STATE OF MINNESOTA
IN COURT OF APPEALS
A09-728

Rickie Foix,
Relator,

vs.

Clusiau Sales & Rental,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed February 2, 2010
Affirmed
Schellhas, Judge

Department of Employment and Economic Development
Agency File No. 21573024

Andy Borland, Hibbing, Minnesota (for relator)

Clusiau Sales & Rental, Grand Rapids, Minnesota (respondent employer)

Britt K. Lindsay-Waterman, Department of Employment and Economic Development, St. Paul, Minnesota (for respondent Department of Employment and Economic Development)

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

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

SCHELLHAS, Judge

In this certiorari appeal, relator challenges the decision of the unemployment-law judge (ULJ) that he is ineligible for benefits because he was discharged from employment for misconduct, arguing that his employer failed to follow the progressive-discipline procedure set forth in the employee handbook. Because the handbook did not mandate that the employer follow the progressive-discipline procedure, we affirm.

FACTS

Relator Rickie Foix was employed by respondent Clusiau Sales and Rental (CSR) from August 6, 2001, until December 5, 2008. At the time of his termination, he was the parts-department manager. According to Tom Clusiau, CSR's owner, CSR terminated relator "for one reason and one reason only, and that was attendance issues." Relator sought unemployment benefits, respondent Minnesota Department of Employment and Economic Development (DEED) determined that relator was ineligible, relator appealed, and a hearing was held before a ULJ.

At the hearing, Clusiau testified that relator was late 25% of the time or more in 2008, and that the "final straw" that led to relator's termination was his absence on December 3, 2008, when a service consultant was visiting the business. On that day, relator did not come to work until 1:50 in the afternoon, when he should have started at 9:00 a.m. According to Clusiau, management did not know where relator was until he arrived in the afternoon.

Clusiau testified that, during the course of the year, he and general manager Pete Wohlers had talked to relator three or four times about his tardiness. Wohlers told relator that, pursuant to the requirements in the employee handbook, he needed to call in if he was going to be absent. Because of relator's repeated tardiness, Clusiau and Wohlers specifically told relator that he needed to call "upper management," which included Clusiau and Wohlers.

Relator disagreed that he was late or absent as often as Clusiau claimed. With respect to the incident on December 3, 2008, he testified that he had stopped by Wohler's office the previous week and told Wohler, "I got to take . . . my mother to the doctor next Wednesday [December 3, 2008], be a few hours in the morning, I don't know exactly how long it'll take." Relator testified that Wohler responded, "fine." Wohler testified that he did not recall this conversation, but admitted that it "is possible" that it happened. But Wohlers went on to say that the termination was a result of "numerous issues" and not just this single absence.

CSR's employee handbook states that regular and on-time attendance is required and provides a call-in procedure for notifying the company of any absence or tardiness. The handbook further states that "[a]ny employee who fails to maintain an acceptable attendance record will be subject to disciplinary action *and or termination*." (Emphasis added.) The handbook then provides the following progressive-discipline procedures:

> UNEXCUSED ABSENCE
>
> The following describes the disciplinary actions that will result from unexcused absence:
>
> 1st Offense — Written notice (copy to employee's personnel file)

2nd Offense	Suspension for up to 3 working day(s) without pay, management review
3rd Offense	Suspension for up to 10 working days without pay or subject to termination at management's discretion.

TARDINESS

Tardiness applies to returning from lunch and/or break periods as well as the beginning of the work day. Following are descriptions of disciplinary actions that will result from tardiness:

1st Offense	Verbal reprimand with written notice to employee's personnel file
2nd Offense	Written reprimand with written notice to employee's personnel file
3rd Offense	Suspension for up to 3 working day(s) without pay
4th Offense	Subject to termination.

Relator testified that "[t]here are no request forms" for arranging to leave work for something like a doctor's appointment and that "[i]t has always been a very informal process." He said the vacation-request policy was also "very informal" and "not enforced with any regularity." He also said that "the things that have been said that [he had] done . . . [were] company culture and it was done all over the place and it was done with the knowledge and consent of management."

Clusiau admitted that the disciplinary procedure laid out in the handbook was not followed in relator's case. Clusiau explained,

> I violated my own policy because we're a close-knit group and [relator is] a pretty good guy and [he] and I got together well and I didn't feel that at certain times a reprimand or a written notice is conducive to good employer–employee relations, that I had talked to [him] and understood some of the issues, but still made it very firm that we wanted [him] to be here. And yes, we could have done that, we could have

> fired [him]. You know, I put that out there for everyone to see in the very beginning, that I didn't follow it.

Following the hearing, the ULJ found that relator had informed Wohlers in advance that he needed to take his mother to a doctor's appointment on December 3, 2008, and that Wohlers had responded, "okay." But the ULJ also found that: relator was late to work by five or more minutes 34 times; many of these incidents were not prearranged with CSR; and many times relator would not call to notify Wohlers that he would be late. The ULJ also found that relator "took lunch breaks that lasted substantially longer than one hour on six occasions without permission."

The ULJ concluded that relator was ineligible for benefits because he was discharged for employment misconduct, reasoning that CSR "discharged [relator] for a pattern of behavior stretching for at least a year" and not because of the single December 3, 2008 incident. Relator requested reconsideration, and the ULJ affirmed. This certiorari appeal follows.

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 findings, inferences, conclusion, or decision are, among other things, affected by an error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2008). Whether an employee engaged in conduct that makes the employee ineligible for 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 an act is a question of fact, but whether the act

constitutes employment misconduct is a question of law. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court views a ULJ's factual findings in the light most favorable to the decision, defers to the ULJ's credibility determinations, and will not disturb a ULJ's factual findings if the evidence substantially sustains them. *Id.* We review legal questions de novo. *Id.*

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. 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) (2008). "The employer has a right to expect an employee to work when scheduled." *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984). Even "a single absence from work may constitute misconduct when an employee has not actually received permission to be absent." *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986). Excessive tardiness can also constitute misconduct. *McLean v. Plastics, Inc.*, 378 N.W.2d 104, 107 (Minn. App. 1985).

Relator does not challenge the ULJ's findings of fact. Instead, relator contends that he cannot be ineligible for benefits on the basis of employment misconduct because CSR did not follow the progressive-discipline procedure set forth in the employee handbook before his discharge.

In a case in which an employer set forth progressive-discipline procedures in an employee handbook that employees could reasonably expect would be followed, and the employer terminated the employees without following the procedures, this court held that the employees did not commit misconduct and were eligible for benefits. *Hoemberg v. Watco Publishers, Inc.*, 343 N.W.2d 676, 678–79 (Minn. App. 1984), *review denied* (Minn. May 15, 1984).

In *Hoemberg*, the employee handbook contained a progressive-discipline procedure including "verbal," "written," and "final" warnings, and explaining that employees "will be told specifically, leaving no doubt, when receiving discipline." *Id.* at 677. After the employer's board of directors complained about employees doing personal errands on company time, the general manager held two meetings explaining the company's policies and then posted a notice, self-described as a "final warning," reminding employees that they had to let the manager know if they were leaving the plant "for any reason." *Id.* at 677–78. Several weeks later, the employee-applicants were discharged without warning after leaving the plant for a coffee break without informing their manager. *Id.* at 678. This court held that the employees' conduct did not rise to the level of employment misconduct, reasoning that "the employees had notice of the disciplinary procedures in the handbook and had every right to expect the company would follow those procedures." *Id.* at 679.

But this court has distinguished *Hoemberg* when a personnel manual stated that disciplinary steps "*may* be taken." *Thurner v. Philip Clinic, Ltd.*, 413 N.W.2d 537, 541 (Minn. App. 1987). *Hoemberg* is similarly distinguishable here. Although CSR's

employee manual sets forth progressive-discipline procedures for tardiness and absence, these procedures are not mandatory. The manual states, "Any employee who fails to maintain an acceptable attendance record will be subject to disciplinary action *and or termination*." (Emphasis added.) Thus, under the terms of the employee handbook, CSR was not required to follow the progressive-discipline procedures—it could simply terminate employees for violating the attendance policy. Because CSR did not violate the disciplinary policies in the handbook when it discharged relator for attendance problems, the ULJ did not err in concluding that relator was terminated for misconduct and is ineligible for benefits.

Affirmed.