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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-1319**

Maurice McCollum,  
Relator,

vs.

Room and Board, Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed July 21, 2009  
Reversed  
Minge, Judge**

Department of Employment and Economic Development  
File No. 20756108-3

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Considered and decided by Minge, 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## **UNPUBLISHED OPINION**

**MINGE**, Judge

Relator challenges an unemployment law judge's (ULJ) finding that he was ineligible for unemployment compensation on the ground that he was discharged for employment misconduct. Relator argues that the basis for his dismissal did not constitute misconduct under Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007), and that the ULJ failed to give him proper notice of the hearing process. We reverse.

### **FACTS**

Relator was employed by Room and Board, Inc., from October 2000 through March 25, 2008. On October 30, 2007, relator was given a verbal warning for inefficient work and was told that, if he continued to take smoke breaks, he could not take the full one-hour lunch break. On March 17, 2008, relator was again told by a supervisor that he was taking longer breaks than allowed and that his supervisor felt that relator was only doing the minimum required. On March 21, 2008, relator approached Room and Board team leader Cassandra Davis about his time card. According to Davis, relator asked her if she could "watch his punches" and "round it back" to 3:00 p.m., if she noticed that relator punched out after 3:00 p.m. Apparently, relator wanted to offset any excessive breaks and avoid overtime. Davis told relator that she could not "round back" his time card, and that the law required that he be paid for overtime shown. According to Davis, she did not think that relator knew that what he was asking her to do was illegal.

On March 25, 2008, Room and Board informed relator that he was "no longer a fit" at Room and Board and that March 25, 2008 would be his last day of employment.

Relator applied for unemployment benefits. Room and Board informed the Minnesota Department of Employment and Economic Development (DEED) that relator was discharged for misconduct and that the misconduct that caused relator's discharge was his request to alter the time card. Room and Board further informed DEED that relator did not know that he could be discharged for this conduct and indicated that relator was not "negligent in the performance of [his] duties, as opposed to unable to meet expectations." DEED denied benefits because it was determined that relator was discharged for misconduct, specifically "asking a fellow employee to alter his timecard." Relator appealed the denial of unemployment benefits.

The ULJ conducted a telephone hearing. At the opening of the hearing, the ULJ stated that the employer had decided not to contest the appeal. When relator expressed confusion as to why the ULJ still needed to take testimony if Room and Board had not contested benefits, the ULJ stated that she still needed to "make a record." At the hearing, Room and Board stated that relator was discharged because he asked his team leader to "watch his punches" and that, after he asked her to "watch his punches," he punched out exactly at 3:00 p.m. In explaining the importance of punching out at 3:00 p.m., Room and Board stated that relator had previously been told to make sure he was not taking excessive breaks because it was not fair for him to get extra break time and get paid overtime. Room and Board stated that, although it did not condone relator's behavior, it did not wish to challenge the appeal. After Room and Board had been questioned by the ULJ about relator's discharge, the ULJ informed the parties that, even

if the employer does not contest the appeal, DEED makes an independent determination whether the former employee qualifies for benefits.

The ULJ found that relator had been discharged for misconduct and denied benefits. Relator filed a request for reconsideration, and the ULJ affirmed the initial decision denying benefits. This certiorari appeal follows.

## **DECISION**

When reviewing a ULJ's decision, this court may "reverse or modify the decision" if relator's substantial rights may have been prejudiced by a finding, inference, conclusion, or decision that is made on unlawful procedure, is affected by an error of law, is unsupported by substantial evidence in light of the entire record, or is arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2007).

### **I.**

The first issue is whether the ULJ erred in determining that relator was discharged for misconduct and therefore ineligible for unemployment compensation. "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). Determining if the employee engaged in the particular act is a fact question. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. App. 2007). This court views factual findings in the light most favorable to the ULJ's decision and defers to the ULJ's credibility determinations. *Davanni's Inc.*, 721 N.W.2d at 344. Whether the facts as found constitute misconduct is a question of law to be reviewed de novo. *Id.*

In determining whether relator qualifies for unemployment benefits, the issue is not whether an employer was justified in discharging relator, but rather whether relator committed “misconduct,” which would disqualify relator from receiving benefits. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721, 724 (Minn. App. 1991). The relator must have been discharged because of the statutorily defined misconduct to be denied unemployment compensation. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). The statute defines employee misconduct as

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) (Supp. 2007). By law, misconduct does not include “[i]nefficiency, inadvertence, simple unsatisfactory conduct, . . . conduct an average reasonable employee would have engaged in under the circumstances, [or] poor performance because of inability or incapacity.” *Id.*

The reason cited by Room and Board for relator’s discharge was relator’s request that team leader Davis “watch his punches” and that, if Davis noticed punches past 3:00 p.m., round the punches back to 3:00 p.m. A knowing violation of an employer’s timecard policy has been found to constitute misconduct. *McKee v. Cub Foods, Inc.*, 380 N.W.2d 233, 236 (Minn. App. 1986). However, unlike the employee in *McKee*, relator did not actually falsify his time card, but only asked his team leader if she could round his punches back. Room and Board stated that relator did not understand that he could be discharged for making such a request or that what he was inquiring about was illegal.

Because relator only asked his team leader if she could round his time card back, and because the employer reported that relator did not know that his request was conduct for which he could be discharged, his conduct was not “dishonest” on its face, and did not display “a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee” or a “lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a). Relator’s request whether a supervisor could round back the hours on his timecard does not meet the statutory definition of misconduct rendering relator ineligible for unemployment benefits.

On appeal, DEED argues there are two additional types of misconduct supporting a determination of ineligibility for benefits. Specifically, DEED argues that relator (1) failed to work diligently during his shift; and (2) took excessive smoke breaks. However, these were not the reasons cited by Room and Board in terminating relator. Under section 268.095, subdivision 4, relator must have been discharged *because of* the misconduct, not inefficiency, inability, or simple unsatisfactory conduct to be denied unemployment compensation. Simple poor work performance is generally not considered misconduct. *Minn. Boxed Meats, Inc. v. Zadworny*, 404 N.W.2d 7, 9 (Minn. App. 1987). Regardless, Room and Board indicated that relator was discharged because of his request to have his time cards rounded back and because he was not a “good fit.”

Because relator’s mere request whether his supervisor could watch his punches did not constitute misconduct under the statutory definition, and because relator was not terminated because of statutory misconduct, we reverse.

## **II.**

The second issue is whether relator should be granted a new hearing because of the alleged failure of the ULJ to timely and adequately inform him of the importance of the hearing process when an employer does not contest benefits. Because we reverse the decision of the ULJ, we do not reach this issue.

**Reversed.**

Dated: