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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1811**

Tina Bell,
Relator,

vs.

Compassioncare Services, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 2, 2018
Affirmed
Bratvold, Judge**

Department of Employment and Economic Development
File No. 35788180-3

Tina N. Bell, Pelican Rapids, Minnesota (pro se relator)

Compassioncare Services, LLC, Golden Valley, Minnesota (respondent employer)

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

Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that she is ineligible for unemployment benefits because she was discharged for employment misconduct after she failed to follow company policy and failed to work as scheduled without obtaining her supervisor's approval to change her schedule. We affirm.

FACTS

From April 7, 2015 to July 14, 2017, relator Tina Bell worked for respondent Compassioncare Services LLC as a registered nurse case manager. Compassioncare is a licensed home care provider and 24-hour assisted-living care provider. When Bell was hired, her supervisor, Patricia Peppel, told Bell that she could occasionally adjust her start and end times from one to two hours, depending on patient and staff needs. Bell liked this flexibility and said it was one of the reasons she accepted the position with Compassioncare. Compassioncare has an attendance policy that employees must report to work for their scheduled hours or contact a supervisor before their scheduled shift begins and obtain permission for any absence or adjustment to their scheduled hours. Bell received training on the company's attendance policy and signed an acknowledgement of having done so.

On September 29, 2016, Peppel wrote Bell a letter informing her that she needed to adhere to her scheduled hours and obtain approval in advance for schedule adjustments. Sometime after September 2016, Bell's schedule changed from Monday through Thursday, 7:00 a.m. to 5:00 p.m. to Monday through Friday, 8:00 a.m. to 4:00 p.m.

On March 3, 2017, Bell did not come into work and did not inform Peppel in advance. Peppel called Bell, who asked to work from home, but Peppel said no. On March 4, 2017, Bell emailed Peppel, requesting time off later in March to care for her mother, who lived out of town, and stating she had already made travel arrangements. Peppel denied the request, and Bell replied she would take those days off regardless.

On March 8, 2017, Compassioncare offered Bell a salaried position, which was a change from her previous hourly position. The letter stated that Bell was “required to be at [her] location [Monday through Friday, 8:00 a.m. to 4:00 p.m.]. Any changes to this schedule must be pre-approved by [her] direct supervisor.” Bell accepted the offer and signed the letter.

On May 17, 2017, Bell did not report to work until 2:00 p.m., and did not notify Peppel in advance. Peppel met with Bell on May 17 to discuss her tardiness. The next day, Peppel emailed Bell a warning notice, as a separate attachment, describing the May 17 incident and stating that Bell needed to inform Peppel before altering her schedule. The warning included a place for Bell to sign and return it, which she failed to do.

On June 19 and 20, 2017, Bell came to work “between 10:00 a.m. and noon” due to child-care needs. Bell did not obtain approval for these absences. On July 12, 2017, Bell left the building from 10:30 a.m. to 4:45 p.m., according to her, to visit the pharmacist for work-related reasons, but without receiving approval from Peppel. Peppel testified that she had told Bell in February or March that she could not leave work to see the pharmacist.

On July 14, 2017, Compassioncare dismissed Bell for “time and attendance issues.” Bell applied for unemployment benefits, but was determined to be ineligible. She appealed

that determination, and respondent Minnesota Department of Employment and Economic Development (DEED) held a hearing on September 12, 2017. The ULJ heard testimony from Bell, Peppel, and Alicia Witherspoon, Compassioncare’s vice-president of finance.

At the hearing, Bell admitted being aware of the policy requiring her attendance at specified times and the need for advance approval of absences; Bell also did not dispute many of the reported absences. But Bell asserted that Peppel had told her that she could adjust her schedule by “an hour or two . . . within reason” without informing Peppel.

Bell also testified to telling Peppel that she would be late to work on May 17. Bell acknowledged that she received an email warning about the incident on May 18, but testified that there was no attachment for her to sign and return. She testified that she did not recall if she arrived at work between 10:00 a.m. and noon on June 19 and 20. She testified that she left work on July 12 to meet a pharmacist which, according to her, was for work-related purposes.

The ULJ found that Bell was ineligible for unemployment benefits because she committed employment misconduct based on her failure to comply with the company’s attendance policy.¹ Bell requested reconsideration, arguing that the ULJ made factual

¹ The ULJ also found that Bell was dismissed for employment misconduct because she violated Compassioncare’s policy prohibiting overtime without advance approval from a supervisor. At the hearing, Peppel admitted to removing overtime hours from Bell’s time card when those hours were not approved in advance. DEED’s brief to this court states that, based on Peppel’s conduct, Bell may have legal claims under state or federal wage laws against Compassioncare. But DEED argues that Bell’s wage claims are not relevant to our review. We agree. *See Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 316 (Minn. 2011) (“[T]he focus of the [employment misconduct] inquiry is the employee’s conduct, not that of the employer.”). Moreover, the ULJ’s decision may be affirmed based on a single instance of employee misconduct. *Nieszner v. Minn. Dep’t of Jobs and Training*,

errors and that she was disadvantaged because she is inexperienced. As a part of her request for reconsideration, Bell included emails suggesting that other Compassioncare employees were threatened with dismissal if they testified on Bell's behalf. The ULJ rejected Bell's reconsideration request, affirmed the original decision, and denied Bell's request for another hearing under Minn. Stat. § 268.105, subd. 2 (Supp. 2017). Bell seeks review by writ of certiorari.

D E C I S I O N

We understand Bell's pro se appellate brief as making three primary arguments: (1) the ULJ's decision was affected by legal error and was not supported by substantial evidence, (2) the ULJ did not provide Bell with a fair hearing, and (3) the ULJ erroneously denied Bell's reconsideration request for an additional evidentiary hearing. DEED refutes Bell's arguments. We affirm the ULJ's decision because we discern no legal error, the ULJ's findings of fact are supported by substantial evidence, Bell received a fair hearing, and the ULJ did not abuse her decision in denying Bell's request for reconsideration.

In reviewing the ULJ's decision, this court may affirm, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the realtor have been prejudiced because the findings, inferences, conclusion, or decision are "made upon unlawful procedure," "affected by other error of law," or "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd.

499 N.W.2d 832, 838 (Minn. 1993). Because we conclude that the record supports the ULJ's findings that Bell failed to comply with the company's attendance policy on several occasions, we do not further consider the ULJ's findings regarding Bell's compliance with the overtime policy.

7(d)(3)-(5) (Supp. 2017); *see also* *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 234-35 (Minn. App. 2011).

I. The ULJ’s decision was not affected by an error of law and was supported by substantial evidence.

An applicant for unemployment benefits is ineligible if she was discharged for employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2016). Employment misconduct means “(1) [serious violations] 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) (Supp. 2017). “Whether an employee engaged in employment misconduct presents a mixed question of fact and law.” *Cunningham*, 809 N.W.2d at 235. Whether an employee committed an act is a question of fact. *Id.* But, whether an employee’s act amounts to employment misconduct is a question of law that we review de novo. *Id.* This court defers to the ULJ’s credibility determinations and views evidence in the light most favorable to the ULJ’s decision. *Id.* This court also views the ULJ’s “factual findings in the light most favorable to the decision” and will not “disturb those findings as long as there is evidence in the record that reasonably tends to sustain them.” *Stagg*, 796 N.W.2d at 315.

A. No legal error affected the ULJ’s decision.

The ULJ determined that “[a]n employer has the right to reasonably expect that its employees report to work as scheduled, and that they notify the employer if they are going to be late or absent.” The ULJ also determined that “refusal to abide by [an] employer’s reasonable policies and directives [] amounts to employment misconduct.” Finally, the ULJ

determined that Bell's repeated tardiness and absenteeism without advance permission from her supervisor was employment misconduct. Bell fails to articulate a specific legal error in this determination, and we discern none.

Generally, refusing to follow an employer's reasonable policies and requests is misconduct that disqualifies an employee from unemployment benefits. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). This court has previously stated that "[a]n employer has the right to establish and enforce reasonable rules governing absences from work" and that violating such policies is employment misconduct. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). Even a single incident of violating reasonable employer rules may amount to employee misconduct if the employee "sufficiently disregards his or her employer's expectations." *Nieszner*, 499 N.W.2d at 838. While there are exceptions to these general rules,² the record does not establish that the ULJ erred in determining that no exception applied to Bell's conduct. Accordingly, the ULJ's decision was not affected by an error of law.

B. Substantial evidence supported the ULJ's factual findings.

The ULJ found that Bell did not "adhere to her schedule," she did not inform Peppel in advance about her absences from work, and her conduct was contrary to Compassioncare's reasonable expectations and workplace policy. Substantial record evidence supported the ULJ's findings that Bell arrived to work late or not at all on four

² See, e.g., *Hanson v. Crestliner Inc.*, 772 N.W.2d 539, 543 (Minn. App. 2009) (stating that an employee's absence without notice to the employer may not be employment misconduct when an immediate family member needs care and absence does not show substantial lack of concern for employment).

occasions and did not follow established procedures by informing Peppel in advance or obtaining her approval. Bell acknowledged that she was aware of Compassioncare's policy about needing advance approval for schedule changes.

Peppel and Bell gave conflicting testimony, for example, regarding whether Peppel told Bell she could make minor schedule adjustments without advance approval and whether Peppel told Bell she could leave work to speak with a pharmacist. But the ULJ found Peppel more credible than Bell, and this court defers to the credibility determinations of the ULJ. *Cunningham*, 809 N.W.2d at 235. Importantly, the ULJ gave specific reasons for finding that Peppel's and Witherspoon's testimony was more credible than Bell's testimony. The ULJ explained that the employer's testimony "was very detailed and specific; because it was more direct, straightforward, certain, and plausible; and because it was corroborated by extensive documentation." The ULJ found Bell's testimony less credible because "it was not direct, because it was self-serving, and because it was, at times, uncertain or vague." See Minn. Stat. § 268.105, subd. 1a(a) (2016) ("When the credibility of a witness testifying in a hearing has a significant effect on the outcome of a decision, the [ULJ] must set out the reason for crediting or discrediting that testimony."); see also *Wichmann*, 729 N.W.2d at 29 (explaining that when credibility findings significantly affect the outcome of the case, the ULJ must set out particular reasons for why one witness is more credible than another). Accordingly, we conclude that the ULJ's factual determinations were supported by substantial evidence.

II. Bell received a fair evidentiary hearing.

Bell argues that she was unable to present testimony by other employees and that Peppel withheld a zip drive containing documents that Bell described as favorable to her. We understand Bell's argument to be that she did not receive a fair hearing.

The ULJ has an obligation to conduct a hearing that clearly and fully develops the relevant facts and preserves the parties' rights to a fair hearing. Minn. R. 3310.2921 (2017); *see also Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). A hearing is generally fair if both parties have the opportunity to give statements, offer and examine witnesses, and present exhibits. *See Ywswf*, 726 N.W.2d at 529-30. The ULJ must assist all parties, including pro se parties, in the presentation of evidence. *See* Minn. R. 3310.2921.

The ULJ started the hearing by telling the parties that they had "the right to request that the hearing be rescheduled so that additional witnesses and documents can be presented by subpoena if necessary." Bell did not ask for rescheduling. At a later point during the hearing, the ULJ specifically offered Bell the opportunity to subpoena witnesses, and she declined. We conclude that Bell had the opportunity to present and dispute evidence consistent with a fair hearing.

Additionally, the record does not include any evidence that Compassioncare withheld the zip drive. Bell left the zip drive and other personal property on Compassioncare's premises. Later, Bell asked Peppel to find these items and return them to her. During the hearing, Peppel testified that she found Bell's other personal property and returned it to her, but Peppel did not find the zip drive.

Bell also appears to argue that the ULJ was biased. Bell states that, seven years ago, she received unemployment-insurance overpayments, and that the ULJ discredited her testimony as a result. But there is no indication that the ULJ considered this previous incident in making her decision. Additionally, our review of the record has disclosed no indication that the ULJ was biased.

III. The ULJ did not err by refusing to conduct an additional evidentiary hearing.

As part of her request for reconsideration, Bell submitted emails from other Compassioncare employees that, according to Bell, showed that some employees were afraid to testify on her behalf for fear of endangering their jobs based on alleged threats from Compassioncare. But Bell does not describe what testimony those employees would have offered. We understand her to argue on appeal that the ULJ should have granted an additional evidentiary hearing to receive new evidence from these employees.

Under Minnesota law, Bell had the right to request reconsideration from the ULJ who heard her appeal. Minn. Stat. § 268.105, subd. 2(a). Upon such a request, the ULJ may “correct any factual or legal mistake in the decision” or it may “order an additional hearing when appropriate.” *Id.*, subd. 2(b)(1). When considering the 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.” *Id.*, subd. 2(c). The ULJ must order an additional hearing if the party submits evidence that was not a part of the original hearing and satisfies one part of a two-part test: (1) the new evidence likely would “change the outcome of the decision and there was good cause for not having previously submitted that evidence” or (2) the new evidence would show that “the evidence that was

submitted at the hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.” *Id.* “Good cause” is a reason “that would have prevented a reasonable person acting with due diligence from submitting the evidence.” *Id.* “This court will defer to the ULJ’s decision not to hold an additional hearing.” *Ywswf*, 726 N.W.2d at 533.

We conclude that the ULJ did not abuse her discretion in denying an additional hearing because Bell’s proposed new evidence failed both parts of the applicable test. First, Bell did not describe the evidence she sought to submit and, therefore, she failed to establish that the outcome would have changed. Also, Bell did not show good cause for not presenting the new evidence at the September hearing because she declined the opportunity to reschedule the hearing. Also, Bell could have subpoenaed these witnesses but declined to do so when the ULJ discussed subpoenas with her during the hearing. Bell’s reconsideration request also fails the second part of the test because, having failed to describe the new evidence, she did not establish that the evidence at the hearing was likely false.

To be clear, this court does not condone any employer’s conduct that explicitly or implicitly threatens witnesses to prevent them from giving testimony. We nonetheless conclude that the ULJ did not abuse her discretion in denying a new hearing because Bell admitted to several instances of absenteeism in violation of company policy. Given Bell’s admission, the ULJ did not abuse her discretion in concluding that an additional hearing would not change the outcome of the decision.

In her brief to this court, Bell also appears to assert that she should have an additional hearing to offer two pieces of evidence that she did not raise in her reconsideration request. Because Bell failed to present either item of evidence in her reconsideration request, the new evidence is not properly before us. *See McNeilly v. Dep't of Emp't and Econ. & Dev.*, 778 N.W.2d 707, 709 n.1 (Minn. App. 2010). Even so, Bell's argument is not persuasive. Bell first alleges that, after her termination, Peppel reported her to the Fergus Falls Police Department and the Minnesota Board of Nurses for inappropriately disposing of narcotics. Bell states that these complaints were unsubstantiated and that both authorities dismissed the allegations. Second, Bell asserts that she has letters and emails commending her performance at Compassioncare. Bell does not state why either piece of evidence would undermine the ULJ's decision. Because neither item of evidence is relevant to the employment misconduct that is the basis for Bell's termination, we conclude that, had Bell included the evidence in her reconsideration request, it would not have affected the outcome of that request.

Accordingly, we will not disturb the ULJ's decision to deny Bell's request for reconsideration and for an additional evidentiary hearing.

Affirmed.