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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-1649**

Michelle Rossos,  
Relator,

vs.

Healthpartners, Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed September 1, 2009  
Affirmed  
Schellhas, Judge**

Department of Employment and Economic Development  
Agency File No. 20896357-3

Michelle Rossos, 17466 George Moran Drive, Eden Prairie, MN 55347 (pro se relator)

Healthpartners, Inc., 8170 33rd Avenue South, Bloomington, MN 55425 (employer respondent)

Lee B. Nelson, Department of Employment and Economic Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101 (for respondent Department of Employment and Economic Development)

Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Muehlberg, 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## **UNPUBLISHED OPINION**

**SCHELLHAS, Judge**

Relator brings a certiorari appeal from an unemployment-law judge's (ULJ) decision concluding that relator was ineligible for unemployment benefits because she was discharged for employment misconduct in the form of tardiness. We affirm.

### **FACTS**

Relator Michelle Rossos challenges the ULJ's decision that she committed employment misconduct and was therefore ineligible for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development (DEED) filed a respondent's brief. Respondent-employer Healthpartners, Inc. did not submit a respondent's brief.

At the time of her termination, relator was employed as a senior administrative secretary. Her start time was 9:00 a.m. Relator was discharged by her supervisor, Frank Muller. DEED determined that relator was eligible for unemployment benefits, and respondent-employer appealed to a ULJ, who held a telephone hearing.

According to Muller, relator was late arriving at work an average of two times per week in 2006. Relator's 2006 performance evaluation notes that relator "continues to be late in her starting schedule which has an impact on others in the area. This has been discussed in the past and continues to be a challenge for her." "Starting work on time" is listed as a previous employment goal and the result of that goal is listed as "unsuccessful, not met." The 2006 evaluation includes a goal of "[s]tarting work on time no later than

9:00 A.M.” Pursuant to her 2006 performance evaluation, relator agreed that her start time was 9:00 a.m.

According to Muller, although he mentioned tardiness to relator several times, relator’s tardiness did not improve in 2007. Relator’s 2007 performance evaluation notes that relator still needed improvement in being ready to work at her starting time. The 2007 evaluation states that the start-time issue had “reached the point of being unacceptable and needs to be addressed immediately.” A March 2008 performance improvement plan states that Muller expected relator to start no later than 9:00 a.m. and that failure to meet expectations would be “cause for disciplinary action, up to and including termination.”

On Friday, May 2, 2008, relator left work early, went out of town because of a family issue, and did not return to work until Thursday, May 8, 2008. Relator called respondent-employer to request the days as paid time-off days, but did not speak with Muller. On May 8, 2008, relator arrived at work 20 minutes late. Muller terminated relator’s employment based on relator’s conduct between May 5 and May 8 and “everything leading up to it.”

Relator testified that she would sometimes arrive at 9:00 a.m. but would do work-related duties in other parts of the building before going to her desk. Relator disputed that she was late two times per week on average but could not recall how often she was late. Relator testified that when she arrived at the office after 10:00 a.m., it was “due to traffic or an appointment” and it “wasn’t intentional.” She also testified that, every time she was late, she notified someone. Relator could not recall coming in to work late on

May 8, 2008, but she did recall stopping more than once on the way to her desk. Relator noted that she had a medical condition and a doctor's note related to start time. The ULJ asked her how her medical condition affected her ability to start by 9:00 a.m., and she responded, "I can't answer that."

The ULJ determined relator was discharged because of employment misconduct and was ineligible for unemployment benefits. The ULJ found that relator was late approximately two times per week and was aware that her tardiness was an issue. The ULJ concluded that relator's tardiness after warnings displayed a violation of the standards of behavior the employer had a right to expect of the employee and could properly be characterized as misconduct.

Relator sought reconsideration, stating that she was late due to "unavoidable delays (traffic, accident, construction, etc.) that were beyond [her] control" and doctors' appointments, and that the determination that her discharge was due to employment misconduct was not supported by sufficient evidence. Relator attempted to submit several additional documents.

The ULJ affirmed its decision, determining that the additional information relator submitted could not be considered and that the prior decision was factually and legally correct. This certiorari appeal follows.<sup>1</sup>

## **DECISION**

When reviewing the decision of a ULJ, this court may affirm, remand for further proceedings, or reverse or modify the decision if the substantial rights of the petitioner

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<sup>1</sup> In a separate order, this court denied relator's motion to accept new evidence.

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) (2008).

An employee who is discharged from employment is ineligible to receive unemployment benefits if the employee was discharged because of employment misconduct. Minn. Stat. § 268.095, subd. 4(1) (2008). “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) (2008). The statute provides that employment misconduct does not include a single incident that does not have a significant adverse impact on the employer, conduct the average reasonable employee would engage in under the circumstances, poor performance due to inability or incapacity, good-faith errors in judgment, or absence because of illness or injury with proper notice to the employer. *Id.*

“Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits 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). This court views the ULJ’s factual findings in the light most

favorable to the decision and will not disturb the findings when the evidence substantially sustains them. *Id.* “Whether a particular act constitutes disqualifying misconduct is a question of law, which [appellate courts] review de novo.” *Schmidgall*, 644 N.W.2d at 804.

Relator argues that there was insufficient evidence to support the ULJ’s determination that her tardiness constituted misconduct. She argues that she was discharged through no fault of her own and that her tardiness was caused by either traffic conditions over which she had no control or doctors’ appointments. We conclude that the ULJ’s findings are supported by the record and the ULJ’s conclusion was correct. The ULJ’s findings that relator was tardy on numerous occasions are supported by Muller’s testimony, relator’s 2006 and 2007 performance evaluations, and relator’s performance improvement plan.

Numerous decisions establish that tardiness and absences can amount to misconduct. *See, e.g., McLean v. Plastics, Inc.*, 378 N.W.2d 104, 107 (Minn. App. 1985) (addressing misconduct in the form of tardiness after warnings); *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985) (concluding misconduct occurred in the form of multiple absences after warnings); *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984) (stating that an employer has a right to expect an employee to work when scheduled). “[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). Relator’s argument that

her tardiness was caused by traffic and doctors' appointments is unavailing. Regarding traffic, tardiness need not be willful to show a lack of concern for employment, *Jones*, 361 N.W.2d at 120, and relator's chronic tardiness, even if it was caused by traffic conditions unanticipated by relator, shows a lack of concern for employment and is a violation of the standards of behavior the employer had a right to expect from relator. Relator's reliance on doctors' appointments is also unpersuasive because relator acknowledges absences unrelated to doctors' appointments. Additionally, relator could not explain at the telephone hearing how her medical condition affected her ability to arrive at work by 9:00 a.m.

Because relator's pattern of tardiness clearly displayed a serious violation of the standards of behavior her employer had a right to expect, it amounted to employment misconduct. The ULJ did not err in concluding that relator was discharged for employment misconduct.

**Affirmed.**