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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-2104**

Dan Schmidt,  
Relator,

vs.

Walgreens,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed September 15, 2009  
Affirmed  
Collins, Judge\***

Department of Employment and Economic Development  
File No. 164382

Dan Schmidt, 13006 Quinn Street Northwest, Coon Rapids, MN 55448 (pro se relator)

Walgreens, P.O. Box 283, St. Louis, MO 63116 (respondent)

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respondent department)

Considered and decided by Worke, Presiding Judge; Minge, 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## **UNPUBLISHED OPINION**

**COLLINS**, Judge

Relator challenges the unemployment law judge's (ULJ) determination that he was discharged for employment misconduct and is, therefore, ineligible to receive unemployment compensation. Because the ULJ's findings are supported by substantial evidence, we affirm.

### **FACTS**

Dan Schmidt began working as a full-time store manager for Walgreens in May 2006. In October 2006 two employees complained to company management that Schmidt "made inappropriate remarks to them." When confronted with these allegations, Schmidt admitted that he "made some inappropriate comments to two female employees." As a result, Schmidt received a "Final Written Warning" for violating Walgreens's sexual-harassment policy.

In May 2007, based on investigations of additional complaints from two other employees, Schmidt was terminated for repeated violations of Walgreens's sexual-harassment policy. Thereafter, Schmidt filed for unemployment benefits with the Minnesota Department of Employment and Economic Development (DEED), and he was determined to be eligible. Walgreens appealed, and the ULJ reversed the DEED's determination of eligibility after finding that Schmidt was discharged for employment misconduct.

Schmidt's request for reconsideration was granted and a new hearing was held. Schmidt admitted making many of the comments that were attributed to him, but he

argued that when taken in context, the comments were less offensive and that, because he later apologized, “things were okay.” Schmidt disputed one of the comments and testified that he did not recall if one other incident occurred. On the day following the hearing, the ULJ affirmed that Schmidt is ineligible to receive unemployment benefits because he was discharged for employment misconduct. Schmidt’s subsequent request for reconsideration was denied, and this certiorari appeal followed.

## **D E C I S I O N**

Schmidt contends that the ULJ erred by finding that he committed employee misconduct, arguing that the ULJ’s decision was “based on things that were not true, as well as supposed statements I made that, I did not.”

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator 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).

Whether an employee has 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). 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. Whether the employee's act constitutes misconduct is a question of law, which we review 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).

An applicant is ineligible to receive unemployment benefits if the applicant was discharged from employment for 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.” *Id.*, subd. 6(a) (2006).

Schmidt seeks reversal of the ULJ's determination of his ineligibility based on erroneous findings of fact. Before rendering his decision, the ULJ reviewed the reports filed by all four complainants and heard Schmidt's testimony in which he identified inconsistencies in events as reported. The ULJ necessarily made a credibility determination, finding that despite Schmidt's assertions to the contrary, the complainants' stories were believable. And because the ULJ's findings are supported by substantial evidence in the form of the complainants' statements, the findings are not erroneous. We reach a similar conclusion with regard to Schmidt's argument as to comments he contends were taken out of context or which he denies. The ULJ received evidence from each complainant detailing her complaint and also heard Schmidt's testimony in which he attempted to “clarify” his comments in broader context. The ULJ's findings to the effect that Schmidt made the comments attributed to him and thereby repeatedly violated

Walgreens's sexual-harassment policy are amply supported by the record. Therefore, the ULJ did not err by determining that Schmidt was discharged for employment misconduct and is ineligible to receive unemployment benefits.

**Affirmed.**