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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A06-2163**

Lisa A. Schmidt,  
Relator,

vs.

Standard Process Equipment,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed April 8, 2008  
Affirmed  
Peterson, Judge**

Department of Employment and Economic Development  
File No. 1058206

Lisa A. Schmidt, P.O. Box 134, Avon, MN 56310 (pro se relator)

Standard Process Equipment Inc., 301 13th Street, Albany, MN 56307-6400 (respondent employer)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101-1351 (for respondent department)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Wright, Judge.

## **UNPUBLISHED OPINION**

**PETERSON, Judge**

This certiorari appeal is from a decision of an unemployment law judge (ULJ) that relator is disqualified from receiving unemployment compensation benefits because she was discharged for employment misconduct. We affirm.

### **FACTS**

In February 2005, relator Lisa A. Schmidt, began working as an administrative assistant at Standard Process Equipment, Inc. (SPE). Schmidt normally worked about 40 hours per week with work hours from 8:00 a.m. to 5:00 p.m. and a one-hour break for lunch. SPE's policy required an employee who was going to be late to notify the employee's supervisor at least 10 minutes<sup>1</sup> before the employee's scheduled start time. SPE's employee manual outlined SPE's discipline policy, which progressed from an oral warning to suspension and possible termination upon the president's discretion.

In June 2005, Schmidt overslept, called in 15 minutes late, and reported to work one hour late. Schmidt received an oral warning. In September 2005, Schmidt again overslept, called in 15 minutes late, and reported to work one hour late. She received a written warning. In April 2006, Schmidt received a second written warning because she was 15 minutes late and did not call in at all.

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<sup>1</sup> SPE's president, Doug Woolridge, testified that employees had to notify their supervisors 15 minutes before their scheduled start time if they were going to be late. But the SPE employee manual submitted to the department indicates ten minutes.

On May 15, 2006, Schmidt received her third written warning after she came to work an hour late. Schmidt was told that if she came in late again, she would be suspended for three days without pay.

On May 18, 2006, Schmidt came to work late and was temporarily suspended<sup>2</sup> without pay. Schmidt was also told that additional tardiness within 90 days would result in termination. Before Schmidt's employment was terminated, she began working extended hours because SPE's work load had increased. She worked about 45 hours per week with work hours from 7:30 a.m. to 5:00 p.m. and a 30-minute lunch break.

On July 5, 2006, SPE's president, Doug Woolridge, found Schmidt sleeping while she was on her break at around 10:00 a.m. Schmidt asked Woolridge if she could take a one-hour lunch break so that she could go home and take a nap. Woolridge agreed, and, to make up the extra time off, Schmidt agreed to work until 5:30. Schmidt took a one-hour lunch break and returned at 1:00 p.m.

At about 4:00 p.m. that same day, Woolridge again discovered Schmidt sleeping. Woolridge told Schmidt that she could go home at 5:00 p.m. because she was not being productive. Woolridge continued talking to Schmidt about her lack of productivity. While Woolridge was still talking to Schmidt about her productivity, Schmidt noticed that it was after 5:00 p.m. Schmidt abruptly informed Woolridge that it was after 5:00 p.m. and walked out even though he was still talking to her about her job performance. Woolridge followed Schmidt to her vehicle and asked her whether she wanted to

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<sup>2</sup> It is not clear from the record how long the suspension lasted.

continue working at SPE. Schmidt did not respond, and Woolridge told her that she was fired.

Schmidt applied to respondent Department of Employment and Economic Development (DEED) for unemployment benefits. DEED initially determined that Schmidt was qualified to receive benefits. SPE appealed DEED's initial determination to a ULJ, and the ULJ held a telephone hearing. Both Schmidt and Woolridge testified to the above facts. The ULJ found that "Schmidt was tardy an excessive amount of time, slept on the job during work hours, and engaged in insubordinate and disrespectful behavior" and specifically found that she was sleeping during the afternoon of the day she was discharged. Based on these findings, the ULJ determined that Schmidt was discharged because of employment misconduct and is disqualified from receiving unemployment benefits. Schmidt moved for reconsideration, challenging the ULJ's finding that she was sleeping on the day she was discharged and alleging that Woolridge had sexually harassed her.

The ULJ affirmed his prior decision. This certiorari appeal followed.

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

This court reviews a ULJ's decision to determine whether the substantial rights of the relator 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).

Generally, an employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2005). Employment misconduct means “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.” *Id.*, subd. 6(a) (2004).

“Whether an employee committed employment misconduct is a mixed question of fact and law.” *Skarhus v. Davanni’s, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether the employee committed a certain act is a question of fact. *Id.* This court reviews the ULJ’s findings of fact in the light most favorable to the decision and defers to the ULJ’s credibility determinations. *Id.* This court will not reverse the ULJ’s findings when substantial evidence supports them. *Id.*; *see also* Minn. Stat. § 268.105, subd. 7(d)(5) (standard of review). “[W]hether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo.” *Skarhus*, 721 N.W.2d at 344.

Schmidt argues that her actions did not constitute misconduct. Schmidt does not dispute that she had attendance problems or that she had received oral and written warnings about her attendance. Schmidt challenges the ULJ’s findings that she was sleeping during the afternoon on July 5, 2006, and that she engaged in insubordinate and disrespectful behavior. The ULJ found Woolridge’s testimony regarding the events that led to Schmidt’s discharge “more persuasive” than Schmidt’s testimony. The ULJ found

that Schmidt was sleeping on the job and that Schmidt's "decision to leave while Woolridge was talking to her was an affront to Woolridge and an obvious attempt to discontinue a conversation she did not want to have but one he was entitled to pursue because of his position as the president of the company." These findings are supported by Woolridge's testimony that Schmidt was sleeping, that Schmidt walked out during their conversation, and that he was frustrated because it appeared that she was not interested in her job. Also, although Schmidt asserted that she was not sleeping during the afternoon, she agreed that she left at shortly after 5:00 p.m. while Woolridge was talking to her. Based on these findings, which are supported by substantial evidence, the ULJ did not err in determining that Schmidt's conduct was a serious violation of the standards of behavior that SPE had the right to reasonably expect from Schmidt and that her conduct clearly displayed a substantial lack of concern for her employment.

Schmidt also challenges the ULJ's determination that she and Woolridge were talking about work on the afternoon when she was discharged. In her request for reconsideration and in her appellate brief, Schmidt asserts that Woolridge sexually harassed her. But because Schmidt did not raise this issue during the hearing before the ULJ, the ULJ properly declined to consider these new allegations when deciding Schmidt's request for reconsideration. *See* Minn. Stat. § 268.105, subd. 2(c) (2006) (stating that "[i]n deciding a request for reconsideration, the [ULJ] shall not, except for purposes of determining whether to order an additional evidentiary hearing, consider any evidence that was not submitted at the evidentiary hearing").

Schmidt also argues that her tardiness was not a basis for determining that she was discharged for employment misconduct because when she was suspended for coming to work late on May 18, 2006, she was told that additional tardiness within 90 days would result in termination, and she was not tardy again within 90 days. But the ULJ's determination that Schmidt was discharged because of employment misconduct was not based only on Schmidt's tardiness. The ULJ found that Schmidt was tardy, slept on the job during work hours, and engaged in insubordinate and disrespectful behavior. Based on these findings, the ULJ determined that Schmidt's conduct was a serious violation of the standards of behavior that SPE had the right to reasonably expect from Schmidt and that her conduct clearly displayed a substantial lack of concern for her employment. Even without a finding that Schmidt was tardy, the ULJ's findings are sufficient to support the determination that Schmidt was discharged because of misconduct and is disqualified from receiving unemployment benefits. *Cf. Auger v. Gillette Co.*, 303 N.W.2d 255, 257-58 (Minn. 1981) (affirming disqualification from receiving unemployment benefits of third-shift employees who slept while they were scheduled to work).

**Affirmed.**