

*This opinion will be unpublished and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
A09-1345**

Daniel Cook,
Relator,

vs.

Interstate Power Systems Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 8, 2010
Affirmed
Kalitowski, Judge**

Department of Employment and Economic Development
File No. 22556605-3

Daniel Cook, New Hope, Minnesota (pro se relator)

Lee A. Henderson, Hessian & McKasy, P.A., Minneapolis, Minnesota (for respondent
Interstate Power Systems Inc.)

Lee B. Nelson, Amy R. Lawler, Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent Department of Employment and
Economic Development)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and
Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Pro se relator Daniel Cook challenges the decision of the unemployment-law judge (ULJ) that he is ineligible to receive unemployment benefits because he engaged in employment misconduct. Relator argues that (1) he did not violate the employer's attendance policy; (2) his conduct falls under the single-incident exception to employment misconduct; and (3) he needed to miss work to care for a family member. We affirm.

DECISION

When an employer discharges an employee for "employment misconduct," the employee is ineligible to receive 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 employment." *Id.*, subd. 6(a) (2008). An employee's refusal to abide by an employer's reasonable policies and requests amounts to employment misconduct. *Schmidgall v. FilmTec Corp*, 644 N.W.2d 801, 804 (Minn. 2002).

A challenge to the determination that an employee committed employment misconduct presents a mixed question of fact and law. *Id.* Whether the employee committed a particular act is a question of fact, but whether the employee's act constitutes employment misconduct is a question of law that we review de novo.

Scheunemann v. Radisson S. Hotel, 562 N.W.2d 32, 34 (Minn. App. 1997). In reviewing the ULJ's decision, "[w]e view the ULJ's factual findings in the light most favorable to the decision," and defer to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We will not disturb the ULJ's factual findings if they are supported by substantial evidence. *Id.*

Attendance Policy

Relator claims that he did not violate his employer's attendance policy, and thus did not commit employment misconduct. We disagree.

Relator was employed in outside sales at respondent Interstate Power Systems, Inc. (IPS). He spent most of his workday out of the office meeting with customers. A section of the IPS attendance policy states that "on the third day of unauthorized leave," IPS shall consider "the job abandoned and the employee will be deemed to have voluntarily quit without notice." Relator argues that because he did not miss three days of work without notifying IPS, he did not violate the attendance policy.

But the ULJ did not refer to this three-day job-abandonment provision in the factual findings or the determination. Rather, the ULJ concluded that relator violated the IPS attendance policy that requires employees to properly notify IPS of absences and provides that failure to do so may result in termination. The ULJ found that relator failed to report to work or contact his supervisor for several days.

We conclude that the ULJ's findings regarding the attendance policy are supported by substantial evidence. At the evidentiary hearing, relator's supervisor testified that IPS expects to hear from its sales representatives throughout the day while they are out of the

office meeting with customers. The attendance policy states that “notification is required [for] each successive day of absence until the employee returns to work or a leave of absence is granted.” The policy concludes, “[W]e have the right to expect regular attendance of our employees and can take corrective action for excessive absenteeism. Tardiness, unexcused absence, or failure to work as required may result in disciplinary action, including termination.”

The ULJ’s finding that relator failed to report for work or contact his supervisor for several days is supported by substantial evidence in the record. While relator was out visiting customers on Monday, April 27, 2009, relator’s supervisor left relator a message asking relator to call him. Relator did not return the supervisor’s call. Then, relator e-mailed his supervisor on the morning of Tuesday, April 28, 2009, to say “[s]omething personal at home which I thought was under control is not. I do need some personal time. If this isn’t acceptable, please let me know.” The supervisor immediately responded to relator’s e-mail message by instructing relator to call him. The supervisor then called relator’s company-issued cell phone and left a message to call the supervisor. Relator did not call or report to work that day. The following day, Wednesday, April 29, 2009, the supervisor again called relator and left another message stating that relator needed to see the supervisor that afternoon. Relator again did not contact the supervisor or report to work that day. When relator did not report for work by 8:00 a.m. on Thursday, April 30, 2009, the supervisor discharged relator for failing to report for work. This evidence supports the ULJ’s conclusion that relator failed to report for work or contact his supervisor to explain his absence.

Relator claims that because he acted as an average reasonable person given the circumstances, his behavior is excluded from the definition of employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(4) (Supp. 2009). Specifically, relator asserts he reported his absence on Tuesday, April 28, in the manner expected at IPS by sending an e-mail to his supervisor. But the record shows that relator knew, or should have known, that he needed his supervisor's approval before taking time off. Although relator had requested a specific amount of time off in the past, he had never previously told a supervisor he would be taking an indefinite amount of time off effective immediately, as he did on April 28. In addition, the e-mail message relator sent stated, "[I]f this is not acceptable, please let me know." Yet relator did not return any of his supervisor's phone messages or e-mails that indicated his absence from work was not acceptable. We conclude that relator's conduct does not fall under the average-reasonable-person exception.

We conclude that relator's failure to comply with the IPS attendance policy or with the company practice of employees obtaining approval for absences from work constitutes employment misconduct. *See Schmidgall*, 644 N.W.2d at 804 (stating that failure to abide by an employer's reasonable policies and requests amounts to employment misconduct).

Single-Incident Exception

Relator argues that his conduct is a single incident that does not rise to the level of employment misconduct. We disagree.

The single-incident exception to employment misconduct was amended in 2009 to provide that if an employee was discharged for a single incident, “that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct.” *See* Minn. Stat. § 268.095, subd. 6(d) (Supp. 2009); 2009 Minn. Laws ch. 15, § 9, at 48 (amending statute for determinations issued on or after August 2, 2009). But at the time of the ULJ’s initial determination, the previous version of the exception was in effect, and provided that relator’s conduct would not qualify as employment misconduct if it was “a single incident that does not have a significant adverse impact on the employer.” Minn. Stat. § 268.095, subd. 6(a) (2008).

Under either provision, we conclude that relator’s conduct was not a single incident. Relator’s misconduct stretched over multiple days. Relator failed to comply with his supervisor’s reasonable requests to call him back on three different days. The supervisor also contacted relator twice on April 28, once by e-mail and once by voicemail. In addition, relator was not present at work by 8:00 a.m. on a fourth day. Relator’s conduct did not constitute a single incident.

Caring for Family Member

For the first time on appeal, relator claims that his actions are exempt from the definition of employment misconduct because he was absent from work to care for a family member. We disagree.

The care-for-a-family-member exception to employment misconduct did not become effective until after the ULJ issued its decision. *See* 2009 Minn. Laws ch. 15,

§ 9, at 48 (amending statute for determinations issued on or after August 2, 2009). Thus, this exception is not statutorily available to relator.

Moreover, even if the exception were available, it would not apply to relator's conduct. The exception states that an absence from work does not constitute employment misconduct when an employee gives "proper notice to the employer," and the absence is "to provide necessary care because of the illness, injury or disability of an immediate family member." Minn. Stat. § 268.095, subd. 6(b)(8) (Supp. 2009). But here, relator failed to provide proper notice to IPS. Relator never informed his supervisor that his absence was "to provide necessary care" to "an immediate family member." *See id.* In the one e-mail he sent to his supervisor on April 28, relator did not specify any health or wellness issues.

When this court has held that an employee's absence was caused by an emergency need to care for a family member, the record reflects that the absence was for this reason. *See, e.g., Hanson v. Crestliner Inc.*, 772 N.W.2d 539, 542 (Minn. App. 2009) (stating that the ULJ found the employee "did not return to work on August 26 because his elderly mother fell on August 25 and was hospitalized"). In contrast, here, throughout the evidentiary hearing, relator did not reveal what prevented him from working or contacting his supervisor. When the ULJ specifically questioned relator about the reason for his absence, relator only stated it "involve[d] his wife" and it was "medical related." Relator also testified that it was not his wife's medical condition that prevented him from contacting his supervisor but that he did not think he needed to follow up after sending the e-mail to his supervisor on April 28. Because the record does not establish that

relator provided the proper notice, and because relator failed to show that he missed work to care for a family member, we conclude that the newly enacted exception for caring for a family member does not apply here.

Affirmed.