STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1429

Chad F. Smith,
Relator,

vs.

McLane Minnesota Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 18, 2009
Affirmed
Johnson, Judge

Department of Employment and Economic Development
File No. 20649332-3

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Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Johnson, Judge.

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

JOHNSON, Judge

Chad F. Smith was employed by McLane Minnesota Inc., a grocery distributor. McLane terminated Smith for excessive tardiness. An unemployment law judge determined that Smith is ineligible for unemployment benefits because he engaged in employment misconduct. We affirm.

FACTS

Smith worked for McLane from January 2006 to January 2008, on the loading dock of McLane's warehouse, where he received and processed goods that had been returned by customers.

When he was hired, Smith received a copy of the McLane attendance policy, which includes a progressive discipline system for "off-schedule" violations, a term that is defined to mean an incident of tardiness that is more than three minutes but less than two hours. For an employee's first six off-schedule violations, the company does not take any corrective action against the employee. If an employee commits a seventh, eighth, or ninth off-schedule violation, the company gives the employee an oral warning, a written warning, or a final warning, respectively. If an employee commits a tenth off-schedule violation, the policy calls for the employee's termination.

The policy also allows an employee, in certain situations, to receive "no corrective action" credits, which reduce the number of off-schedule violations on the employee's attendance record. An employee may receive one credit by working four consecutive

months without a new violation. An employee automatically receives six credits at the conclusion of each calendar year, unless the employee is at the final-warning stage.

In 2007, Smith was cited for nine off-schedule violations. Because he was in final-warning status at the conclusion of the year, he was ineligible for the annual allocation of six credits. In January 2008, Smith was cited for his tenth off-schedule violation when he was approximately seven minutes late returning to work after a lunch break. Pursuant to its policy, McLane terminated Smith's employment the following day.

After Smith applied for unemployment benefits, the Department of Employment and Economic Development (DEED) initially determined that he was eligible. McLane appealed that determination. After a telephonic hearing, an unemployment law judge (ULJ) determined that Smith was ineligible for benefits because his violations of the attendance policy constituted employment misconduct. After Smith requested reconsideration, the ULJ affirmed the determination of ineligibility. Smith appeals by way of a writ of certiorari.

D E C I S I O N

This court reviews a ULJ's decision denying benefits to determine whether the findings, inferences, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2007).

I. Determination of Ineligibility

Smith argues that the ULJ erred in her determination of ineligibility because his violations of McLane's attendance policy were *de minimis* violations that do not

constitute employment misconduct. A ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination whether an employee's act constitutes employment misconduct is a question of law, which is subject to a *de novo* standard of review. *Id.*

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). "Employment misconduct" is defined as "intentional, negligent, or indifferent conduct" that clearly displays either "a serious violation of the standards of behavior the employer has the right to reasonably expect" or "a substantial lack of concern for the employment." *Id.*, subd. 6(a) (Supp. 2007). "An employer has the right to establish and enforce reasonable rules governing absences from work." *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). Generally, refusing to follow an employer's reasonable policies and requests is misconduct because it shows a substantial lack of concern for the employer's interest. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

In this case, the ULJ concluded that Smith's conduct was a "serious violation of the standards of behavior that McLane Minnesota reasonably had the right to expect of him" and "clearly showed a substantial lack of concern for the employment." Both the agency record and the caselaw support the ULJ's determination. Smith described the incident in his own testimony as follows: "I got done eating and I was daydreaming or whatever, and the next thing I know, I'm late." The facts of this case are similar to those

of *Evenson v. Omnetic's*, 344 N.W.2d 881 (Minn. App. 1984), in which the employee was terminated because she was late for work three times and took long lunches four times, despite receiving oral and written warnings. *Id.* at 882. In affirming the denial of unemployment benefits, this court stated, "Relator's continued 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 had a right to expect of its employees." *Id.* at 883.

Smith makes three specific arguments why his conduct should not be deemed misconduct. First, he contends that the McLane attendance policy is unreasonable because it is unduly complicated. But Smith testified that he "knew it was a strict policy" and that he knew that he could not "miss too many days." Also, Smith signed both of the written warnings issued by McLane, thus indicating that he understood that he could be terminated for his tenth violation. The situation Smith faced was easier to understand than the situation in *Evenson*, in which the policy provided only that "excessive or unwarranted" tardiness "*could* result in a verbal warning, a written warning, suspension without pay, or discharge." 344 N.W.2d at 881 (emphasis added). In contrast, the McLane policy gave Smith advance notice of the number of off-schedule violations that would result in termination, and the final warning informed him that he would be terminated upon his next instance of being tardy.

Second, Smith contends that his tardiness was "not excessive." He notes that, in his last six months of employment, he was late only four times, for a total of 29 minutes. He also notes that one of his tardies was due to a bridge closure. In addition, he notes

that he almost qualified for the annual allocation of six credits. Smith compares himself favorably to employees in other unemployment cases whose conduct was worse than his own, such as an employee in one unpublished case who was tardy 117 times. These arguments simply do not overcome the ULJ's finding that Smith's conduct was a "serious violation of the standards of behavior that McLane Minnesota reasonably had the right to expect of him" and "clearly showed a substantial lack of concern for the employment." *See* Minn. Stat. § 268.095, subd. 6(a). "An employer has the right to establish and enforce reasonable rules governing absences from work," *Wichmann*, 729 N.W.2d at 28, and McLane's attendance policy is not unreasonable.

Third, Smith contends that he "took action to improve his arrival time." He notes that he made an effort to leave home earlier but then was cited for taking breaks that were too long. Again, this argument simply does not overcome the ULJ's finding that he violated his employer's reasonable standards and lacked concern for his employment.

Thus, the ULJ did not clearly err by finding that Smith's violations of McLane's attendance policy "evidences disregard by [Smith] of [McLane]'s interest" and constitutes a "violation of standards of behavior which [McLane] had a right to expect of [Smith]." *Evenson*, 344 N.W.2d at 883; *see also McLean v. Plastics, Inc.*, 378 N.W.2d 104, 106-07 (Minn. App. 1985) (holding that 13 occasions of tardiness in 12-month period, despite two warnings, was employment misconduct).

II. Appeal Hearing

Smith also argues that the ULJ failed to develop relevant evidence regarding the McLane attendance policy or the circumstances surrounding Smith's violations. This

argument arises from a ULJ's obligation to conduct an evidentiary hearing as an "evidence gathering inquiry" rather than "an adversarial proceeding" and to "ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (Supp. 2007); *see also Wichmann*, 729 N.W.2d at 27.

Smith makes two specific arguments concerning the ULJ's alleged failure to develop the factual record. First, he contends that the ULJ did not elicit more information regarding the length of his first six off-schedule violations and whether they occurred at the start of his shift or after a break. But Smith does not dispute that these violations occurred, and he does not explain how this additional information might be relevant to the finding of misconduct. As discussed above, McLane had a right to expect compliance with its attendance policy under *Evenson* and *McLean*, and the mitigating factors Smith has identified do not overcome the ULJ's findings.

Second, Smith contends that the ULJ did not inquire into the reasons for his off-schedule violations and whether the violations were "excusable." Assuming for the moment that this evidence would have been relevant, the transcript of the hearing indicates that the ULJ did inquire into the reasons for Smith's attendance violations but that Smith did not provide any information in response:

> ULJ: Would it do any good to go through each incident and ask you why you were late? Would you remember each specific time?
>
> SMITH: No.
>
> ULJ: Okay. So that probably wouldn't do any good?
>
> SMITH: No.

> ULJ: Okay. Were there general reasons why, well, first of all, do you know how many of the tardies were due to late arrivals and how many were due to long lunches?
>
> SMITH: Not exactly, but I have, and I don't even have all my Time Off Request Approval Slips. . . . I sent you all the ones I had, but I'm missing a couple.

Following this exchange, the ULJ asked Smith about the length of his commute, the typical traffic and road conditions during his commute, the amount of time that Smith allowed for his commute, and the specific circumstances of his last violation in January 2008. The existence of this inquiry effectively rebuts Smith's contention.

Thus, the ULJ did not err by failing to ensure that "all relevant facts [were] clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b); *see also Wichmann*, 729 N.W.2d at 27.

Affirmed.