

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0318**

Gordon E. Ess,  
Relator,

vs.

ALD Enterprises Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed January 27, 2009  
Affirmed  
Shumaker, Judge**

Department of Employment and Economic Development  
File No. 61478-4

Gordon E. Ess, 501 East Burnsville Parkway, Apartment 121, Burnsville, MN 55337-2886 (pro se relator)

ALD Enterprises Inc., 5137 Gus Young Lane, Edina, MN 55436 (respondent employer)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic Development, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351 (for respondent department)

Considered and decided by Peterson, Presiding Judge; Shumaker, Judge; and  
Stauber, Judge.

## UNPUBLISHED OPINION

**SHUMAKER**, Judge

In this certiorari appeal, the pro se relator challenges the unemployment law judge's (ULJ) ruling that he is ineligible to receive unemployment benefits because he was discharged for employment misconduct. Relator argues that his conduct during the course of his employment did not constitute misconduct. Because the evidence supports the ULJ's finding that relator was discharged for employment misconduct, we affirm.

### FACTS

Pro se relator Gordon E. Ess worked part time as a personal trainer for ALD Enterprises, Inc.'s gym from May 2007 to August 2007. Ess's contract stated that he was to work a split shift on Mondays, and then Wednesday through Friday mornings and every other Saturday. The contract also stated: "Notice later than 5:00 PM the night before a scheduled shift will result in a deduction from next paycheck of each client session missed."

Late in the morning on August 8, 2007, Ess notified Deron Lindquist, his supervisor and the gym owner, that he was unable to work the next day, August 9, 2007. Ess was fired August 8 after he repeatedly refused to work on August 9 and failed to give a reason for his refusal. After his termination, Ess applied for unemployment benefits, and the Department of Employment and Economic Development (DEED) determined that he was eligible for unemployment benefits.

ALD Enterprises appealed this decision, and the ULJ held a hearing via telephone. At the hearing, Lindquist testified that Ess complained about working his training

sessions and arrived late or left early from work. Lindquist testified to a specific incident on August 6 when Ess did not come to work because he had a bug in his eye and was unable to drive to work, so he was given a verbal warning that he would not “make a match here” if he was not willing to work his scheduled shifts. Then on the day that Ess was terminated, Lindquist told Ess that he would be training additional clients the following day but would not be required to work additional hours. Ess responded that he did not want the extra workload and was not going to work the following day. Lindquist testified that when asked why he was unable to work, Ess failed to give a reason and was told he would be let go immediately if he failed to give a reason. Ess gave no reason for his failure to work, and Lindquist terminated Ess that day.

One of Ess’s former colleagues, Gary Sjoberg, testified that Ess complained about his workload and “want[ed] more free time for the summer.” Sjoberg also testified that clients commented to him that Ess appeared “detached” and did not want to be at work.

Ess testified that he gave Lindquist advance notice and legitimate reasons for his absence on both August 6 and 9. Ess admitted to missing work on August 6 but stated it was because he had an eye infection. Ess testified that he did give Lindquist a reason why he was unable to work on August 9. Ess told Lindquist that “[he] did have some things that [he] had to take care of” but Lindquist would not allow him to explain further. Ess disputes Lindquist’s testimony regarding his work habits. Ess stated that he always completed his training sessions and received satisfactory comments from his clients. Ess testified that he always intended his job as a personal trainer to be part time and never

wanted the full-time obligation. Finally, Ess accused Lindquist of failing to pay him the remainder of his earned wages.

During Ess's testimony, the ULJ repeatedly probed him for the reason he was unable to work on August 9. Eventually, Ess stated that a family member needed his assistance with transportation and that he had a doctor's appointment around 10 a.m.

Following the hearing, the ULJ determined relator was ineligible to receive benefits, finding that Ess was discharged for employment misconduct which precluded him from receiving unemployment benefits. Ess filed a request for reconsideration, but the ULJ affirmed the decision to deny unemployment benefits. This certiorari appeal followed.

## **D E C I S I O N**

This court may reverse or modify the ULJ's findings or inferences if they are "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5) (Supp. 2007). "We view the ULJ's factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ. In doing so, we will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (citations omitted).

Ess contends that the ULJ erred in concluding that certain incidents regarding his work habits constitute employment misconduct making him ineligible to receive unemployment benefits. An applicant discharged from employment for misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007).

“Whether an employee has engaged in conduct that disqualifies him from unemployment benefits is a mixed question of fact and law.” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 289 (Minn. 2006). “Whether the employee committed an act alleged to be employment misconduct is a fact question, but the interpretation of whether that act is employment misconduct is an issue of law.” *Risk v. Eastside Beverage*, 664 N.W.2d 16, 19-20 (Minn. App. 2003).

Employment misconduct is described as intentional, indifferent, or negligent conduct, on or off the job which either: (1) clearly displays a serious violation of the standards of behavior an employer has the right to reasonably expect from an employee, or (2) conduct which clearly displays a substantial lack of concern for the employment. Minn. Stat. § 268.095, subd. 6(a) (Supp. 2007). Absence from work “because of illness or injury with proper notice to the employer” is not employment misconduct. *Id.*

Ess argues that he properly notified Lindquist that he would not be at work, supporting his absences with good reasons. The ULJ found that Ess lacked concern for his employment and seriously violated the standard of behavior that ALD Enterprises has the right to reasonably expect from its employees. The record supports the ULJ’s findings that Ess occasionally arrived late for work and left early; Ess had been warned about his absences and other misconduct; and, after Lindquist told Ess that he would have additional clients to train the following day, Ess informed Lindquist that he was unable to work and failed to give a good reason. The ULJ determined that Ess was not credible when he said he had a medical appointment on August 9 because he did not disclose this information until after being repeatedly questioned by the ULJ as to his reason for not

working. *See Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (listing witness's demeanor and experience, reasonableness of the witness's testimony, witness's interest in the case's outcome as relevant factors to consider when assessing witness credibility); *Skarhus*, 721 N.W.2d at 345 ("Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.");

Ess further argues that his absence did not constitute employment misconduct; therefore, he is entitled to unemployment benefits. Ess instead contends that Lindquist's staff shortage was not his problem and that because Ess would not do extra work Lindquist fired him.

Ess refused to work August 9, even after he was told he was needed. Ess's request for time off was merely a request that his employer could grant or deny. The ULJ concluded that Ess's employment contract did not allow him to take time off whenever he desired and the notice provision gave no such right. Moreover, ALD Enterprises had the "right to establish and enforce reasonable work rules relating to absenteeism." *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985). Ess's unwillingness to work his scheduled shift without giving a good reason was an intentional violation of a known standard of behavior and lack of concern for his employment.

Ess had notice of the employment expectations when Lindquist verbally warned him following his August 6 absence, telling Ess that he was expected to report to work as scheduled. ALD Enterprises' expectation that Ess would report to work for his scheduled hours was reasonable, particularly when Ess was needed because of short-staffing. *See, e.g., Sandstrom v. Douglas Mach. Corp.*, 372 N.W.2d 89, 91 (Minn. App. 1985) (stating

that the reasonableness of an employer's request is determined by examining the circumstances of each case); *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. App. 1984) (holding that an employer has a right to expect an employee to work when scheduled).

Even a single incident of absenteeism without an excuse may constitute misconduct. *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986). Before this incident, Ess was known to arrive late to work, leave early, show discontentment with his job, and lack concern for the fact that ALD Enterprises was severely short-staffed and needed Ess to work. In the August 8 conversation, Ess repeatedly told Lindquist he would not report to work on August 9, despite being told he was needed and could not have the day off. As a result of Ess's insistence, Lindquist anticipated his absence on that day and fired him on the spot. Finally, the ULJ noted that Ess repeatedly refused to give his good reasons for being absent. It was this conduct that the ULJ determined to be intentional in that it "showed a substantial lack of concern for [Ess's] employment."

Ess argues that he is entitled to unemployment benefits because he falls under the statutory exemption for illness or injury. Minn. Stat. § 268.095, subd. 6(a). However, Ess failed to establish that his absence on August 9 was because of illness or injury. On August 8, Lindquist repeatedly asked why Ess needed the following day off but Ess did not claim it was because of illness or injury at that time. In fact, Ess did not indicate that he wanted the day off for "personal" reasons until the ULJ asked him repeatedly for the reason.

Because substantial evidence supports the ULJ's findings, they will not be disturbed on appeal. Minn. Stat. § 268.105, subd. 7(d)(5).

Finally, Ess contends that Lindquist owes him wages. The ULJ has the authority to hear only challenges to eligibility determinations made by the commissioner. *See* Minn. Stat. § 268.101, subd. 2(f) (stating that “[a] determination of eligibility or determination of ineligibility is final unless an appeal is . . . .”); Minn. Stat. § 268.105, subd. 1(c) (stating that the “unemployment law judge must make findings of fact and decision . . . .”). Ess attempts to have the ULJ rule that the employer was required to pay him wages that were earned but are unpaid. The ULJ's decision that this issue was irrelevant to the question of whether Ess committed misconduct was not an abuse of discretion. *See* Minn. R. 3310.2922 (2007).

**Affirmed.**