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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1649**

Michael Johnson,
Relator,

vs.

Dunham Express (Corp),
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 30, 2010
Affirmed
Larkin, Judge**

Department of Employment and Economic Development
File No. 22788733-3

Michael R. Johnson, Brooklyn Center, Minnesota (pro se relator)

Dunham Express (Corp), Madison, Wisconsin (respondent)

Lee B. Nelson, Britt K. Lindsay-Waterman, Department of Employment and Economic
Development, St. Paul, Minnesota (respondent-department)

Considered and decided by Wright, Presiding Judge; Schellhas, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Relator challenges a determination that he is ineligible for unemployment benefits. Because relator was discharged for employment misconduct, we affirm.

FACTS

On August 17, 2008, relator Michael Johnson began work as a warehouse supervisor at respondent Dunham Express. Dunham is an overnight delivery company that delivers office supplies and pharmaceuticals to hospitals and drug stores. Dunham has a policy that prohibits employees from using, possessing, or selling illegal drugs at any time. Johnson was aware of this policy.

On Saturday, May 30, 2009, Johnson was out drinking at a bar. He accepted a ride home from strangers and got into a fight when they tried to rob him. The police found him either wandering around or unconscious. He was arrested for possession of narcotics. Johnson was taken to jail at around 2:30 a.m. and was unable to use the telephone until mid-morning on Sunday. On Sunday morning, Johnson was provided with a telephone book and an opportunity to use the telephone.¹ At that time, Johnson tried to call his father and a bail bondsman, but he was unable to make bail. Therefore, Johnson missed his Sunday night shift at Dunham. He was released from jail on Monday and called Dunham. Dunham called the police and was informed that Johnson had been arrested for felony drug possession. According to Dunham, Johnson admitted that the

¹ There is no indication in the record, and Johnson does not argue, that the authorities at the jail placed any restrictions on who he could call.

police found drugs on him, but Johnson claimed that the drugs were not his. Dunham subsequently terminated Johnson's employment. No criminal charges have been filed against Johnson.

Johnson established a benefit account with the Department of Employment and Economic Development (DEED). DEED determined that Johnson was ineligible to receive unemployment benefits because he was discharged for employment misconduct. Johnson appealed this decision, and an evidentiary hearing was held. An unemployment-law judge (ULJ) found that Johnson had committed employment misconduct by failing to notify his employer that he was going to be absent from his shift because of his incarceration. But the ULJ found that the evidence did not support a finding that Johnson violated Dunham's drug policy, stating that "it cannot be concluded that Johnson violated the employer's drug policy as Johnson denied this under oath and no police or other records have been provided." Johnson filed a request for reconsideration. The ULJ affirmed her initial decision regarding employment misconduct based on his failure to notify Dunham of his absence from work, but reversed her earlier finding regarding violation of Dunham's drug policy. The ULJ found that Johnson's possession of drugs, in direct violation of Dunham's policy, provided an additional basis to conclude that he was discharged for employment misconduct. This certiorari appeal follows.

DECISION

Our review of a ULJ's eligibility determination is governed by Minn. Stat. § 268.105, subd. 7(d) (2008), which provides:

The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may 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.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct means “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 misconduct definitions set out in the act are exclusive and “no other definition applies.” *Id.*, subd. 6(e) (2008).

Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether a particular act constitutes employment misconduct is a question of law, which an appellate court reviews de novo. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). Whether the employee committed the particular act, however, is a question of fact. *Id.* This court reviews the ULJ’s factual findings “in the light most

favorable to the decision.” *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Johnson missed a shift, without calling to inform Dunham that he would not be there, because he was incarcerated. “Absence from work under circumstances within the control of the employee, including incarceration following a conviction for a crime, has been determined to be misconduct sufficient to deny benefits.” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006) (citation omitted). The ULJ found that Johnson “had an opportunity to use the phone while in jail but made no effort to notify the employer that he would not be at work.” This finding is supported by substantial evidence in the record. Johnson testified that he was provided with a telephone book and a telephone on Sunday morning but did not attempt to contact Dunham, even though he was scheduled to work a shift that evening. And the ULJ correctly concluded that Johnson’s “conduct caused him to be incarcerated during a time he was supposed to [be at] work.” Johnson’s difficulty or inability to notify Dunham was the result of his own conduct. Johnson’s failure to report to work due to incarceration without notifying his employer displays clearly a substantial lack of concern for his employment and constitutes employment misconduct.

Furthermore, Johnson was arrested for felony-level drug possession. Dunham has a policy prohibiting use, possession, or sale of illegal drugs at any time. Johnson was aware of this policy. Dunham ships pharmaceuticals to hospitals and drug stores. Due to the nature of its business, Dunham has a substantial interest in maintaining a drug-free staff. And because Dunham’s contracts prohibit employment of anyone with a criminal

drug charge, its policy against illegal drug use, possession, or sale by its employees is reasonable. *Cf. Hein v. Gresen Div.*, 552 N.W.2d 41, 44 (Minn. App. 1996) (“The employer’s requirement that [appellant] abstain from illegal drug use while off-duty was reasonable in light of the public policy against such use.”) Johnson’s drug possession violates Dunham’s policy and displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee. *See Schmidgall*, 644 N.W.2d at 804 (“As a general rule, refusing to abide by an employer’s reasonable policies and requests amounts to disqualifying misconduct.”).

It is not necessary that Johnson be charged or convicted of a crime for his drug possession to be considered employment misconduct; mere possession is sufficient. The ULJ determined that Johnson possessed drugs at the time of his arrest, in direct violation of Dunham’s policy, and found Johnson’s assertions to the contrary to be incredible. During the telephone hearing, Johnson denied possessing the drugs, but Dunham testified that Johnson had admitted to possessing the drugs, yet insisted that they did not belong to him. The ULJ made express credibility determinations noting that Johnson’s version of the events leading to his arrest—including his claim that the police “planted” drugs on him—was “inherently incredible” as well as “contradictory and unclear.” This court defers to the ULJ’s credibility determinations regarding Johnson’s testimony and we will not disturb the ULJ’s factual findings. *See Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citations omitted), *review denied* (Minn. Oct. 1, 2008). Because the evidence substantially sustains the ULJ’s determination that Johnson

possessed drugs, and this possession alone constitutes employment misconduct, the absence of criminal charges or a conviction is irrelevant.

Johnson makes several arguments regarding a performance-correction notice that Dunham provided to him on the day he was terminated. He first asserts that because he only received the “corrected” document a few days before the hearing, he did not have enough time to arrange for his witness to testify. Johnson also contends that an alleged witness falsely signed the document, arguing that the witness was not present when Johnson refused to sign the performance-correction notice. While the purported false representation might call Dunham’s credibility into question, the document does not impact the ULJ’s determination that Johnson committed employment misconduct, because the determination was not based on this document. Johnson’s arguments regarding the performance-correction notice do not provide a basis to reverse.

Johnson also argues that because the possession occurred off of Dunham’s property while he was not working, this incident should not be considered employment misconduct. But the statutory definition of employment misconduct includes conduct that occurs “on the job or off the job.” Minn. Stat. § 268.095, subd. 6(a).

Lastly, Johnson asserts that his drug possession should not be considered misconduct because he had a perfect attendance record and had never been given a written or verbal warning by Dunham. This is irrelevant to a finding of misconduct because “a single absence from work may constitute misconduct.” *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986). Johnson missed work without notifying Dunham that he would be absent and violated Dunham’s reasonable policy

against drug possession. The ULJ did not err by determining that Johnson was ineligible for unemployment benefits because he was discharged for employment misconduct.

Affirmed.

Dated:

Judge Michelle A. Larkin