STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0331

Stephanie S. Robak,
Relator,

vs.

The Bernick's Management Company (Corp.),
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed November 26, 2012
Affirmed
Worke, Judge

Department of Employment and Economic Development
File No. 28644541-4

Stephanie S. Robak, Rice, Minnesota (pro se relator)

Dorraine A. Larison, Christopher W. Harmoning, Gray, Plant, Mooty, Mooty & Bennett, P.A., St. Cloud, Minnesota (for respondent employer)

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

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Chutich, Judge.

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

WORKE, Judge

Relator challenges the unemployment-law judge's (ULJ) decision that she was discharged for employment misconduct and ineligible for unemployment benefits, arguing that the employer's witnesses testified untruthfully, and that her discharge was inconsistent with the employer's for-cause-termination policy. We affirm.

D E C I S I O N

Relator Stephanie S. Robak challenges the ULJ's determination that she was discharged from employment at respondent employer The Bernick's Management Company (Corp.) for repeated tardiness, which constituted employment misconduct making her ineligible for benefits.

This court reviews a ULJ's decision to determine whether a party's substantial rights were prejudiced because the findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4)-(5) (2010). 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 Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

An employee discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Whether an employee committed employment misconduct is a mixed question of fact and law. *Stagg v. Vintage*

Place Inc., 796 N.W.2d 312, 315 (Minn. 2011). Whether the employee committed a particular act is a question of fact, which this court will not disturb if substantially supported by the evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court reviews factual findings in the light most favorable to the decision and defers to the ULJ's credibility determinations. *Id.* Whether that act constitutes employment misconduct is a question of law that this court reviews de novo. *Stagg*, 796 N.W.2d at 315.

The ULJ determined that relator arrived late for work 123 times in a rolling calendar year, which constituted misconduct. 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." Minn. Stat. § 268.095, subd. 6(a) (2010). Whether an employee's absenteeism amounts to employment misconduct depends on the circumstances of the case. *Stagg*, 796 N.W.2d at 316-17 (holding that employee discharged for excessive absenteeism and tardiness committed employment misconduct); *see also Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986) (holding that even a single work absence without permission may constitute misconduct).

The ULJ's determination that relator's chronic tardiness constituted misconduct is supported by substantial evidence. Relator worked at the public-access doors and was expected to open the business for customers. The employer has a written tardiness policy stating that within a 12-month period, an initial tardy is followed by a written warning, a

second tardy is followed by a suspension, and a third tardy results in termination. Between October 6, 2010, and January 1, 2011, relator was tardy over 30 times. But the employer did not take action, choosing instead to afford relator lenience because she was only minutes late each time. Relator was routinely late for work in 2011. On August 24, 2011, the employer issued a written warning. Following four more tardy arrivals, the employer suspended relator on September 21. She was late on October 4 and was discharged on October 5. Between January 1, 2011, and October 5, 2011, relator was tardy 88 times.

Relator argues that the employer's testimony was not accurate. But relator acknowledged receipt of the employer's team-member handbook, which contains the employer's policy on tardiness. Relator testified that she understood the employer's tardiness policy and her employer's expectation that she report to work on time. Relator conceded that she was tardy 77 times, but not the 123 times found by the ULJ. But 77 instances of tardiness are excessive and this conduct violated her employer's reasonable expectations. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002) (stating that refusal 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) (stating that employer has the right to establish and enforce reasonable rules governing absences from work). The ULJ determined that the testimony and documentation submitted by the employer was detailed and consistent, and found that the employer was more credible than relator. We defer to a ULJ's

credibility determinations. *Skarhus*, 721 N.W.2d at 344. On this record, there is substantial evidence to support the ULJ's decision.

Relator also argues that she could not have been discharged for cause because she received payment for unpaid vacation time and, according to company policy, an employee discharged for cause is ineligible to receive this benefit. This argument, however, does not alter the fact that relator admits to being tardy 77 times in a rolling calendar year, which demonstrates lack of concern for her employment. The record supports the ULJ's findings and decision that relator was discharged for employment misconduct and ineligible for unemployment benefits.

Affirmed.