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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-181**

Merlin Mathews,
Relator,

vs.

Dashir Management Services Inc,
Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed October 27, 2009
Affirmed
Stauber, Judge**

Department of Employment and Economic Development
File No. 21311086-3

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(pro se relator)

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(for respondent DEED)

Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and
Minge, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from the decision denying him unemployment benefits, relator argues that the unemployment law judge (ULJ) erred in concluding that he was discharged for employment misconduct. We affirm.

FACTS

In December 2006, relator Merlin Mathews became employed by respondent Dashir Management Services, Inc. (Dashir) as a janitor. In April 2008, Dashir received complaints that relator was not sweeping or vacuuming the classrooms in the school where relator was assigned to perform his janitorial duties. Relator's supervisor Greg Robbins verified the complaints and issued a warning to relator for his poor work quality. Relator also received a second warning that same day concerning the following statement relator made to a choir teacher: "What am I supposed to do with your sh*t?" Robbins further warned that any future incidents would result in termination of relator's employment under Dashir's "three-strike" policy.

On September 26, 2008, a teacher opened the door of her classroom and found relator lying on a table. The teacher claimed that the lights were off, the T.V. was on, and relator appeared to be asleep. Relator admitted that he decided to lie down on the table in the classroom because his leg was swollen and he wanted to watch T.V. Relator was subsequently discharged for his third violation of company policy because relator's decision to take his break in the classroom was in violation of Dashir's policy.

Relator established a benefit account with respondent Minnesota Department of Employment and Economic Development (department), and a department adjudicator initially determined that relator was ineligible for unemployment benefits because he was discharged for reasons of employment misconduct. Relator appealed and, following a de novo hearing, an unemployment law judge (ULJ) affirmed the initial determination. Relator requested reconsideration of that decision, and the ULJ affirmed the decision that relator was discharged for employment misconduct. This certiorari appeal followed.

D E C I S I O N

This court may reverse or modify the decision of a ULJ if the substantial rights of the petitioner may have been prejudiced because the ULJ's findings, inferences, conclusions, or decisions are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008). 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; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Employees discharged for misconduct are ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). “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 an employee committed the alleged act is a fact question. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court defers to the ULJ's

credibility determinations and findings of fact. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But whether a particular act constitutes employment misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

Employment misconduct is defined 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.

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.

Minn. Stat. § 268.095, subd. 6(a) (2008).

Relator appears to argue that the ULJ erred in concluding that relator committed employment misconduct. We disagree. The record reflects that relator received a warning about his poor quality of work, and that after a brief improvement, relator again failed to meet work-quality expectations. Although relator disputes the testimony pertaining to his quality of work, this court defers to the ULJ's credibility determinations, and the ULJ apparently did not find relator's testimony on the issue to be credible. *See Ywswf*, 726 N.W.2d at 529. Moreover, the record reflects that relator admitted that he used inappropriate language toward one of the teachers and rested on one of the tables in

a classroom with the door locked, the lights off, and the T.V. on. Relator's conduct clearly displayed a serious violation of the standards of behavior Dashir had a right to reasonably expect from an employee. Accordingly, the ULJ did not err in concluding that relator was discharged for employment misconduct.

Relator appears to argue that his decision to rest in the classroom did not constitute employment misconduct because he was on his 30-minute unpaid lunch break. But even if relator was on his break, the record reflects that relator knew that it was against Dashir's policy to take breaks in the classrooms. And, relator knew that he was supposed to take his breaks in the teacher's lounge. Relator's decision to rest in the classroom was against his employer's policy and relator knew that his employment would be terminated if he had one more violation. Therefore, the ULJ did not err in concluding that relator was ineligible to receive unemployment benefits because he was discharged from employment for misconduct.

Affirmed.