**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-1077**

Jeffrey William Foshay,
Relator,

vs.

Quality Mfg.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 24, 2008**
**Affirmed**
**Halbrooks, Judge**

Department of Employment and Economic Development
File No. 02425 07

Jeffrey W. Foshay, 1973 4th Street, White Bear Lake, MN 55110 (pro se relator)

John C. Hauge, Casey E. Jarchow, Briggs and Morgan, P.A., 2200 IDS Center, 80 South 8th Street, Minneapolis, MN 55402 (for respondent employer)

Lee B. Nelson, Katrina I. Gulstad, Minnesota 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 Willis, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

**HALBROOKS,** Judge

Pro se relator Jeffrey Foshay challenges an unemployment-law judge's (ULJ) determination that he is disqualified from receiving unemployment benefits because he was discharged for employment misconduct. Relator argues that there is insufficient evidence in the record to support the determination that his tardiness was employment misconduct and that because the ULJ concluded that relator was not insubordinate, his termination did not disqualify him for unemployment benefits. Because the record supports the ULJ's conclusions, we affirm.

## FACTS

Relator was employed by respondent Quality Manufacturing (Quality) as a sheet-metal worker from July 25, 1995 to January 12, 2007. At the time of his termination, relator was a full-time employee, earning $18.09 per hour.

Between January 3, 2006, and his termination on January 12, 2007, relator arrived at work more than ten minutes late a total of 117 times. On some of these occasions, relator arrived as much as three hours late and, according to testimony from Quality's president, did not call in advance to advise the company. On December 19, 2006, Quality's president told relator that his tardiness would not be tolerated and that he had to be on time. In the subsequent 14 days, relator arrived more than ten minutes late on 11 occasions, including five days when he was more than one hour late.

On January 12, 2007, relator was told that he would not receive holiday pay for the Christmas holiday because he did not work the days before and after the holiday, as

required by the terms of his collective-bargaining agreement. Relator became upset and yelled at other employees. Later that day, relator was asked to do some work close to the end of his shift. Relator testified that he told his supervisor that he "didn't feel like doing it" because he thought he was following instructions from a union meeting. Relator stated that employees were instructed at a union meeting to not accept jobs directly from the office because it would disrupt the scheduled priority of other work. In response, relator's supervisor told him that his actions were insubordinate. But relator testified that because he was asked if he "felt like" doing the job, he felt free to respond that he did not "feel like doing it." Relator stated that if he had been "told to do it" by the supervisor, he would have. Following his refusal to do this work, relator was discharged by Quality's president.

Relator established a benefit account with respondent Minnesota Department of Employment and Economic Development (DEED). DEED initially concluded that relator was disqualified from receiving benefits because he was discharged for insubordination. Relator challenged that determination and requested a hearing before a ULJ. Following the hearing, the ULJ concluded that relator's actions on January 12, 2007, constituted "simple unsatisfactory conduct," but not misconduct or insubordination. Nevertheless, the ULJ determined that relator was disqualified from receiving unemployment benefits because his discharge resulted from unemployment misconduct due to his excessive tardiness. Relator requested reconsideration, and a ULJ affirmed the conclusion that relator was discharged for employment misconduct resulting from his excessive tardiness. This certiorari appeal follows.

## D E C I S I O N

Appellant challenges the determination that he was discharged for employment misconduct, arguing that the record does not show that tardiness was a problem during his employment with Quality.

This court may overturn or modify a ULJ's 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).

Employment-misconduct cases present mixed questions 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). Whether the employee's act constitutes disqualifying misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804; *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. App. 2007).

Findings of fact are viewed in the light most favorable to the ULJ's decision and are upheld if supported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(5); *Skarhus*, 721 N.W.2d at 344. Substantial evidence means: (1) such relevant evidence as a

reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety. *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984).

An applicant is disqualified from receiving unemployment benefits if he was discharged from employment for misconduct. Minn. Stat. § 268.095, subd. 4 (2006). "Employment misconduct" means

> 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.

*Id.*, subd. 6(a) (2006). "[C]ontinued tardiness, combined with several warnings, evidences disregard by the employee of the employer's interest. It is a violation of standards of behavior which the employer [has] a right to expect of its employees." *Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App. 1984).

Here, the ULJ determined that relator had a long-standing, poor attendance record at Quality. Although relator argues that the record contains only one documented example of tardiness, Quality provided a document detailing his arrival times at work for

the entire 2006 calendar year and January 2007. This document showed that relator was late 117 times. In addition, relator's own testimony was that he "always had a problem getting up in the morning," which caused his poor attendance record. The ULJ found the document provided by Quality to be credible.

In determining the propriety of discharge from employment and qualification for unemployment-compensation benefits, relator's behavior is considered as a whole. *Drellack v. Inter-County Cmty. Council, Inc.*, 366 N.W.2d 671, 674 (Minn. App. 1985). The ULJ determined that relator's tardiness was a serious violation of the standards of behavior that Quality should have been able to reasonably expect of its employees. And following the warning on December 19, 2006, relator's tardiness continued. He arrived two hours late the following day and was late on 13 of the next 14 days. Relator also argues that the one warning he was given is not sufficient to establish that tardiness was a substantial problem. But whether or not an employee receives a warning is not determinative of the conclusion that the employee has engaged in employment misconduct. *See Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981) (stating that a warning is not essential to demonstrate that an employee acted in willful disregard of the employer's interest).

Relator further argues that because Quality originally stated that he was discharged for insubordination and the ULJ concluded that he was not insubordinate, he is not disqualified for unemployment benefits. But the basis for relator's discharge was not solely an assertion of insubordination, and relator's tardiness is well supported in the record. Relator offers additional evidence to this court to demonstrate that Quality was

inconsistent in its enforcement of disciplinary policies. But because this evidence was not provided to the ULJ, it is not considered on appeal. *See* Minn. R. Civ. App. P. 110.01; *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd*, 504 N.W.2d 758 (Minn. 1993).

**Affirmed.**