nelson health-insurance coverage, Nelson declined to enroll. As a condition of declining, Nelson was required to provide proof of other coverage. Nelson represented that she was applying for coverage from MinnesotaCare, a

¹ This and a subsequent written warning also lists dates when Nelson left work early without approval, was absent, and did not adhere to the lunch schedule. The ULJ found that tardiness alone was enough to constitute employment misconduct; therefore, we only address tardiness.

less-expensive option, and thought she would be approved. However, Nelson did not qualify for MinnesotaCare because she exceeded the program's income limits. Whether or not a Best Assets employee enrolled in its health insurance program, it paid employees an additional three dollars per hour to offset out-of-pocket health-care costs.

On September 11, 2009, Nelson was issued another written attendance warning. The warning stated that Nelson had been tardy more than 50 times from May to September. Numerous instances of tardiness continued to occur in September and October 2009. On October 28, 2009, Best Assets terminated Nelson's employment due to excessive tardiness and multiple unexcused absences.

Nelson filed for unemployment benefits with respondent Minnesota Department of Employment and Economic Development (DEED). DEED staff determined that she was ineligible for benefits. Nelson appealed the determination and a ULJ conducted a de novo hearing. The ULJ found that Nelson was discharged for employment misconduct and was ineligible for benefits. Nelson requested reconsideration and the ULJ affirmed. Nelson then filed a certiorari appeal with this court.

D E C I S I O N

The only issue in this case is whether Nelson's tardiness constituted employment misconduct. This court may reverse and remand, or modify the decision of a ULJ if "the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision" are affected by an error of law or unsupported by substantial evidence in the record. Minn. Stat. § 268.105, subd. 7(d) (2010).

Whether the employee committed a certain act is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We review a ULJ's findings of fact in the light most favorable to the decision and give deference to the ULJ's credibility determinations. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). This court will affirm the ULJ's credibility determinations if "[t]he ULJ's findings are supported by substantial evidence and provide the statutorily required reason for her credibility determination." *Ywsyf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007); *see also* Minn. Stat. § 268.105, subd. 1(c) (2010).

"[W]hether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo." *Skarhus*, 721 N.W.2d at 344. Employment misconduct is defined as "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." Minn. Stat. § 268.095, subd. 6(a) (2010). The statute defines the following as not being employment misconduct:

- (1) conduct that was a consequence of the applicant's mental illness or impairment;
- (2) conduct that was a consequence of the applicant's inefficiency or inadvertence;
- (3) simple unsatisfactory conduct;
- (4) conduct an average reasonable employee would have engaged in under the circumstances;
- (5) conduct that was a consequence of the applicant's inability or incapacity;
- (6) good faith errors in judgment if judgment was required;

(7) absence because of illness or injury of the applicant, with proper notice to the employer.

Id., subd. 6(b) (2010).

The ULJ found that Nelson was excessively tardy on as many as 80 occasions from April 2009 to October 2009. The ULJ also found that Nelson was given two written warnings and did not take reasonable measures to correct her tardiness. The ULJ noted that Best Assets paid Nelson additional compensation of three dollars per hour to cover out-of-pocket medical expenses, yet she still failed to obtain the employer-requested certification from a healthcare provider. The ULJ concluded that “Nelson’s failure to improve [her tardiness] and to submit FMLA paperwork was negligent or indifferent conduct that shows a substantial lack of concern for the employment.” The ULJ also concluded that “the tardiness alone was so egregious that it constitutes employment misconduct” and did not address other reasons for Nelson being terminated.

Nelson had numerous opportunities to resolve her attendance issues and several reasonable options, such as catching an earlier bus or leaving earlier from home, to address some of her tardiness issues. Under the unemployment-benefits law, Nelson had the right to provide proper notification that her tardiness was due to health-related matters. She also had the opportunity to apply for FMLA to be excused from work to address her health-related issues. She was ultimately given several weeks to obtain a certification of her illness from a health-care provider and she knew that her health-related leave would not be covered by FMLA unless she completed the form. Nelson was also aware that she could be subject to disciplinary action, including termination, if

she did not turn in the confirmation of her medical excuse. Still she did not complete the necessary paperwork.

Nelson suggests that the cost of obtaining a doctor's certification precluded her from obtaining a needed signature. Health-insurance coverage that would presumably cover visits to a doctor's office, was available to her in an employer-sponsored group plan, but she declined to participate. Nelson represented that she was obtaining her own personal coverage. She was paid additional compensation for out-of-pocket expenses. Given the benefits available, Nelson's failure to fully utilize them, and the lack of any showing of the actual burden of obtaining such medical confirmation of her condition, we conclude that the ULJ did not clearly err in rejecting this excuse. We further conclude that there is substantial evidence in the record to support the ULJ's findings.

Finally, we conclude that the ULJ did not err in determining that Nelson's failure to take reasonable steps to arrive at work on time and the volume of incidents in question demonstrated negligent or indifferent conduct that showed a substantial lack of concern for the employment.

Nelson argues that the ULJ did not consider time sheets that were submitted after the hearing. However, the time sheets appear to be related to the issue of her lunch hour, a subject which was not considered by the ULJ, not relevant to the issue of tardiness, and therefore not relevant to the issues on appeal.

Affirmed.

Dated: