STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2089

Scot Walstad,
Relator,

vs.

Calemart Inc.,
Respondent,

Department of Employment
and Economic Development,
Respondent.

Filed July 20, 2010
Affirmed
Klaphake, Judge

Department of Employment and Economic Development
File No. 23066773-3

Scot A. Walstad, Gaylord, Minnesota (pro se relator)

Calemart Inc., Glencoe, Minnesota (respondent)

Lee B. Nelson, 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 Toussaint, Chief Judge; Klaphake, Judge; and Minge, Judge.

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

KLAPHAKE, Judge

In this unemployment compensation appeal, relator Scot Walstad challenges the decision of an unemployment law judge (ULJ) that he was ineligible to receive unemployment benefits because he was discharged for employment misconduct. We affirm because there was substantial evidence to support the ULJ's determination that relator was discharged for employment misconduct due to excessive unexcused absences.

D E C I S I O N

A ULJ's decision must be affirmed unless the decision violates the constitution, exceeds statutory authority or the department's jurisdiction, is based on unlawful procedure, relies on an error of law, is unsupported by substantial evidence, or is arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d) (1-6) (2008). An applicant is ineligible to receive unemployment benefits if "the applicant was discharged because of employment misconduct." Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct is defined as "a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee" or conduct "that displays clearly . . . a substantial lack of concern for the employment." *Id.*, subd. 6 (Supp. 2009). This court defers to the ULJ's factual findings as to the employee's conduct but reviews the legal issue of whether that conduct constitutes employment misconduct de novo. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Relator raises three factual issues with respect to his discharge: (1) he challenges the statement of his employer, Tom Hueser, owner of Sam's Tire Service (Sam's), that it

was company policy for employees to call his residence to inform him of work absences; (2) he claims that he was never told that his prior absences were unexcused, and other than one warning, he was never told that his job was in jeopardy because of unexcused absences; and (3) he claims that he received no written notice to show that he was reprimanded or that his job was at risk.

The record includes substantial evidence on these issues. First, relator received a company handbook on his first day of employment that includes the following absenteeism policy:

> Unavoidable absence[s] should be reported to your supervisor at least one hour prior to your scheduled start time. Failure to call in or report to work as scheduled will be considered an unexcused absence. More than three unexcused absences may be cause for termination.

Second, Hueser testified that he personally informed relator "many times" of the policy and asked relator to call him either on his cell phone or at his home number at least one hour before a scheduled shift if he was going to be absent, and that he verbally warned relator about his habitual tardiness and unexcused absences at his January 2009 review and numerous other times. Despite these warnings, relator continued to miss work without proper excuse or without providing proper notice, ultimately causing problems for customers and affecting the reputation of the shop. According to Hueser, relator had five unexcused absences in April, two in May, and four in June. The week of July 13, relator's fiancée was detained in jail. Relator worked four hours on Monday, was very tired, and left early to seek bail money for his fiancée; on Tuesday, he was 20 minutes late to work but worked a full shift; on Wednesday, relator was sent home for safety

reasons at 11:30 a.m. when he appeared to be extremely tired and asked to take a nap in his car during a lunch break; on Thursday, relator came to work on time, was very tired, and left at 10:00 a.m. to attend to family matters; on Friday, Hueser discharged relator after a manager arrived at work and found a note from relator taped to the door stating that he could not be at work that day because of family issues. Hueser's testimony also showed that he did not believe some of relator's excuses for being absent in earlier months, because relator routinely missed work on the Mondays after he was paid.

Although relator's assertions contradict the testimony of Hueser and are contrary to the findings of the ULJ, we defer to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344. Thus, the ULJ was free to credit Hueser's testimony that employees were to call his residence to inform him of absences and that relator was told that his many absences were unexcused.

Further, there was no company policy requiring either that Sam's provide relator with written reprimands or that Sam's inform him that his job was in jeopardy because of his absenteeism—the many verbal warnings relator received were sufficient to put him on notice that his absenteeism would not be tolerated by the company. Viewing the evidence in the light most favorable to the ULJ's decision, *id.* at 344, the evidence supports the ULJ's decision. *See Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986) (noting that absenteeism has been recognized as evidence of misconduct and "an employee engages in misconduct if he is absent even once without notifying his employer"); *Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App.

1984) (ruling that repeated tardiness, even after warnings, constitutes employment misconduct).

Affirmed.