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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1700**

Craig Berg,  
Relator,

vs.

Apol's Harley Davidson Inc.,  
Respondent,

Department of Employment  
and Economic Development,  
Respondent.

**Filed July 29, 2008  
Affirmed  
Hudson, Judge**

Department of Employment  
and Economic Development  
File No. 7369 07

Craig Berg, 226 Runestone Place, Alexandria, Minnesota 56308 (pro se relator)

Apol's Harley Davidson Inc., P.O. Box 242, Raymond, Minnesota 56282 (respondent)

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Minnesota 55101 (for respondent DEED)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and  
Connolly, Judge.

## UNPUBLISHED OPINION

**HUDSON**, Judge

Relator challenges the decision by the unemployment-law judge (ULJ) that he was disqualified from receiving unemployment benefits because he had been discharged for misconduct. Relator argues that (1) his conduct did not constitute employment misconduct; (2) he was singled out because he had facial hair, which was unfair because other employees had facial hair; and (3) he was not discharged for employment misconduct because his appearance at work was presentable. We affirm.

### FACTS

Relator Craig Berg began working for Apol's Harley Davidson Inc. (Apol's) as a salesperson in May 2006. During his employment with Apol's, relator was warned at least ten times by his supervisor, Thomas Brenden, about the need to appear professional. Brenden told relator that "if you want to grow a beard, grow a beard. If you don't want to grow a beard, then shave. . . . I don't want the, I'm just not going to shave until every third or fourth day look." Despite Brenden's warnings, relator continued to appear for work unshaven because he did not think he would get fired for not shaving.

On April 20, 2007, relator arrived for work unshaven and, according to Brenden, not "dressed properly." Brenden admonished relator for not shaving and not looking professional. Relator did not shave that day because his razor was extremely dull, which causes him to break out under his chin and neck.

The next day, Brenden received a text message from relator stating that he had overslept and would be late for work. Relator finally arrived at work at 9:00 a.m., 30

minutes late. Relator missed the 8:30 a.m. staff meeting and, according to Brenden, looked “pretty rough,” like he was “homeless.” Relator was still unshaven, and his clothes “were all bundled up and wrinkled.” Brenden and a service writer also thought relator smelled of alcohol. Brenden allowed relator to do the first delivery, but then told relator “look, this is unacceptable. I need you to go home and get showered, get shaved, get cleaned up and come back to work looking like a professional. And . . . if you can’t do that, don’t come back today.” Relator went home and shaved as instructed but did not return to work because he “would have been crabby” had he returned to work. Relator failed to call Brenden and tell him that he was not returning to work.

On April 23, 2007, relator reported for work as scheduled. Although he was clean shaven, Brenden discharged relator for his conduct the previous week. Relator subsequently established a benefit account with respondent Minnesota Department of Employment and Economic Development (department). A department adjudicator initially determined that relator was discharged for reasons of employment misconduct and, therefore, disqualified from receiving benefits. Relator appealed and, following a de novo hearing on the matter, an unemployment-law judge (ULJ) affirmed the initial determination. Relator filed a request for reconsideration with the ULJ, who affirmed the decision that relator was discharged for employment misconduct. This certiorari appeal follows.

## **DECISION**

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,

conclusion, or decision are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4), (5) (2006). 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 disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). “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 a 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) (2006).

Here, the ULJ found that relator's conduct constituted employment misconduct because "[h]e did not correct the problems with his appearance that he had been warned about, he missed a meeting on April 21, 2007, and he did not return to work . . . after he was asked to go home and correct the problems with his appearance on April 21, 2007." Thus, the ULJ concluded that relator was disqualified from receiving unemployment benefits.

Relator argues that he is entitled to benefits because his conduct did not amount to employment misconduct. We disagree. "The general rule is that if the request of the employer is reasonable and does not impose an unreasonable burden on the employee, a refusal will constitute misconduct." *Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985). Here, relator held a salesperson position, and it would be reasonable for Apol's to require that its salespeople look professional when selling its products. This would include looking presentable and keeping facial hair well-groomed. Relator was warned at least ten times about his appearance, but he refused to correct the problem. Moreover, there is evidence that relator smelled of alcohol on April 21, 2007, and that he missed a meeting that morning because he overslept. Relator further demonstrated a lack of concern for his employment by failing to return to work after being sent home to shower and shave simply because he would have been "crabby."

Therefore, the ULJ did not err in concluding that relator's conduct constituted employment misconduct.

Relator also contends that he was singled out because he had facial hair, which was unfair because other employees at Apol's also had facial hair.<sup>1</sup> But the record does not support relator's claim. Although there were other employees at Apol's who had facial hair, the issue was unkempt facial hair. Moreover, another employee's violation of an employer's rules is not a defense to misconduct. *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986). And an employer's selective enforcement of its own rules is also not a defense to a finding of misconduct. *Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986), *review denied* (Minn. Aug. 20, 1986). Thus, even if relator was singled out for not shaving, the fact that other employees had facial hair would not be a defense to relator's misconduct.

Finally, relator contends that he was not discharged for employment misconduct because his appearance at work was presentable. We disagree. Relator's supervisor testified that on the last two days of relator's employment, he looked "pretty rough," like he was "homeless." He also testified that relator was unshaven, looked like he had not showered, and his clothes "were all bundled up and wrinkled." Although relator testified that he had showered and that he looked presentable, relator admitted that he never ironed

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<sup>1</sup> Attached to relator's informal brief is a statement from a former co-worker at Apol's, and the business card of a different co-worker. The business card contains a picture of the employee, and the employee has facial hair. Because this evidence was not part of the record below, we decline to consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) ("An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.").

his shirts. Moreover, we defer to the ULJ's credibility determinations, and the ULJ specifically found "Brenden's testimony to be more credible than that of [relator] because [relator's] testimony varied during the course of the hearing." *See Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006) (noting that credibility determinations are resolved by the ULJ and that this court will defer to those determinations on appeal). Accordingly, the record supports the ULJ's decision that relator was discharged for employment misconduct.

**Affirmed.**