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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0510**

Qu'iana N. Lynn,  
Relator,

vs.

Fairview Health Services,  
Respondent,

Department of Employment and  
Economic Development,  
Respondent.

**Filed January 22, 2013  
Affirmed  
Rodenberg, Judge**

Department of Employment and Economic Development  
File No. 28854171-3

Qu'iana N. Lynn, Fridley, Minnesota (pro se relator)

Fairview Health Services, c/o Talx UCM Services, St. Louis, Missouri (respondent employer)

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

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and  
Rodenberg, Judge.

## UNPUBLISHED OPINION

**RODENBERG**, Judge

Relator challenges the decision of the unemployment law judge (ULJ) that she was discharged for employment misconduct and is thus ineligible for unemployment benefits. Because the record contains substantial evidence to support the ULJ's finding that relator was unable to account for her activities on at least eight mornings where there were unreasonably long delays between the time she "clocked in" for work and her first logged employment tasks, we affirm.

### FACTS

Relator Qu'iana Lynn worked full-time for respondent-employer Fairview Health Services as a laboratory care technician at an acute-care hospital. Relator was regularly scheduled to begin work at 5:00 a.m. After clocking in, she was expected to prepare a collection tray for drawing blood samples, begin drawing blood samples from patients, and then return the samples to the laboratory for analysis. After this task was completed, relator was permitted to take a scheduled break and then report to her next assignment for the day.

Relator's progress in completing her work was tracked in two ways. First, the time that she arrived at work and clocked in each morning was recorded. Second, relator's progress on blood draws was tracked by a hand-held laboratory computer and scanner used by laboratory care technicians. The scanner recorded and tracked when blood draws were performed on particular patients and which laboratory technician had performed the blood draw.

Relator's direct supervisor testified that, on average, it should take five to ten minutes to prepare the blood-draw tray upon arriving in the morning. In addition, the time between arrival and logging the initial blood draw could be extended by 15–30 minutes on days where the laboratory care technician encounters a difficult blood draw or is asked to assist a coworker with a blood draw. Respondent-employer keeps track of each laboratory care technician's average time between arrival and first blood draw, and provides each employee with a weekly report including that information. The weekly reports encourage employees to strive for an average delay of 25 minutes. Relator testified that her average delay was 45 minutes.

On October 18, 2011, relator clocked in at 5:00 a.m., but did not record a first blood draw until 8:16 a.m., a delay of three hours and 16 minutes. On October 19, 2011, relator clocked in at 5:04 a.m., but did not record a first blood draw until 5:59 a.m., a delay of 55 minutes. On October 20, 2011, relator clocked in at 5:05 a.m., but did not record a first blood draw until 6:35 a.m., a delay of one hour and 30 minutes. On October 25, 2011, relator clocked in at 5:02 a.m., but did not record a first blood draw until 9:52 a.m., a delay of four hours and 50 minutes (of which three hours was unaccounted-for time). On October 27, 2011, relator clocked in at 5:02 a.m., but did not record a first blood draw until 7:26 a.m., a delay of two hours and 24 minutes. On October 31, 2011, relator clocked in at 5:00 a.m., but did not record a first blood draw until 7:15 a.m., a delay of two hours and 15 minutes. On November 1, 2011, relator clocked in at 5:05 a.m., but did not record a first blood draw until 5:54 a.m., a delay of 49 minutes. On

November 2, 2011, relator clocked in at 5:04 a.m., but did not record a first blood draw until 6:09 a.m., a delay of one hour and five minutes.

Relator's supervisor testified that she confronted relator concerning these instances after receiving complaints from other employees and that relator gave a number of excuses to explain each delay. However, when relator's supervisor investigated the excuses, in the process asking 20 other employees whether they had seen relator working, the supervisor was unable to substantiate the excuses. The supervisor terminated relator's employment due to the significant amount of working time for which relator could not account. The supervisor testified that she could not trust relator to do the work for which she was being paid.

Relator applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development denied her claim because she was discharged for employee misconduct. Relator appealed. At the hearing before the ULJ, relator attempted to provide explanations for these delays between when she clocked in and her first recorded work activity. Relator's primary explanation for the delays was that she takes a longer than average time to clean and resupply the trays.

Relator also offered the testimony of a fellow employee, whose shift begins at 7:00 a.m. and who testified that "a lot of times," when he arrives for work, he sees relator working. However, relator's witness did not testify to any observations on the days in question or to relator's typical activities prior to 6:45 a.m. to 7:00 a.m.

In his December 20, 2011 decision, the ULJ found that relator's supervisor was credible because the supervisor had thoroughly investigated relator's explanations,

because the discharge was based on records kept in the ordinary course of business, and because relator could offer no reasonable explanation for the long delays between when she clocked in for work and when she first engaged in documented work activity. The ULJ determined that the delays amounted to employment misconduct because respondent-employer had a right to reasonably expect that relator would perform work while clocked in, and that the delays between clock-in time and first-documented work activity represented a serious violation of that expectation. The ULJ also determined that relator knew or should have known of that expectation and should have been aware that respondent-employer kept track of relator's time and expected relator to account for her activities.

Relator was again denied benefits on reconsideration. This certiorari appeal followed.

## **D E C I S I O N**

An employee who is discharged for employment misconduct is not eligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Employment misconduct is defined as “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly” either “a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee” or “a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a) (2012).

Whether an employee committed misconduct sufficient to disqualify her from receipt of unemployment benefits is a mixed question of law and fact. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). “Whether [an] employee committed a

particular act is a question of fact.” *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). However, “[d]etermining whether a particular act constitutes disqualifying misconduct is a question of law,” which we review de novo. *Stagg*, 796 N.W.2d at 315.

When reviewing the decision of the ULJ, we defer to the ULJ’s credibility determinations if they are supported by substantial evidence. *Compare Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006) (stating that credibility determinations are “the exclusive province of the ULJ and will not be disturbed on appeal”), *with Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (stating that the ULJ’s credibility determinations will be upheld if supported by substantial evidence) (citing *Ywsfw v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 532–33 (Minn. 2007) (upholding a ULJ’s credibility determination after subjecting it to substantial evidence review)). In conducting this review, we may reverse or modify the ULJ’s factual findings if they are “unsupported by substantial evidence in view of the entire record as submitted.” Minn. Stat. § 268.105, subd. 7(d)(5) (2012).

“Substantial evidence” is defined as “1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2. More than a scintilla of evidence; 3. More than some evidence; 4. More than any evidence; and 5. Evidence considered in its entirety.” *Cable Commc’ns Bd. v. Nor-West Cable Commc’ns P’ship*, 356 N.W.2d 658, 668 (Minn. 1984) (addressing the standard of review for administrative agency decisions); *see also* Minn. Stat. §§ 14.69 (establishing the standards of review for administrative agency actions, and containing language that is virtually identical to that in

section 268.105, subdivision 7(d)), 645.17(4) (“[W]hen a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language.”) (2012).

In *Stagg*, an employee at a group home for troubled youth was terminated for excessive absenteeism and tardiness. 796 N.W.2d at 314, 317. Over the course of several months, the employee in *Stagg* (1) missed a mandatory training meeting without providing prior notice, (2) missed two days of work without prior notice to his supervisor, and (3) arrived late for work on three occasions. *Id.* at 314. The supreme court held that the employee had violated the standards of behavior that an employer has a right to reasonably expect of its employees, and that the employee is not entitled to unemployment benefits. *Id.* at 317.

The facts in this case differ from those in *Stagg* in that relator regularly arrived at work at the scheduled time and clocked in at or very shortly after her scheduled 5:00 a.m. start time. However, on multiple occasions, relator was unable to account for her activities during early portions of the workday when the regular performance of her work duties would have created a record of those activities.

“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). We have previously stated that “an employee’s deliberate work avoidance and unnecessary delays . . . evidencing a disregard for the employer’s interests may constitute misconduct.” *Minn. Boxed Meats, Inc. v. Zadworny*,

404 N.W.2d 7, 9 (Minn. App. 1987).<sup>1</sup> From a practical standpoint, it would seem that there is little difference to an employer between an employee who is absent or tardy and an employee who is present but does no work. *Cf. Auger v. Gillette Co.*, 303 N.W.2d 255, 257–58 (Minn. 1981) (applying *Tilseth* to hold that two night janitors caught sleeping on the job were discharged for employment misconduct). If anything, the misconduct of an hourly-wage employee who is present and being paid but who is doing

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<sup>1</sup> *Minn. Boxed Meats* was decided under the *Tilseth* standard. *See Minn. Boxed Meats*, 404 N.W.2d at 9 (quoting *Tilseth v. Midwest Lumber Co.*, 295 Minn. 372, 374–75, 204 N.W.2d 644, 646 (1973)). In *Tilseth*, the supreme court defined employment misconduct as

conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of [its] employee . . . . On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion are not to be deemed “misconduct.”

295 Minn. at 374–75, 204 N.W.2d at 646 (quoting *Boynton Cab Co. v. Neubeck*, 296 N.W. 636, 640 (Wis. 1941)). In 1997, the legislature superseded *Tilseth* by statute when it first enacted a definition of employment misconduct. *Houston v. Int’l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002). However, *Tilseth*-grounded cases, such as *Minn. Boxed Meats*, “remain instructive as to the areas in which the *Tilseth* and [current] statutory definitions overlap.” *Lawrence v. Ratzlaff Motor Express Inc.*, 785 N.W.2d 819, 823 (Minn. App. 2010), *review denied* (Minn. Sept. 29, 2010). The statute and *Tilseth* agree that violations of “standards of behavior the employer has the right to reasonably expect of the employee” constitute employment misconduct. Minn. Stat. § 268.095, subd. 6(a)(1); *see also Tilseth*, 295 Minn. at 374–75, 204 N.W.2d at 646. If anything, the definition of misconduct in the statute is broader than that in *Tilseth*, because where *Tilseth* was concerned with conduct that was “wilful,” “wanton,” or “deliberate,” the statute reaches conduct even if it is only “intentional, negligent, or indifferent.” Minn. Stat. § 268.095, subd. 6(a); *Tilseth*, 295 Minn. at 374–75, 204 N.W.2d at 646. Because *Minn. Boxed Meats* rests on this element of *Tilseth*, it remains good law and instructs this court on how to approach the present case.

no work is more egregious than that of the tardy employee, who is at least not being paid for time not worked.

In this case, relator was not able to account for her activities for significant periods of time during which she should have been performing blood draws. In many instances, the delays between when relator clocked in to work and when relator recorded her first blood draw were well over an hour.<sup>2</sup> Relator's supervisor testified that there were no other job duties that relator could have legitimately been performing for such long periods of unaccounted-for time. The ULJ found the supervisor's testimony credible and did not find relator's testimony credible. The ULJ's credibility determination is supported by substantial evidence.

Under these circumstances, the ULJ did not err in determining that relator's conduct was a serious violation of the standards of behavior that respondent-employer had a right to reasonably expect or that the conduct demonstrated a lack of concern for the employment. *See* Minn. Stat. § 268.095, subd. 6. Thus, the ULJ did not err by determining that relator was discharged for employment misconduct and is thus ineligible for unemployment benefits. *See* Minn. Stat. § 268.095, subd. 4(1).

**Affirmed.**

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<sup>2</sup> Relator argues that, based on weekly "collection productivity reports" she offered into evidence, her "average time to first blood draw" was around 45 minutes and in excess of the 25-minute goal set by respondent-employer. Appellant's argument is factually accurate, as the reports show a 37-minute "average time to first blood draw" over the 11-week period reported. However, the delays leading to relator's discharge exceed anything that appears in the collection productivity reports, and the reports do not indicate the year to which they relate.