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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1531**

Latonia Rolbiecki,
Relator,

vs.

Regions Hospital,
Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed June 11, 2018
Affirmed
Florey, Judge**

Department of Employment and Economic Development
File No. 35688007-3

Latonia Rolbiecki, Coon Rapids, Minnesota (pro se relator)

Regions Hospital, St. Paul, Minnesota (respondent employer)

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

Considered and decided by Rodenberg, Presiding Judge; Jesson, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Relator challenges a determination, on reconsideration, by an unemployment-law judge (ULJ) that relator is ineligible for unemployment benefits because she was

discharged for employment misconduct. She asserts that respondent-employer should not have discharged her because the employment absence that resulted in her final warning was covered by the federal Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-54 (2012), and therefore her subsequent absence should have resulted in a final warning instead of discharge. We affirm.

FACTS

Relator Latonia Rolbiecki worked for respondent Regions Hospital (Regions) between December 2013 and June 2017. She worked about 32 hours per week as a laboratory-services technician, generally from 6:00 a.m. to 2:30 p.m. During her employment, relator took intermittent leave under the FMLA.¹ However, she had a number of attendance infractions separate and apart from her FMLA leave.

On September 1, 2016, relator received a written warning regarding her attendance. The warning stated that she had 5 1/3 “unscheduled occurrences” in the preceding 12 months. Relator was late for work or had an unexcused absence on 10 occasions in the 12 months preceding that warning, excluding FMLA absences. After her warning, she was informed that she needed to contact the person in charge of her shift and the FMLA administrator before a scheduled shift if she intended to have time covered by the FMLA.

On March 4 and 5 of 2017, relator’s daughter went to the emergency room. Relator was scheduled to work on March 5, but she did not appear for her shift. Relator intended

¹ The FMLA “entitles eligible employees to take up to 12 work weeks of unpaid leave per year” for specified family and medical reasons. *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 34, 132 S. Ct. 1327, 1332 (2012).

to have her absence covered by the FMLA and was capable of giving Regions notice. However, she did not give notice prior to her shift on March 5. On March 16, 2017, relator was issued a final written warning stating that she had 7 2/3 “occurrences” following her warning in September. The final warning stated that one more no call/no show would result in termination. On May 29, 2017, relator did not show up for work. She called a couple of hours after her shift had begun. She claimed that she had overslept because of medication. She was terminated on June 2, 2017.

Relator applied for unemployment benefits and was determined ineligible because she was discharged for employment misconduct. She appealed that determination. An evidentiary hearing was held before a ULJ. A number of exhibits were admitted, and testimony was received from relator, a human-resources employee, and relator’s direct supervisor. The ULJ issued a decision denying relator unemployment benefits because her discharge was based on employment misconduct. The ULJ found that medication did not cause relator to oversleep on May 29. Relator sought reconsideration. Both relator and Regions submitted additional documents.

On August 30, 2017, the ULJ affirmed the prior decision. The ULJ acknowledged that relator provided additional evidence showing that her March 5 absence was later deemed by Regions to be covered by the FMLA. But, the ULJ determined that the additional evidence would not be admitted because it did not show that relator “provided proper notice for that absence.” *See* Minn. Stat. § 268.105, subd. 2(c) (2016) (stating that in deciding a request for reconsideration, the ULJ “must not consider any evidence that was not submitted at the hearing, except for purposes of determining whether to order an

additional hearing”). The ULJ determined that the additional evidence would not change the outcome of the proceedings. This certiorari appeal followed.

D E C I S I O N

When reviewing a ULJ’s decision, this court may affirm, remand the case for further proceedings, or reverse and modify the decision if the substantial rights of the relator have been prejudiced because, among other things, the decision is arbitrary or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2016).

An applicant who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016). Employment misconduct is defined, in part, as “intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee.” Minn. Stat. § 268.095, subd. 6(a) (2016). “Whether an employee’s absenteeism and tardiness amounts to a serious violation of the standards of behavior an employer has a right to expect depends on the circumstances of each case.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 316 (Minn. 2011).

Determining whether an employee’s conduct disqualifies the employee from unemployment benefits presents a mixed question of fact and law. *Id.* at 315. Whether an employee committed a particular act is a question of fact viewed in the light most favorable to the ULJ’s decision and affirmed if supported by substantial evidence. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether certain findings

establish employment misconduct is a question of law, which we review de novo. *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011).

Relator asserts that her conduct does not qualify as employment misconduct because Regions approved her March 5 leave under the FMLA. The ULJ considered relator's argument and concluded that, regardless of whether her absence was ultimately covered by the FMLA, she failed to give notice prior to her March 5 shift that she would be using the FMLA. Relator acknowledged at the evidentiary hearing that she did not give notice to her employer until after her March 5 shift had begun, and she did not contact the FMLA administrator until March 6 or 7 to give notice that she intended to have her March 5 absence covered by the FMLA. The record therefore supports the ULJ's finding that relator failed to give notice.

Relator had ongoing attendance issues resulting in her being issued at least two written warnings. She was informed that she needed to give prior notice if she intended to use the FMLA. She failed to do so on March 5 and received a final warning, which indicated that "[o]ne more event of no call/no show will result in termination." Relator did not show for her shift on May 29, 2017, and she did not call until a couple hours after her shift had begun. This court has previously held that "except in certain limited circumstances, an employee engages in misconduct if [she] is absent even once without notifying [her] employer." *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986); see *Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App. 1984) (holding that repeated tardiness, particularly when combined with warnings, is employment misconduct). We conclude that relator's conduct constitutes employment misconduct.

Relator sought reconsideration of the ULJ's determination. The ULJ concluded that his prior decision was "factually and legally correct" and that a further hearing was not warranted because, despite the fact that relator's March 5 absence was later deemed to be covered by the FMLA, relator failed to give notice prior to her absence. On reconsideration, a ULJ is not required to hold an additional hearing to consider additional evidence if that evidence would not change the outcome of the ULJ's decision. Minn. Stat. § 268.105, subd. 2(c). "A reviewing court accords deference to a ULJ's decision not to hold an additional hearing and will reverse that decision only for an abuse of discretion." *Davanni's Inc.*, 721 N.W.2d at 345. Despite relator's additional evidence, her repeated attendance infractions and failure to follow her employer's reasonable FMLA policy constitutes employment misconduct. The ULJ did not abuse his discretion by refusing to hold an additional hearing or by reaffirming his previous decision to deny relator unemployment benefits.

Affirmed.