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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1045**

Jesse C. Wolfe,
Relator,

vs.

Parks of Minnesota LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 10, 2008
Affirmed
Peterson, Judge**

Department of Employment and Economic Development
File No. 3574-07

Jesse C. Wolfe, Six Downtown Plaza, Fairmont, MN 56031 (pro se relator)

Parks of Minnesota LLC, 1435 130th Avenue, Welcome, MN 56181 (respondent)

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 of Employment and Economic Development)

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

UNPUBLISHED OPINION

PETERSON, Judge

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

FACTS

Relator Jesse C. Wolfe was employed by respondent Parks of Minnesota as a full-time barn laborer from March 10, 2003, to February 6, 2007. Wolfe was scheduled to work from 4:00 p.m. until he finished his duties, which sometimes took most of the night. Wolfe frequently did not arrive at his scheduled start time and was sometimes as much as five hours late. The Parks of Minnesota employee handbook states that an employee who cannot be on time must telephone his supervisor at least 30 minutes before the scheduled starting time, and if an employee fails to do so, the employee's absence is considered unexcused. Having more than two unexcused absences in a year is considered excessive and will result in disciplinary action up to and including discharge.

In early November 2006, Rick Smith took over as the night manager for Parks of Minnesota. Wolfe testified that when Smith previously served as the assistant manager, he made disparaging comments about Wolfe to other workers. Wolfe took exception to the comments, and after complaining to the manager, J.P. Curtis, he received permission to arrive at work after Smith had left for the night, which was about 6:00 p.m. Smith testified that when he took over as night manager, Curtis did not tell him about this arrangement.

Smith issued Wolfe two written warnings for arriving late to work. The first warning stated that on November 27, 2006, Wolfe arrived at 5:42 p.m., instead of 4:00 p.m., and the second warning stated that on December 4, 2006, Wolfe arrived at 6:30 p.m., instead of 4:00 p.m. Wolfe was presented with and signed both of the warnings on December 5, 2006, and Smith told Wolfe that he must arrive for work by 4:00 p.m. A timecard report presented by Parks of Minnesota's human-resources representative showed that during the last week of December 2006 and the first two weeks of January 2007, Wolfe arrived late for work at least ten times.¹ Wolfe admitted during his testimony that he arrived late on several occasions after being told that he had to arrive at work by 4:00 p.m.

Sometime in December 2006 or January 2007, Smith told Wolfe that because it was supposed to snow the next day, either Wolfe or a fellow worker needed to move a pile of woodchips into a shed using a small bulldozer, or "Bobcat." The chips were not moved before the snow fell, and, to move them, Wolfe had to use the Bobcat in icy conditions. While attempting to pick up the woodchips, Wolfe lost control of the Bobcat, and it flipped onto its side. Both Smith and Wolfe agreed that this was an accident, but Smith believed that the accident would not have occurred if the woodchips had been moved the day before as requested.

While mopping a floor on February 6, 2007, Wolfe was using a water bucket on wheels. As the mopping progressed, he kicked the bucket forward. At one point, he

¹ The timecard report listed the following start times: 6:32 p.m., 4:47 p.m., 4:05 p.m., 4:47 p.m., 5:05 p.m., 4:06 p.m., 3:57 p.m., 5:00 p.m., 4:42 p.m., 4:55 p.m., and 4:03 p.m.

kicked the bucket too hard, and it crashed into a wall and left a seven-inch hole. Wolfe cleaned up the water that had spilled on the floor and left for the day, believing that he could fix the hole later.

The next day, Smith terminated Wolfe's employment, citing his excessive tardiness, his tipping the Bobcat, and the damage to the wall. Wolfe filed a claim for unemployment benefits with respondent Department of Employment and Economic Development, and a department adjudicator determined that Wolfe was disqualified from receiving unemployment benefits. Wolfe appealed to an unemployment law judge (ULJ), and following an evidentiary hearing, the ULJ found that (1) the incident involving the Bobcat was an accident; (2) the incident involving the water bucket was "careless"; (3) Wolfe was given two warnings for being excessively late; (4) he continued to be late nearly every day after these warnings were issued; and (5) his excessive tardiness constituted employment misconduct. Wolfe requested reconsideration, and the ULJ affirmed her decision. This certiorari appeal followed.

DECISION

This court may affirm the decision of the ULJ; remand for further proceedings; or reverse or modify the decision if the relator's substantial rights may have been prejudiced because the findings, inferences, conclusion or decision were: "(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).

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006).

“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.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Minn. Stat. § 268.095, subd. 6(a) (2006).

Whether an employee 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). Factual findings of the ULJ are reviewed in the light most favorable to the decision, and deference is given to the ULJ's credibility determinations. *Id.* Accordingly, we will not disturb factual findings of the ULJ that are supported by substantial evidence. *Id.* Whether an employee's actions constitute employment misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

The ULJ concluded that despite receiving two written warnings, “Wolfe continued to be late nearly every day” and that this “conduct amounted to employment misconduct.” Substantial evidence in the record supports this finding. After the new manager told Wolfe in December 2006 that he needed to arrive by 4:00 p.m., Wolfe arrived late more than ten times.

Employers have the right to expect their employees to work when scheduled. *See Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985) (chronic and excessive absenteeism); *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 814-15 (Minn. App. 1984) (failure to report to work after being denied leave). Continued tardiness, combined with multiple warnings, demonstrates disregard of the employer’s interests and violates the standards of behavior that an employer has a right to expect of its employees. *Evenson v. Omnetic’s*, 344 N.W.2d 881, 883 (Minn. App. 1984); *see also McLean v. Plastics Inc.*, 378 N.W.2d 104, 107 (Minn. App. 1985) (finding employment misconduct where employee was tardy 13 times in one year and received two warnings).

Wolfe argues that he was the only employee out of many who had been written up for being late; that Smith used the employer policies as a way to “get rid of him”; and that the only reason he showed up late was to avoid working with Smith, whom he felt was biased toward him. But violations of an employer’s policies by other employees and selective enforcement of work rules is not a defense against a finding of employment misconduct. *See Sivertson v. Sims Sec. Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986) (stating that claims of selective enforcement are not relevant to whether relator’s violation of employer policies constituted employment misconduct), *review denied* (Minn.

Aug. 20, 1986); *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986) (stating that violation of employer's rules by other employees is not a valid defense to a claim of employment misconduct).

Wolfe argues that the written warnings he received were issued as a form of retribution the day after he was involved in a dispute with Smith. But Smith testified that although the two written warnings were given to Wolfe on the same day, they were created on different days. Also, Wolfe admitted during his testimony that he was late on the dates for which he received warnings.

Finally, Wolfe argues that the incident involving the water bucket was an accident. The ULJ determined that Wolfe acted carelessly when he kicked the water bucket but did not rely on this incident when determining that Wolfe was terminated for employment misconduct.

Because the ULJ's findings that Wolfe received two warnings about his tardiness and continued to be late nearly every day after receiving the warnings are supported by substantial evidence, and excessive tardiness constitutes employment misconduct, the ULJ did not err in concluding that Wolfe is disqualified from receiving unemployment benefits because he was discharged for employment misconduct.

Affirmed.