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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0929**

Kristin K. Choronzy,
Relator,

vs.

Viracon, Inc. (1995) (Joint Account),
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 8, 2019
Affirmed
Schellhas, Judge**

Department of Employment and Economic Development
File No. 35331450-6

Benjamin L. Weiss, Southern Minnesota Regional Legal Services, Inc., St. Paul, Minnesota
(for relator)

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Considered and decided by Schellhas, Presiding Judge; Slieter, Judge; and Stauber,
Judge.*

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Relator challenges an unemployment-law judge's decision that she is ineligible for unemployment benefits. We affirm.

FACTS

Relator Kristin Choronzy worked full-time at respondent Viracon Inc., a laminate-glass manufacturer, from January 2015 to January 20, 2017. Viracon terminated Choronzy's employment for violating its attendance policy.

Under a policy contained in a written employee handbook, Viracon assigned four attendance points to employees who missed a shift after providing their supervisor advance notice of their anticipated absence. The "Attendance Disciplinary Procedure," contained in Viracon's employee handbook stated that Viracon would terminate an employee who received 30 attendance points within a 12-month cycle. Viracon gave vacation time to employees and required that employees' vacation requests be made at least 24 hours in advance and "be approved" by the employees' supervisor. For emergencies, the 24-hour notice could be "waived at a supervisor's discretion." Viracon also gave employees personal-holiday time (PTO) to use without advance permission.

As of January 15, 2017, Choronzy had received 28 attendance points. On January 16 and 17, Choronzy did not show up for her scheduled shifts because she was in jail on a charge of fifth-degree assault.¹ Prior to the start of the January 16 shift, Choronzy's sister,

¹ On January 13, 2017, police officers arrested Choronzy, and the State of Minnesota charged her with unlawful use of a stun gun.

Amy Day, e-mailed Choronzy's supervisor, Steve Britt, to inform him that Choronzy had been arrested the previous night and wanted to use PTO to cover her January 16 shift and vacation time for her January 17 shift. Britt responded, "ok got it." Viracon applied Choronzy's remaining PTO to her January 16 absence. But Viracon did not approve Choronzy's use of vacation time for her absence on January 17 and gave her four attendance points for the absence. Viracon terminated Choronzy's employment because she received 30 attendance points within a 12-month cycle.

Choronzy applied for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development (DEED) determined that she was ineligible for benefits. Choronzy appealed the determination. After a hearing, an unemployment-law judge (ULJ) decided that Choronzy was ineligible for benefits because Viracon terminated her employment due to her employment misconduct. Choronzy appealed to this court, and this court concluded that "the ULJ did not fulfill the duty to develop the record," in part, because the ULJ failed to enter into evidence Viracon's attendance policy. *Choronzy v. Viracon, Inc.*, No. A17-1018, order op. at 3 (Minn. App. Mar. 7, 2018) (*Choronzy I*). Based on the "inadequate record," this court remanded for the ULJ to "consider whether [Choronzy] had vacation or personal time available to cover her absence on January 17," and, if so, whether Viracon's policy prevented her from using it to cover her absence while in jail. *Id.* at 4.

On remand, the ULJ received into evidence Viracon's employee handbook, the time-off request from Day, Choronzy's attendance records, and testimony from Choronzy, her supervisor, Viracon's human-resources manager (the HR manager), and Day. The ULJ

concluded that Choronzy committed employment misconduct because her “conduct that led to her discharge displayed clearly a serious violation of Viracon’s reasonable expectations” because her “own actions [] resulted in her arrest,” and her January 17 absence “was not approved,” causing her to reach “the maximum number of allowed attendance points.” Choronzy requested reconsideration, and the ULJ affirmed.

This certiorari appeal follows.

D E C I S I O N

When reviewing the decision of a ULJ, this court may affirm or remand for further proceedings; or it may reverse or modify the decision if a relator’s substantial rights were prejudiced because the findings, inferences, conclusion, or decision are: “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2018). “This court reviews a ULJ’s findings of fact in a light most favorable to the decision, and will not disturb the findings so long as there is evidence in the record that substantially supports them.” *Gonzalez Diaz v. Three Rivers Cmty. Action, Inc.*, 917 N.W.2d 813, 815–16 (Minn. App. 2018).

An employee discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2018). Whether an employee engaged in employment misconduct is a mixed question of law and fact. *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). Whether a particular act constitutes

misconduct is a question of law this court reviews de novo. *Id.* Whether the employee committed an act is a question of fact. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

I. Choronzy's commission of employment misconduct

Choronzy argues that the ULJ erroneously determined that she committed employment misconduct. "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). A "decision to violate knowingly a reasonable policy of the employer is misconduct," which is "particularly true when there are multiple violations of the same rule involving warnings or progressive discipline." *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 806–07 (Minn. 2002). "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).

Here, the ULJ concluded that Choronzy's unexcused absence violated Viracon's attendance policy and constituted employment misconduct because she already had accumulated 28 attendance points, her final absence caused her to exceed 30 points, and her final absence resulted from her own actions that were within her control. In *Stagg*, the supreme court concluded that an employee's multiple absences constituted misconduct as a serious violation of the standards of behavior that the employer had a right to reasonably expect, where the employer had an attendance policy that resulted in an employee's discharge following the fifth policy violation. *Id.* at 314. The supreme court, after

reviewing the attendance policy and finding that it was reasonable, concluded that the employer discharged the employee for misconduct because the record supported the ULJ's findings that the employee knew about the policy, the purpose for it, and that he had to comply by it and had violated it five times. *Id.* at 316.

Similarly, here, Viracon had an attendance policy that provided for progressive discipline, resulting in termination after an employee received 30 attendance points. *See Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011) ("Minnesota law allows an employer to establish and enforce reasonable rules governing employee absences."). At the first hearing before the ULJ, Choronzy admitted that she knew about Viracon's policy and knew that another violation could lead to termination. And Choronzy's supervisor did not approve her vacation-time request for January 17, 2018. At the hearing on remand, Viracon's HR manager testified about, and Choronzy's attendance records show, multiple attendance absences by Choronzy before her absence on January 17, for which she did not have approval to use vacation time. The ULJ found Viracon's evidence more credible than Choronzy's testimony because the information formed "a more logical chain of events." But this does not end our inquiry.

Choronzy argues that the ULJ improperly based its decision on the details of her arrest. In finding employment misconduct, a ULJ must rely on the actual reasons for discharge. *Hansen v. C.W. Mears, Inc.*, 486 N.W.2d 776, 780 (Minn. App. 1992), *review denied* (Minn. July 16, 1992). But under *Jenkins v. Am. Express Fin. Corp.*, when an employee's absence due to incarceration leads to termination, "the inquiry must focus on the facts in th[e] particular case," to determine if the employee's absence rises to

employment misconduct. 721 N.W.2d 286, 291 (Minn. 2006). In *Jenkins*, an employer terminated an employee's employment for missing work due to incarceration following the employer's failure to verify employment status to a workhouse. *Id.* at 288. The supreme court held that an absence due to incarceration was not per se employment misconduct and instructed courts to examine the underlying circumstances when incarceration causes an absence. *Id.* at 291–92. The supreme court concluded that under the “unique facts” presented, the employee did not commit employment misconduct because she “engaged in significant attempts to report for work and continue her employment” and therefore did not show “a substantial lack of concern for her employment.” *Id.* at 287, 292. But the supreme court stated that its decision did not “preclude employers from claiming misconduct because an employee was in jail.” *Id.* at 292.

Choronzy's circumstances are distinguishable from the “unique facts” in *Jenkins*. Despite knowing that another attendance violation could lead to her termination and that she had only enough PTO to cover a single absence, Chorony provoked a confrontation in another person's home, which she visited without invitation. After she twice used a stun gun on the home's occupant in an attempt to recover a ring, police arrested her and she was charged with fifth-degree assault. While Chorony testified that she used the stun gun in self-defense, the ULJ found her testimony not credible.

Minnesota law excludes from the definition of employment misconduct “conduct an average reasonable employee would have engaged in under the circumstances.” Minn. Stat. § 268.095, subd. 6(b)(4) (2018). Chorony argues that regardless of the cause of her absence, she acted as a reasonable employee would have acted under the circumstances.

We disagree. A reasonable employee would not go to a person's home uninvited for the purpose of confronting an occupant and use a stun gun twice on the occupant. A reasonable person would know that the conduct could reasonably lead to an arrest that would result in missing work. In Choronzy's case, she knew that another unexcused absence could lead to employment termination. The ULJ found that Choronzy's claim that she was not the cause of her arrest not credible, and we will not disturb that credibility determination on appeal. *See Bangtson v. Allina Med. Grp.*, 766 N.W.2d 328, 332 (Minn. App. 2009) ("Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." (quotation omitted)); *cf. Winkler v. Park Refuse Serv., Inc.*, 361 N.W.2d 120, 124 (Minn. App. 1985) (concluding that employee committed misconduct by missing work after arrest on outstanding warrant where he knew about warrant and own actions led to arrest).

Choronzy argues that, prior to January 16, 2018, Viracon erroneously assigned her attendance points for absences covered by the Family and Medical Leave Act (FMLA). Minnesota law excludes from the definition of employment misconduct "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)(8) (2018). But an assignment of error based on "mere assertion," and not supported by argument or authority is waived unless prejudicial error is obvious on "mere inspection." *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971). Choronzy fails to explain to which absences Viracon allegedly erroneously assigned her attendance points. And the HR manager's testimony directly refutes Choronzy's argument, testifying that "none of the dates that [Choronzy] had actually called

in because of FMLA were ever assigned [attendance] points.” Because no prejudicial error is obvious on mere inspection, we reject this argument.

The ULJ concluded that Choronzy committed employment misconduct by “looking at the circumstances as a whole,” which included “reach[ing] the maximum number of allowed attendance points.” Viracon’s HR manager stated that Choronzy was “discharged because she met the maximum number of points allowed on the attendance policy.” The record supports the ULJ’s findings regarding the events that occurred prior to Choronzy’s termination. We conclude that the ULJ did not err in concluding that Choronzy committed employment misconduct when she was absent from work on January 17, 2018, without prior approval to take vacation for the day. *See Stagg*, 796 N.W.2d at 317 (concluding repeated attendance-policy violations amounted to employer misconduct); *Petracek v. Univ. of Minn.*, 780 N.W.2d 927, 930 (Minn. App. 2010) (concluding that ULJ did not err in determining that relator did not have “good cause” to miss hearing due to arrest, and in failing to provide evidence showing arrest was not his fault); *cf. Hanson v. Crestliner, Inc.*, 772 N.W.2d 539, 544 (Minn. App. 2009) (concluding that employee did not commit misconduct where absence from work without notice was due to unexpected hospitalization of an immediate family member).

II. The ULJ’s compliance with remand instructions

Choronzy argues that the ULJ deviated from this court’s remand instructions. “On remand, a [decision-maker] must ‘execute a reviewing court’s mandate strictly according to its terms’ and lacks power to ‘alter, amend, or modify that mandate.’” *Rooney v. Rooney*, 669 N.W.2d 362, 371 (Minn. App. 2003) (quoting *Halverson v. Vill. of Deerwood*, 322

N.W.2d 761, 766 (Minn. 1982)), *review denied* (Minn. Nov. 25, 2003). “Appellate courts review . . . compliance with remand instructions under the deferential abuse of discretion standard.” *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 633 (Minn. 2017) (quotation omitted).

In its March 7, 2018 order opinion, this court stated:

On remand, the ULJ must consider whether relator had vacation or personal time available to cover her absence on January 17. If she did, is there anything in Viracon’s policy that would have prevented her from using that time for absence while in jail? If relator did have vacation or personal time available to cover January 17, and there is no policy against using that time to cover her time in jail, relator’s absence following the approval of her employer is not employment misconduct.

Choronzy I, order op. at 4. Choronzy argues that *Choronzy I* establishes as “law of the case” that the ULJ could not base its decision on whether her actions led to her arrest.

“Law of the case applies when the appellate court has ruled on a legal issue and remanded for further proceedings on other matters. The issue decided becomes ‘law of the case’ and may not be relitigated in the [district] court or reexamined in a second appeal.” *Sigurdson v. Isanti County*, 448 N.W.2d 62, 66 (Minn. 1989). In *Sigurdson*, an employment-discrimination case was appealed three times, and the issue of whether the complaint violated a statute of limitations was not litigated until the third appeal. *Id.* at 65. The supreme court concluded that because neither of the two previous appeals “finally concluded the lawsuit,” and no court had resolved the statute-of-limitations issue, “no law of the case” existed. *Id.* at 66.

Similarly, here, this court did not previously decide that the circumstances leading to Choronzy's absence are irrelevant. *Choronzy I* only "observe[d]" that the ULJ "focused too closely on whether [Choronzy]'s absence from work due to being in jail was or was not avoidable." This court did not determine as a matter of law that the circumstances surrounding Choronzy's incarceration were irrelevant; this court concluded that the record was incomplete. *Cf. Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 503 N.W.2d 793, 795–796 (Minn. App. 1993) (concluding that findings in second appeal following remand to consider more evidence did not violate law-of-the-case doctrine), *review denied* (Minn. Sept. 30, 1993). We conclude that the ULJ did not violate this court's remand instructions under the law-of-the-case doctrine.

Choronzy argues that the ULJ failed to make findings, as instructed on remand, regarding her available vacation time and whether Viracon's policies prohibited her from using it to cover her time in jail. We disagree. The ULJ's order on remand summarizes Viracon's attendance policy, Choronzy's vacation-time request, her lack of supervisor approval to use vacation time, and her attendance records. We therefore conclude that the ULJ complied with this court's remand instructions.

Choronzy argues that the ULJ's finding regarding the lack of her supervisor's approval of her use of vacation time is beyond the scope of remand. A lower court "exceeds its broad discretion on remand when it makes findings on a subject not included in the appellate court's remand instructions." *Leiendecker*, 895 N.W.2d at 633. But here the remand instructions explicitly refer to "the approval of her employer," as a prerequisite for concluding whether Choronzy did commit employment misconduct and the need for

findings on the issue. We conclude that the ULJ did not err by disregarding this court's remand instructions.

III. Alleged legal and procedural errors by the ULJ

Choronzy argues that the ULJ made legal and procedural errors that require reversal. She argues that the ULJ erred by admitting into evidence the police report from her arrest and her criminal history as irrelevant and improper hearsay evidence. Choronzy's argument is unpersuasive. We have previously concluded that a ULJ can enter a police report to help develop the record. *See Vasseei v. Schmitt & Sons Sch. Buses Inc.*, 793 N.W.2d 747, 751 (Minn. App. 2010) (concluding that ULJ did not err in reopening record to admit police report of incident that formed reason for discharge from employment).

Choronzy argues that the ULJ erred by independently obtaining her criminal record and the police report. But the ULJ concluded that Choronzy committed employment misconduct based on her violation of Viracon's attendance policy. Any alleged error from the ULJ's independent investigation is therefore harmless because neither document formed the basis for the conclusion that Choronzy committed employment misconduct. *See Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987) (stating that "[a]lthough error may exist, unless the error is prejudicial, no grounds exist for reversal"). And Choronzy's failure to raise this issue in *Choronzy I* further supports our disregard of this argument. *See Leiendecker*, 895 N.W.2d at 633 ("If a party petitions for review, the party must bring all claims then ripe in that petition for review or waive further review of such claims in our court." (quotation omitted)).

Choronzy also argues that the ULJ's "actions were arbitrary and capricious." A decision is arbitrary or capricious if it "represents the agency's will and not its judgment." *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, 768 N.W.2d 112, 118 (Minn. 2009). Choronzy cites the ULJ's improper "prodd[ing]" of her supervisor to testify about his denial of her vacation-time request. We disagree. By questioning Choronzy's supervisor, the ULJ merely performed his or her task as the main factfinder on remand. *See* Minn. R. 3310.2921 (2017) (stating that ULJ "may obtain testimony and other evidence from department employees and any other person the judge believes will assist the judge in reaching a proper result"). We therefore conclude that the ULJ did not decide the case in an arbitrary and capricious manner, and we affirm the ULJ's decision.

Affirmed.