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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-72**

Randee Ward,  
Relator,

vs.

Larry Reids Bloomington Chrysler Jeep,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed March 25, 2008  
Affirmed  
Worke, Judge**

Department of Employment and Economic Development  
File No. 12679 06

Randee Ward, 7100 Garfield Avenue South, Richfield, MN 55423 (pro se relator)

Larry Reids Bloomington Chrysler Jeep, Inc., 8000 Penn Avenue South, Bloomington,  
MN 55431 (respondent employer)

Lee B. Nelson, Katrina I. Gulstad, E200 First National Bank Building, 332 Minnesota  
Street, St. Paul, MN 55101 (for respondent Department of Employment and Economic  
Development)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins,  
Judge.\*

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

## **UNPUBLISHED OPINION**

**WORKE**, Judge

Relator challenges the decision by the unemployment-law judge that she was discharged for misconduct and disqualified from receiving unemployment benefits after she did not report to work and took an unauthorized extended leave from work, arguing that even though there was no formal policy for requesting time off, she attempted to obtain permission but was unable to reach her employer. We affirm.

### **DECISION**

This court may affirm the decision of the unemployment-law judge (ULJ), remand the case for further proceedings, or reverse or modify the decision if

the substantial rights of the petitioner may have been 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) (2006).

The ULJ determined that relator Randee Ward was disqualified from receiving unemployment benefits because she was discharged for misconduct from her employment in car sales at respondent Larry Reids Bloomington Chrysler Jeep. Whether an employee has committed employment misconduct is a mixed question of fact and law.

*Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). “Whether the employee committed a particular act is a question of fact.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). In making factual findings, the ULJ must make credibility determinations, which we accord deference and review the findings in the light most favorable to the decision. *Id.* The ULJ’s findings will not be disturbed when they are substantially supported by the evidence. *Id.* But whether an act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

The ULJ found that relator engaged in employment misconduct because she failed to report to work as scheduled and took an unauthorized leave from work. Employment misconduct is “any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a) (2006). An employer has a right to expect that employees will work when scheduled. *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984). Absenteeism as a result of circumstances within the employee’s control has been recognized as employment misconduct because it demonstrates a substantial lack of concern for the employer’s interests. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290-91 (Minn. 2006). Similarly, an employee’s failure to give proper notice of an absence may demonstrate a lack of concern for employment that constitutes disqualifying misconduct. *Edwards v. Yellow Freight Sys.*, 342 N.W.2d 357, 359 (Minn. App. 1984). The supreme court has

held that it is disqualifying misconduct to take an unauthorized extended leave of absence. *Tuff v. Knitcraft Corp.*, 526 N.W.2d 50, 51 (Minn. 1995).

The record supports the ULJ's findings that relator failed to report to work as scheduled and accepted a job in New Jersey prior to obtaining permission to take an extended leave. Relator testified that she was offered a short-term job in New Jersey. Relator was scheduled to be off work on Tuesday, August 1, 2006, and called Larry Reids to get permission to take an extended leave, but was unable to reach her manager. Relator was scheduled to work on Wednesday, August 2, but she did not report to work; instead, she left voicemails for her manager and the general manager. Relator testified that she lives only ten minutes away from the dealership and that "she could have gone in" to work on Tuesday or Wednesday in order to get permission to take a leave from work, but she was hoping to discuss it over the phone. Relator flew to New Jersey on Thursday, August 3. The general manager left relator a message on Thursday stating that he did not know if her merely calling to say that she would be gone for a couple of weeks was acceptable, but that he would discuss it with her manger. Relator talked to her manager on Saturday, August 5; he informed relator that if she did not come to work for a couple of weeks, he understood that to mean that she no longer worked for Larry Reids. The manager did not hear from or see relator after speaking with her. The ULJ did not err in determining that relator was discharged for misconduct and disqualified from receiving unemployment benefits because she exhibited lack of concern for her job and substantial disregard for the standard of behavior her employer had the right to reasonably expect.

But relator argues that Larry Reids had no formal policy for taking time off and that she was treated differently from other employees. Relator's allegations that she worked in a "hostile work environment," was "berated in front of other salespeople and . . . customers," and was "treated differently" were never raised before the ULJ and relator provided no evidence to support her claims. *See Imprint Techs., Inc. v. Comm'r of Econ. Sec.*, 535 N.W.2d 372, 378 (Minn. App. 1995) (stating that issues not raised below may not be raised for first time on appeal). And if relator was treated differently from other employees, that is not an excuse for her failure to obtain authorization prior to taking a leave from work because a violation of an employer's policies by others, or an employer's selective enforcement of its rules, is not a defense to a charge of employment misconduct. *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986); *see also Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986) (stating that employer's alleged selective enforcement of rules is not a defense to a finding of employee misconduct), *review denied* (Minn. Aug. 20, 1986). The ULJ did not err in determining that relator was discharged for employment misconduct and disqualified from receiving unemployment benefits.

**Affirmed.**