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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1829**

Timothy E. Vann,
Relator,

vs.

Stericycle, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 13, 2012
Affirmed
Kalitowski, Judge**

Department of Employment and Economic Development
File No. 27914183-3

Timothy E. Vann, St. Paul, Minnesota (pro se relator)

Stericycle, Inc., St. Louis, Missouri (respondent)

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

Considered and decided by Chutich, Presiding Judge; Kalitowski, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Relator Timothy E. Vann challenges the decision of an unemployment-law judge (ULJ) that he was discharged for employment misconduct and is ineligible for unemployment benefits. We affirm.

DECISION

We may reverse a decision of a ULJ if the substantial rights of the applicant may have been prejudiced because the findings, conclusion, or decision are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2010).

Whether an employee engaged in employment misconduct presents a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). We view questions of fact in the light most favorable to the decision and will not disturb the ULJ's findings if they are supported by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether an employee committed a particular act is a question of fact. *Cunningham v. Wal-Mart Assocs.*, 809 N.W.2d 231, 235 (Minn. App. 2011). Whether the facts constitute employment misconduct is a question of law that is reviewed de novo. *Id.*

Here, the ULJ found that respondent discharged relator from his full-time position for absenteeism in April 2011. The ULJ found that relator took vacation days on April 18, 19, and 20, 2011, but was scheduled to work after April 20. The record indicates that relator was incarcerated at the Ramsey County workhouse from April 18, 2011, until June 13, 2011. The ULJ found that relator did not report to work during that

eight-week period. And although relator claims he made attempts to contact his supervisors from the workhouse, the ULJ found that relator failed to notify respondent that he was ineligible for work release or when he would return to work. The ULJ concluded that relator was discharged for employment misconduct and was ineligible for unemployment benefits.

Relator argues that his absences and failure to notify respondent that he would be absent did not amount to employment misconduct. Employment misconduct is “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) (2010).

An employer has the right to create and enforce reasonable attendance policies, and an employee’s refusal to abide by these policies is generally considered employment misconduct. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007); *see Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002) (holding that an employee’s refusal to abide by an employer’s reasonable policies generally constitutes misconduct). An employer may reasonably expect an employee to work when scheduled. *Stagg*, 796 N.W.2d at 316; *see Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984) (“The employer has a right to expect an employee to work when scheduled.”), *superseded by statute on other grounds*, Minn. Stat. § 268.095, subd. 6(e) (Supp. 2007). “Whether an employee’s absenteeism . . . 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*, 796 N.W.2d at 316.

Relator argues that his incarceration was a reason that “would cause any careful employee to fail to notify the employer.” We disagree. “Absence 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.” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006) (citing *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 44-45 (Minn. App. 1984)). Thus, incarceration is not an exception to the general rule that unexcused absences may constitute misconduct. *See id.* at 291 (noting that an employee may commit misconduct if the employee “simply fail[s] to show up at work” because he or she is incarcerated); *see also Grushus v. Minn. Mining & Mfg. Co.*, 257 Minn. 171, 176, 100 N.W.2d 516, 520 (1960) (explaining that an employee’s inability to accept an offered position was caused by his incarceration due to his commission of a crime, thus the failure to accept the position “can be attributed only to the employee’s ‘fault’”).

It is undisputed that relator was scheduled to work between April 21 and June 13, 2011, he did not report to work, and he did not notify respondent that he would be absent. We conclude that incarceration was a circumstance within relator’s control, and therefore the ULJ did not err by concluding that relator’s absences due to incarceration amounted to employment misconduct.

Relator also argues that he “was not aware that [his] actions were a violation of employer standards.” But employment misconduct need not be knowing or intentional.

See Minn. Stat. § 268.095, subd. 6(a) (“Employment misconduct means any intentional, negligent, or indifferent conduct . . .”). Moreover, relator states in his brief that respondent had a policy providing for discharge after three consecutive absences without notification. Therefore, by his own admission, relator was aware that respondent expected employees to report to work when scheduled and call to report absences.

Relator contends that reversal is warranted because respondent violated its three-day absence-without-notification policy by mailing him a discharge letter on April 22, 2011, which was only two days after his approved absences expired. But it is undisputed that relator did not receive the April 22 letter and that relator was unaware that he had been discharged until he was released from the workhouse in June 2011. Therefore, relator’s failure to report to work or call in between April 21 and June 13 was unrelated to the discharge letter. Moreover, even if respondent failed to comply with its own three-day policy, such failure would not preclude a determination of employment misconduct if failure to report to work or call in for two days violated respondent’s standards of behavior. *See Stagg*, 796 N.W.2d at 316 (“[W]hether an employer follows the procedures in its employee manual says nothing about whether the employee has violated the employer’s standards of behavior.”).

Finally, relator asserts that the ULJ’s finding that relator was incarcerated on April 15, 2011, is unsupported by substantial evidence. We agree. The record establishes that relator met with his supervisor on April 15 to discuss the possibility of work release and that relator first reported to the workhouse on April 18. But the ULJ’s determination that relator was discharged for misconduct was based on relator’s absences

after April 20, which relator does not dispute. Therefore, relator's substantial rights were not prejudiced by the unsupported finding as to April 15. We conclude that the ULJ's determination that relator committed employment misconduct and is thus ineligible for unemployment benefits is not erroneous.

Affirmed.