STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0788

Edward Foster-Graham,
Relator,

vs.

Specialized Treatment Services, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed December 23, 2013
Affirmed
Connolly, Judge

Department of Employment and Economic Development
File No. 30900781-3

Edward Foster-Graham, New Brighton, Minnesota (pro se relator)

Specialized Treatment Services, Inc., c/o Doherty Employment Group, Edina, Minnesota (respondent)

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

Considered and decided by Connolly, Presiding Judge; Schellhas, Judge; and Klaphake, 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

CONNOLLY, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that relator was discharged for employee misconduct and is therefore ineligible for unemployment benefits. He argues that he did not commit misconduct and that the ULJ was biased against him. Because relator concedes that he repeatedly failed to appear for work as scheduled and failing to report for work when scheduled has been identified as misconduct in prior caselaw and because our review of the record discloses no bias in the ULJ, we affirm.

FACTS

In December 2012, relator Edward Foster-Graham began to work for respondent Specialized Treatment Services Inc. (STS) as a methadone counselor with a caseload of about 50 clients. He was given a copy of the STS employee handbook, which provides that, "[i]f an employee is absent for two consecutive business days without directly notifying his/her manager, he/she will be considered to have voluntarily resigned his/her position with STS." Relator signed a statement saying he knew he was responsible for reading the handbook.

Relator did not go to work and did not notify anyone at STS on Tuesday, Wednesday, and Thursday, February 12-14, 2013. On February 14, he called respondent Minnesota Department of Employment and Economic Development (DEED) and reactivated his unemployment benefits account, saying he was laid off by STS on January 25, 2013.

On Friday, February 15, his fourth day away from work, relator called his STS manager and told her he was in Chicago attending to a family emergency, i.e., his brother's medical condition following an assault, and did not know when he would be back in Minnesota. He said, "I suppose I don't have a job now . . . ." His manager did not confirm or deny this, but said she had to wait until she could confer with STS's president, who made termination decisions and would be back in the office on Monday, February 18.

On February 18, relator called to say that he was in Minnesota but did not know when he would return to work. His manager told him to call on Wednesday, February 20, and let her know when he would be back. Immediately after that call, relator called the manager back to ask about his paycheck, which was provided to him.

Later on February 18, STS's president told relator's manager that relator's employment should be terminated. Relator was sent a letter summarizing the events of February 12-18 and stating, "As a result of the above representations that you won't fulfill the duties of your job, [STS] accepts your resignation effective immediately."

Also on February 18, DEED informed the Doherty Employment Group (DEG), which administers STS's unemployment cases, that relator had applied for benefits on February 14 because he had been laid off on January 25. However, STS was not informed of relator's alleged January 25 layoff and activation of his unemployment account until Tuesday, February 19. When DEG called STS with this information, STS said that relator had three no show/no call days and his employment had been terminated the previous day.

To determine relator's eligibility for benefits, DEED asked relator how many days of work he missed before contacting his employer. Relator said he contacted STS on the fourth day that he missed work. DEED also asked relator for the date on which he last worked for STS, noting that relator had told DEED his last day was January 25 but STS told DEED his last day was February 11. Relator said, "02/11/2013 was the last day I was at [STS]. At the time I talked with [DEED] . . . I was not thinking clearly and was trying to hold everything together for my family." DEED determined that relator was ineligible for benefits, and relator challenged that determination.

A telephone hearing was scheduled. During the hearing, the ULJ asked relator, "[On] the 12th, 13th, and 14th is there any particular reason you couldn't have just called in and said listen I'm out of town[?]" Relator answered, "[T]ruthfully I'm not even going to make an excuse for that."

The ULJ found that, although STS's letter told relator his "resignation" was "accepted," the letter met the statutory criterion for a discharge, not for a quit. "[The letter] would lead a reasonable employee to believe the employer will no longer allow him to work for the employer in any capacity. Therefore, [relator] was discharged." The ULJ also found that "[relator] was discharged after being a no-call/no-show for three straight days. . . . [He] acknowledged he could have taken a few minutes earlier in the week to inform STS of his situation." The ULJ concluded that "[relator's] actions displayed a serious violation of the standards of behavior STS had a right to reasonably expect. Therefore, on February 18, 2013, [relator] was discharged for employment

misconduct and is ineligible for unemployment benefits." Relator's request for reconsideration led to an affirmance of that decision.

Relator now challenges that decision, arguing that he did not commit misconduct and that the ULJ was biased against him.

D E C I S I O N

1. Employment misconduct

Whether an employee committed a particular act is a question of fact, reviewed in the light most favorable to the ULJ's decision, but whether the particular act was misconduct is a question of law, reviewed de novo. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008).

The STS handbook states that, after two consecutive days of not appearing for work and not calling the manager, an employee is "considered to have voluntarily resigned . . . ."[1] The parties agree that, for three consecutive days, relator did not appear for work and did not call his manager. Both statutory law and caselaw indicate that this is misconduct. Minn. Stat. § 268.095, subd. 6(a) (2012) (defining misconduct as "any intentional, negligent, or indifferent conduct, on the job or off the job that displays

[1] As the ULJ concluded, the statement that an employee "is considered to have voluntarily resigned", or to have quit, means that the employee will no longer be permitted to work for the employer and, within the meaning of the unemployment statutes, indicates that the employee has not quit but rather has been discharged. *See* Minn. Stat. § 268.095, subd. 5(a) (2012) ("A discharge from employment occurs when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity."); Minn. Stat. § 268.095, subd. 2(a) (2012) ("A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee's.").

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"); *Torgerson v. Goodwill Indus., Inc.*, 391 N.W.2d 35, 37-38 (Minn. App. 1986) (finding misconduct when an employee failed to come to work for three scheduled work shifts); *Smith v. Am. Indian Chem. Dependency Division Project*, 343 N.W.2d 43, 44-45 (Minn. App. 1984) (finding misconduct when an employee failed to show up for three scheduled work shifts).

Relator does not dispute that STS had the right to reasonably expect that he would appear for work or call his manager or that his failure to appear or call for three days indicated a substantial lack of concern for his employment, particularly in light of the handbook statement that employees who missed two consecutive days without calling would be assumed to have resigned. Thus, relator does not challenge the substance of the ULJ's decision that he committed employment misconduct and was discharged.

Instead, he relies on three statutory provisions to make collateral challenges to the decision. First, relator relies on Minn. Stat. § 268.095, subd. 6(b)(4) (providing that "conduct an average reasonable employee would have engaged in under the circumstances" is not misconduct) to argue that "it is totally subjective as to what would be reasonable conduct for an average employee to engage [in] under the same circumstances, such as an abrupt, unannounced out of state family emergency . . . ." But an average, reasonable employee, even in those circumstances, would not have missed work for three days without calling the employer unless the employee was unable to make phone calls. Relator does not argue that he was unable to call, and such an

argument would be refuted by the fact that he did call DEED to reactivate his benefit account. As the ULJ found, relator "acknowledged he could have taken a few minutes earlier in the week to inform STS of his situation."

Second, relator relies on Minn. Stat. § 268.095, subd. 6(d) (2012) (providing that "[i]f the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct . . . .") to argue that there was only "one unexpected, unplanned occurrence, which was beyond the [r]elator's control." But that is viewing the situation from relator's perspective: from the perspective of STS, there were three unplanned occurrences on February 12, 13, and 14, when relator did not appear for work and did not call. The "single incident" consideration in determining misconduct does not apply here.

Third, relator relies on Minn. Stat. § 268.105, subd. 1(c) (2012) (providing that "[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, the unemployment law judge must set out the reason for crediting or discrediting that testimony") to argue that the ULJ did not make adequate findings as to why relator's manager was a more credible witness than relator. But relator cites no point on which their testimony conflicted that would have had a significant effect on the outcome. He mentions that the manager referred to only two of relator's calls to STS, the call on February 15, the fourth day of his absence, and the first call on February 18, and did not mention relator's other call concerning his paycheck on February 18 or his call on February 20, two days after his

termination, to say when he would be back at work. But neither of these additional calls was relevant to the misconduct committed on relator's three no-show/no-call days, February 12, 13, and 14. Similarly, the manager's failure to agree with relator about activities prior to February 12 or after February 18 was not relevant to STS's decision to terminate relator.

Relator's failure to go to work or to call STS for three consecutive days was employment misconduct, for which he was discharged.

2. Bias

Relator argues on appeal, as he argued during the hearing, that the ULJ was biased against him. This court reviews claims of bias in unemployment cases de novo. *See, e.g., Sivertson v. Sims. Sec., Inc.*, 390 N.W.2d 868 (Minn. App. 1986). In *Silvertson*, "[The relator] . . . claim[ed] the referee was biased against him and interrupted him during the hearing. A review of the record disclose[d] no bias. The referee interrupted [the relator] only for procedurally valid reasons, such as repetitive questioning of witnesses and testifying when [the relator] should have been cross-examining." *Id*. at 872.

A similar situation occurred here. When relator began questioning his manager about a conversation they had in her office on the protocol for coming in early, the DEG representative asked the ULJ what the relevance of these questions could be. This led to the following colloquy.

> ULJ: [Relator], you'll get a chance to testify later. Just please if you have questions for [the manager] ask them. Let

> her answer them and then we'll get your testimony once we're done with the employer's witnesses.
> RELATOR: Okay. Prior to doing that, Your Honor, I want to establish the fact that do you have any bias towards me up front. So that I mean if we're going to proceed along, it seems you've buried defenses towards me in particular.
> ULJ: What I want is to adhere to the protocol of the hearing, which is I ask questions . . . Because your testimony will come when . . . we get beyond . . . your examination period . . . Right now, it's your turn to question.
> RELATOR: I want, I want to establish whether you have any bias towards me, do we need to get another Judge?
> ULJ: Sir what sort of biases would you mean.
> RELATOR: I don't know. You seem very short . . . and very disrespectful towards me . . . . [You gave] me the indication . . . that you have some preconceived ideas about how this case should go. . . . [Y]ou commented that you had no idea why I was going on with the questioning.
> ULJ: No, no that was [the DEG representative] . . . . When it's your opportunity to question please ask questions. And, when it's your time to testify that's when you present information as opposed to ask the questions.

When relator again began to testify while asking questions, the ULJ again requested that he "Just ask her . . . what the question is you want her to answer." Relator responded:

> RELATOR: Do we need to get another [unemployment law j]udge? Because, I don't feel comfortable in any decision that you probably come up with given how you are addressing or communicating with me. It seems like you already have an idea where you want to go with this. . . case. . . . I'm not a lawyer, so I mean a little patience and, in explaining or point me in the right direction. It just seems like you have no patience here. I don't understand it.
> ULJ: [Relator], I don't think I've been doing anything but that.
> RELATOR: No but you've been very short. The . . . way you've been addressing me is different from the way you've been addressing them. . . . I mean a lot is on the line here and if you have any preconceived ideas as to how this case is

> going to end up then we need to get another . . . [unemployment law j]udge for this case.
> . . . .
> ULJ: I don't have biases on this[, Relator].

Early in the hearing, relator said he could not find one exhibit; the ULJ told him what it looked like and when it had been mailed. The ULJ also asked relator, "please don't blow into the microphone of your phone. No one can hear anything when that . . . noise is going through there." When relator asked, "Am I still breathing into the phone?" the ULJ answered, "Nope, everything is much better. Thank you." Later in the hearing, relator told the ULJ that he seemed "very disrespectful . . . starting with the comment about me breathing in the phone. If I was aware of the fact that I was breathing into the phone, I would have [taken] the phone away."

In his response to relator's request for reconsideration, the ULJ noted that relator "first argues that [I, the ULJ] was biased and hostile" and said that he was not impatient when relator was going through the documents but helped relator locate them and that there was nothing hostile about his request that relator not blow into the microphone of his phone. The record supports the ULJ's statements.

In his brief, relator again argues that the ULJ was hostile, saying "[u]nfortunately, the written transcription . . . fail[s] to demonstrate the tone of the exchange between . . . the ULJ and the [r]elator" and that "[t]he ULJ ensured he could proceed in the case without bias or prejudice, but failed to do so." But relator cites no other example of the alleged bias or prejudice, and the transcript indicates that relator was given every

opportunity to present his case. On this record, we do not find any bias on the part of the ULJ.

Relator does not dispute that he failed to show up for work or call his manager on three consecutive days; nor does he dispute that this failure was misconduct. The ULJ's decision that relator committed misconduct, was discharged for it, and is ineligible for benefits is affirmed.

Affirmed.