STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0524

David K. Broska,
Relator,

vs.

Premier Investment Services Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 22, 2008
Affirmed
Worke, Judge

Department of Employment and Economic Development
File No. 15675 06

David K. Broska, 4841 Sundance Loop, Unit F, Hermantown, MN 55811 (pro se relator)

Premier Investment Services, Inc., 9101 South I-35 Service Road, Oklahoma City, OK 73160 (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 (for respondent Department)

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

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

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Relator challenges the decision by the unemployment-law judge that he was discharged for misconduct and disqualified from receiving unemployment benefits after repeated issues with tardiness and absences, arguing that his hours were flexible, he was never warned that an absence could lead to termination, and he was actually terminated because he did not get along with his immediate supervisor. We affirm.

D E C I S I O N

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:
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> (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 David K. Broska was disqualified from receiving unemployment benefits because he was discharged for misconduct from his employment with respondent Premier Investment Services Inc., and affirmed the decision on reconsideration. 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 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.* 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, despite warnings, he continued to be tardy and absent 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 and has a right to "establish and enforce reasonable work rules relating to absenteeism." *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985); *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. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006); *cf.* Minn. Stat. § 268.095, subd. 6(a) ("[A]bsence because of illness or injury with proper notice to the employer [is] not employment misconduct."). A knowing violation of absenteeism-related rules constitutes employment misconduct because it demonstrates a substantial lack of concern

for the employer's interests. *Schmidgall*, 644 N.W.2d at 806; *McLean v. Plastics, Inc.*, 378 N.W.2d 104, 107 (Minn. App. 1985) (holding that excessive absences constituted misconduct when employee was tardy 13 times in one year and had received two warnings); *Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App. 1984) (holding that repeated tardiness, particularly when combined with warnings, is employment misconduct).

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); *see also Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986) ("[A]n employee engages in misconduct if he is absent even once without notifying his employer."); *Flahave v. Lang Meat Packing*, 343 N.W.2d 683, 687 (Minn. App. 1984) (holding that repeated failure to report to work without proper notice, combined with written warnings, demonstrated substantial disregard of employer's interest). This principle is particularly applicable when the employee has been previously warned. *McLean*, 378 N.W.2d at 107. But an employer is not required to give a warning before discharging an employee for employment misconduct. *See Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981) (stating that a warning was not essential to demonstrate that employees acted in willful disregard of employer's interest).

The record supports the ULJ's findings that relator had continued issues with tardiness and absences, which were a result of circumstances within his control. Relator was scheduled to begin work at 7:00 a.m. Relator was late for work on August 22,

September 7, September 26, and October 5, 2006. On September 28, relator was more than two hours late; he called in and stated that he forgot about a dentist appointment. Relator failed to report to work on August 16, August 26, September 1, and September 2, 2006. On September 29, relator failed to report to work; he called in at 8:30 a.m. and told a dispatcher that he forgot that he had to move that day. On October 13, relator did not report to work; he called in at 8:40 a.m. and after learning that his job duties had been taken care of, he decided not to report to work. On October 17, relator did not report to work; he called a dispatcher, but did not speak with his immediate supervisor, which was contrary to call-in procedure. The ULJ did not err in determining that relator was discharged for misconduct and disqualified from receiving unemployment benefits because he exhibited lack of concern for his job and substantial disregard for the standard of behavior his employer had a right to reasonably expect.

While relator argues that his hours were flexible, the record shows that relator knowingly violated Premier's absenteeism-related rules and failed to give proper notice of a tardiness or absence. Relator testified that his start time was "7:00 sharp," but he still reported to work after this time. Relator also testified that he was absent in October because the work atmosphere was stressful. Additionally, relator testified that despite being instructed by his supervisors to call his immediate supervisor when he was going to be late or absent, he did not do so. Relator did call in at one point, but after he waited on "hold" to speak to his supervisor, he decided to hang up. Relator conceded that he should have waited to speak with his supervisor.

Relator contends that if he had known that he could have been terminated because of his tardiness and absences he would not have continued to call in and not report for work. But while an employer is not required to give a warning before discharging an employee for employment misconduct, the record shows that relator was orally warned on at least two occasions. Finally, relator argues that he was really terminated because he did not get along with his immediate supervisor. Although the ULJ found that relator's relationship with his immediate supervisor was tense, the ULJ based his decision on relator's tardiness and absences. And the record, including relator's testimony, supports the finding that relator was often tardy, often absent, and did not follow the employer's call-in procedure to report an absence. The ULJ did not err in determining that relator was discharged for employment misconduct and disqualified from receiving unemployment benefits.

Affirmed.