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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1831**

Helen Brown,
Relator,

vs.

PDR Administrative Services, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 5, 2017
Affirmed
Larkin, Judge
Dissenting, Randall, Judge***

Department of Employment & Economic Development
File No. 34881080-3

Helen Brown, Minneapolis, Minnesota (pro se relator)

PDR Administrative Services, Inc., Edina, Minnesota (respondent)

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

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

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Randall, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Pro se relator challenges an unemployment-law judge's determination that she is ineligible for unemployment benefits because her employment was terminated for employment misconduct. We affirm.

FACTS

Relator Helen Brown was employed as a medical receptionist for respondent PDR Administrative Services (PDR) from September 2015 through August 9, 2016. PDR terminated Brown's employment based on her absenteeism.

Respondent Minnesota Department of Employment and Economic Development (DEED) determined that Brown was discharged for employment misconduct and denied Brown's application for unemployment benefits. Brown appealed the determination. An unemployment-law judge (ULJ) conducted an evidentiary hearing. Brown testified at the hearing, but PDR did not participate.

Brown testified that she was scheduled to work 40 hours per week and that PDR had a strict policy of not allowing employees to take "time off without PTO time." Brown further testified that in February 2016, following an unexcused absence, PDR warned her that her attendance was unacceptable to PDR. Brown reported in her unemployment-insurance-request questionnaire that she was told that she could not have any other unexcused absences. At the hearing before the ULJ, Brown admitted that, on August 7,

she was arrested and incarcerated after she hit her husband multiple times following an argument, and that she was unable to report to work on August 8 because she was in jail. Brown testified that she did not have PTO time to cover that absence and that her supervisor told her that she was discharged from her employment based on her absenteeism.

The ULJ found that PDR discharged Brown due to her attendance issues. The ULJ concluded that her absence from work due to incarceration constituted employment misconduct, reasoning that “Brown knew that she could be discharged if she had another unexcused absence from work and she should have known that physically assaulting her husband could cause her to get arrested and go to jail.” Brown requested reconsideration, and the ULJ affirmed his decision. Brown appeals by writ of certiorari.

D E C I S I O N

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016). “Employment misconduct means 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) (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).

“An employer has the right to establish and enforce reasonable rules governing absences from work.” *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). An employee who fails to follow an employer’s absenteeism and

tardiness policies violates the standards of behavior that an employer has the right to reasonably expect from an employee, and, therefore commits employment misconduct. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 317 (Minn. 2011); *see also Winkler v. Park Refuse Serv., Inc.*, 361 N.W.2d 120, 124 (Minn. App. 1985) (stating that absence from work under circumstances within the control of the employee can constitute employment misconduct).

Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall*, 644 N.W.2d at 804. “Whether the employee committed a particular act is a question of fact.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court views the ULJ’s factual findings in the light most favorable to the decision and will not disturb those findings when they are supported by substantial evidence. *Id.* Whether a particular act constitutes employment misconduct is a question of law, which this court reviews de novo. *Stagg*, 796 N.W.2d at 315.

The crux of Brown’s argument for reversal is that her “previous employer provided signed documents stating that [her] separation from Physician’s Diagnostics & Rehabilitation Clinics **was not due to misconduct, and they are not contesting unemployment benefits.**” For the reasons that follow, Brown’s reliance on PDR’s opinion that she was not discharged for employment misconduct is unavailing.

DEED “has the responsibility for the proper payment of unemployment benefits regardless of the level of interest or participation by an applicant or an employer in any determination on appeal.” Minn. Stat. § 268.069, subd. 2 (2016). An employer does not have a burden to submit evidence to show that it terminated an employee for misconduct

and is not required to participate in a benefits hearing. Minn. Stat. § 268.101, subd. 2(c) (2016) (providing that “an issue of ineligibility is determined based upon that information *required* of an applicant, any information that *may* be obtained from an applicant or employer, and information from any source” (emphasis added)); *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 461 n.12 (Minn. 2016). And “[a]ny agreement between an applicant and an employer is not binding on [DEED] in determining an applicant’s entitlement” to unemployment benefits. Minn. Stat. § 268.069, subd. 2. Thus, an employer’s failure to challenge an employee’s request for unemployment benefits has “no bearing on whether or not the benefits are paid.” *Rasidescu v. Comm’r of Econ. Sec.*, 644 N.W.2d 504, 506 (Minn. App. 2002), *review denied* (Minn. July 16, 2002).

In *Jenkins v. Am. Express Fin. Grp.*, the supreme court held that “[a]bsence from work due to incarceration is not misconduct that will disqualify an employee on a per se basis from establishing eligibility for the receipt of unemployment compensation.” 721 N.W.2d 286, 287 (Minn. 2006).¹ In *Jenkins*, the employee was convicted of assault and sentenced to 30 days in jail with work-release privileges. *Id.* at 288. Before the employee started her sentence, her employer told her that the employer would cooperate with her work-release privileges and provide verification of her employment to the jail. *Id.* The employer did not verify the employee’s employment, despite the employee’s repeated attempts to contact the employer, and the employee was unable to report to work. *Id.* The

¹ Although Brown does not challenge the ULJ’s findings in support of the eligibility determination or argue that her actions did not constitute employment misconduct, we briefly address this issue.

employer discharged the employee based on absenteeism. *Id.* The supreme court held that under those facts, the employee's absence from work was not misconduct disqualifying her from receiving unemployment benefits. *Id.* at 292-93. But the supreme court noted that "[a]bsence from work under circumstances within the control of the employee, including incarceration following a conviction for a crime, has been determined to be misconduct sufficient to deny benefits." *Id.* at 290.

This case is distinguishable from *Jenkins*. As the ULJ reasoned, PDR warned Brown that she could not have another unexcused absence and Brown should have known that physically assaulting her husband could cause her to be arrested, go to jail, and miss work. Brown's unexcused absence from work caused by her incarceration was due to circumstances under her control. It also violated PDR's reasonable attendance and PTO policies and demonstrated a substantial lack of concern for employment. The ULJ therefore did not err by concluding that Brown was discharged for employment misconduct and that she is ineligible for unemployment benefits.

Affirmed.

RANDALL, Judge (dissenting)

The majority concludes that the unemployment-law judge (ULJ) did not err by finding Brown was discharged for misconduct. I disagree for several reasons. First, Brown’s employer specifically stated in the record that she was not discharged for misconduct. Second, the ULJ used faulty reasoning in concluding that Brown, who caught her cheating spouse and hit him, should have had the presence of mind to anticipate that the police would arrest her for simple assault, ignore her husband, and put her in jail, causing her to miss work. Third, the ULJ completely ignored the specific wording of the controlling statute, which provides exceptions to the general definition of employment misconduct. Minn. Stat. § 268.095, subd. 6(b) (2016).

The unemployment ineligibility statute presumes that an employee who is discharged from employment is eligible for unemployment benefits unless the discharge was for employment misconduct. *Id.*, subd. 4(1) (2016) (stating an applicant “is ineligible for all unemployment benefits . . . if: (1) the applicant was discharged because of employment misconduct as defined in subdivision 6”). As defined in subdivision 6, employment misconduct, in part, “means any intentional, negligent, or indifferent conduct, on the job or off the job that *displays clearly . . . a substantial lack of concern for the employment.*” *Id.*, subd. 6(a)(2) (2016) (emphasis added). Disqualification provisions are narrowly construed. *Smith v. Emp’rs Overload Co.*, 314 N.W.2d 220, 222 (Minn. 1981). Whether the employee committed a particular act is a fact question, but whether the act constitutes employment misconduct is a question of law we review de novo. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). I conclude that the

facts of this case do not show a “substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a)(2).

The facts concerning the reason for Brown’s absence are not disputed. Brown was employed as a medical receptionist. Brown missed work in February 2016 to take her daughter to the doctor, for which she received a verbal warning. Brown missed work again when she was arrested after assaulting her philandering husband. Brown was arrested on August 7, 2016, and she notified her employer.² She missed work on August 8 and 9 because she was in jail.

Her employment was terminated on August 10, 2016. After she was released from jail on August 9, her employer told her not to come in to work that day, but to wait to gather her composure. The employer’s response is totally incompatible with intentional misconduct. The only issue is whether her absence was the result of negligent or indifferent conduct displaying a substantial lack of concern for the employment.

Brown argues that she should not have been denied benefits because her employer submitted signed documents stating that Brown was not discharged for employment misconduct. The majority rejects Brown’s argument, noting that an employer’s failure to challenge eligibility for benefits has no bearing on whether benefits are paid, because unemployment is paid from state funds. *Rasidescu v. Comm’r of Econ. Sec.*, 644 N.W.2d 504, 506 (Minn. App. 2002), *review denied* (Minn. July 16, 2002).³ In reality, this cannot

² According to Brown’s testimony, she has not been charged with any crime for her conduct.

³ That is not true. It should not be used as an argument to ignore the employer’s view of what happened. Once eligibility for unemployment compensation has been determined,

be taken literally. The appellate courts do not take it literally. The average case that comes to our court, and sometimes goes to the supreme court, involves an appeal of a denial of benefits when the employer objects to the payment of benefits and produces evidence that the employee committed willful misconduct. If that evidence is credible, the ULJ relies on it and cites it in the opinion to deny benefits. If that evidence is found credible by the Minnesota Court of Appeals, that evidence is cited to support an affirmance of the ULJ, and the same thing happens if our supreme court brings it up. Both courts rely on “the credible evidence” and detail it to support the finding of misconduct. Therefore, you have a total lack of due process, and a total lack of common sense, when you do not weigh as credible evidence a signed unequivocal statement by the employer that the employee was not discharged for misconduct. The employer affirmatively stated in two documents that Brown was *not* discharged for misconduct. In my view, that determination should count for something.

Instead, the ULJ concluded that Brown was ineligible for unemployment benefits because her conduct in assaulting her husband “displayed clearly a substantial lack of concern for the employment.” The ULJ determined that Brown knew that she could be discharged for another unexcused absence from work and “should have known that

the state does send out regular checks until the benefits are exhausted or the recipient goes back to work. But unemployment benefits are paid from a fund that is funded by employers. Employers pay a percentage of their payroll in unemployment-insurance taxes and their loss history affects the amount of tax they pay. See Minn. Stat. §§ 268.051, .047 (2016). That is why employers who terminate an employee and who feel it was for misconduct come into court, present evidence, and fight the payment of benefits, so they can avoid the increase in their tax rate. See Minn. Stat. § 268.047, subd. 1 (discussing use of past unemployment benefits paid to compute an employer’s future tax rate).

physically assaulting her husband could cause her to get arrested and go to jail,” and, therefore, miss work. This is a total stretch and defies the reality of couples. When one spouse catches another cheating, the wronged spouse does not sit down and have the following rational discussion in his or her mind: “Before I whale on this jerk, I have to understand that he or someone might call the police, and that the police will come, and that they will ignore him, but arrest me and take me to jail and confine me for two days, and thus I will miss work!” The facts of this case indicate that Brown “was not thinking about” the impact her actions would have on her employment when she reacted to seeing her husband cheating on her with another woman. *See State v. Boyce*, 284 Minn. 242, 254, 170 N.W.2d 104, 112 (1969) (discussing heat of passion provoked by conduct which “would provoke a person of ordinary self-control under like circumstances”).

The ULJ appears to rely solely on the fact that Brown was in jail for an assault as evidence of misconduct. Again, that is not the law. The supreme court has held that a criminal act resulting in jail time is not misconduct as a matter of law under subdivision 6(a)(2). *Jenkins v. Am. Express Fin. Grp.*, 721 N.W.2d 286, 291 (Minn. 2006). Instead, this is a fact-based inquiry, requiring the ULJ to “focus on the facts in this particular case as to whether [an appellant’s] misconduct was established by evidence that demonstrates a substantial lack of concern for her employment.” *Id.* Committing a crime resulting in incarceration may be evidence that an employee lacked concern for her employment, but where the record establishes the employee “made diligent efforts to report to work,” including informing her employer of her conviction and attempting to arrange work-release, the “conduct does not demonstrate a substantial lack of concern for her

employment.” *Id.* at 292. The facts here are only slightly different from *Jenkins*, as noted by the majority. Like *Jenkins*, Brown was forthcoming about her arrest and notified her employer that she was in jail and would have to miss work. The record shows that not only did the employer not find misconduct nor terminate her on the spot, but told her to take a day off and compose herself. That is not compatible in any way with the employer terminating her for misconduct. Brown’s efforts to notify her employer of the reason for her absence show a concern for her employment, not a substantial lack of concern as the ULJ determined.

Most importantly, the ULJ failed to consider the applicable statutory exceptions to the definitions of misconduct. Some such exceptions include “simple unsatisfactory conduct,” and “absence, with proper notice to the employer, in order to provide necessary care because of the illness, injury, or disability of an immediate family member of the applicant.” Minn. Stat. § 268.095, subd. 6(b)(3), (8) (2016). Brown’s conduct fits both of these exceptions, particularly subdivision 6(b)(3).

This is what I suspect happened. Brown was a marginal employee. Her employer continued to employ her, but with the appropriate warnings about absenteeism. When this incident with her husband happened, they deliberately did not fire her on the spot for misconduct, but simply told her to take a day off to compose herself. During that time, the employer and human resources staffed Brown’s history of employment. They made a decision that they were not going to carry her any farther. They terminated her. Brown was an at-will employee, and employers do not need any reason to terminate an at-will employee. The employer not only gave no reason on the record as to why Brown was

terminated, but rather made it a point to say she was not terminated for misconduct. Her employer understood that she likely needed a job and her paycheck, and that her spouse was not a reliable provider. They knew by letting her go, as an at-will employee, she could collect unemployment benefits and at least have rent and food money between jobs. Thus, she was let go for her unsatisfactory conduct.

There was absolutely no reason for the ULJ to manufacture out of whole cloth an indefensible reasoning, to me, meaning, “Brown should have anticipated the entire chain of events when she first found her husband cheating!” This is not a case where the judiciary should step in and take benefits away from an employee.

The statute also provides 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[.]” *Id.*, subd. 6(d). Brown’s first absence was to care for an ill family member, so that absence does not count against her. *Id.*, subd. 6(b)(8). Brown’s absence for being in jail is, therefore, a single incident. “A single incident can constitute misconduct when an employee *deliberately* chooses a course of conduct that is adverse to the employer.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806 (Minn. 2002) (emphasis added). There was nothing deliberate about Brown’s emotional response to catching her husband of ten years cheating on her.

The ULJ’s finding of misconduct is not reasonably supported by the record. The ULJ ignored the controlling fact that Brown’s absence from work was a single incident that

was not the result of deliberate conduct, and that “simple unsatisfactory conduct” is not employment misconduct as a matter of law. *Id.*, subd. 6(b)(3).

I would reverse and grant appellant her unemployment