STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1296

Donna E. Schwartz,
Relator,

vs.

Customer Elation, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed March 13, 2017
Affirmed
Bjorkman, Judge

Department of Employment and Economic Development
File No. 34699913-3

Donna E. Schwartz, Hutchinson, Minnesota (pro se relator)

Customer Elation, Inc., Bloomington, Minnesota (respondent employer)

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

Considered and decided by Peterson, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Relator challenges the determination of an unemployment-law judge (ULJ) that she is ineligible for benefits because she was discharged for employment misconduct, arguing that she did not intentionally violate her employer's policy. We affirm.

FACTS

Relator Donna Schwartz worked as a customer-service representative in a call center for respondent Customer Elation, Inc. from August 29, 2012 until May 26, 2016. During their eight-hour work day, call-center employees have four ten-minute breaks and a 30-minute lunch break. Employees may extend a break only with prior approval of a manager. Customer Elation's break policy also provides that when employees go on break, they must change their call status to "unavailable" so in-coming calls are not forwarded to them. Employees must immediately change their status back to "available" when they return from a break so they receive their share of the calls.

On December 15, 2015, Schwartz received an oral warning for violating the break policy by being "unavailable" after her allotted break. Customer Elation also placed Schwartz on an action plan through April 4, 2016. The plan required her to comply with the break policy and to check her call status every ten minutes to verify that she was "available" to receive calls. On January 12, 2016, Schwartz received a written warning for violating the policy the previous day by failing to change her call status for almost an hour after a break. Six days later, Schwartz failed to change her status after a break for 26 minutes. As a result of this violation, Customer Elation gave her a final written warning.

On February 16, Schwartz again violated the break policy when she returned from a break but did not change her status back to "available" for 65 minutes. She received a "final" final written warning as a result of this violation.

On May 20, Schwartz attempted to initiate what she knew would be an extended personal phone call during her lunch break. She was unsuccessful, so she made the call during one of her later ten-minute breaks. Schwartz completed the call but extended her break by 45 minutes.[1] Customer Elation discharged Schwartz six days later.

Respondent Minnesota Department of Employment and Economic Development denied Schwartz's application for unemployment benefits because she was discharged for employment misconduct. Schwartz appealed the ineligibility determination. A ULJ conducted an evidentiary hearing during which Schwartz and Shelley Schmidt, a Customer Elation manager, testified. The ULJ found that Schwartz was discharged for consistently violating Customer Elation's reasonable break policy, and concluded that she is ineligible for unemployment benefits. Schwartz requested reconsideration and the ULJ affirmed her decision. Schwartz appeals by writ of certiorari.

D E C I S I O N

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016). "Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed

[1] The ULJ erred by finding that Schwartz made this call during her lunch break and that it lasted 75 minutes. The evidence shows Schwartz made the call during a later break and that its duration exceeded the authorized ten-minute break by 45 minutes. This error is immaterial as Schwartz's lengthy personal call violated Customer Elation's break policy.

question of fact and law." *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). The issue of whether an employee committed a particular 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 factual findings in the light most favorable to the decision, giving deference to the ULJ's credibility determinations. *Id.* We will not disturb those findings if they are supported by substantial evidence. *Id.* Whether a particular act constitutes disqualifying misconduct is a question of law, which we review de novo. *Stagg*, 796 N.W.2d at 315.

Employment misconduct is defined as "any intentional, negligent, or indifferent conduct . . . 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) (2016). "As a general rule, refusing to abide by an employer's reasonable policies and requests amounts to disqualifying misconduct." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). What is reasonable generally depends on the circumstances of the case. *Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985).

I. Substantial evidence supports the ULJ's finding that Schwartz consistently violated her employer's break policy.

Schwartz does not challenge the ULJ's findings regarding her history of violating Customer Elation's break policy and the numerous warnings she received. But she contends that she did not intentionally violate company policy on May 20, 2016. She acknowledges that she exceeded her scheduled break time by 45 minutes, but asserts that if her manager had not already left the office that day, she would have authorized an extended break. We are not persuaded.

Customer Elation warned Schwartz on at least four documented occasions not to take excessive breaks and to change her status back to "available" as soon as her scheduled break was over. Schwartz knew that her May 20 personal call would take longer than ten minutes and that she needed to get pre-approval for an extension. She did not do so, even though other managers were on site. On this record, we conclude that substantial evidence supports the ULJ's findings that Customer Elation terminated Schwartz for repeatedly violating the break policy.

II. Schwartz's violation of her employer's reasonable break policy constitutes employment misconduct.

Schwartz argues that she had no reason to believe that her conduct on May 20 could lead to termination because her previous break-policy violations "drop[ped] off" when her action plan expired on April 4. This argument fails for two reasons.

First, Customer Elation's policy is reasonable. Operation of a call center requires that employees be available during business hours to respond to calls. Customer Elation's detailed break policy provides employees with periodic breaks, while ensuring that there are always some employees available to answer calls. The policy provides employees the opportunity to extend a break if they obtain prior approval. Customer Elation reasonably expected that employees would either make personal calls after work hours, or obtain pre-approval to extend a break if necessary. And Schwartz's belief that her previous warnings would "drop off" and not factor into Customer Elation's termination decision has no bearing. "[A]n employee's expectation that the employer will follow its disciplinary procedures has no bearing on whether the employee's conduct violated the standards the employer has a reasonable right to expect." *Stagg*, 796 N.W.2d at 316.

Second, Schwartz's repeated violations of the break policy are serious and display a substantial lack of concern for the employment. Schwartz intentionally violated the policy on numerous occasions, including on May 20. As Schmidt testified, Customer Elation "did try and work with [Schwartz] on several, many different occasions outside of what is documented here in regard to accountability and helping her to be successful in this area. However, that just continued to be unsuccessful." The record persuades us that Schwartz's continuing violations display a substantial lack of concern for Customer Elation's business; this is employment misconduct. *Schmidgall*, 644 N.W.2d at 804.

Affirmed.