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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0278**

Roger Porter,  
Relator,

vs.

Owens & Minor Distribution, Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed August 6, 2012  
Affirmed  
Harten, Judge\***

Department of Employment and Economic Development  
File No. 28715213-3

Roger Porter, Blaine, Minnesota (pro se relator)

Owens & Minor Distribution, Inc., Columbus, Ohio (respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and  
Harten, Judge.

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

## UNPUBLISHED OPINION

**HARTEN**, Judge

Relator challenges an unemployment-law judge (ULJ) decision that he is ineligible to receive benefits because he was dismissed from his employment for misconduct; relator claims that the ULJ decided the case without considering documentary evidence showing that he was mentally impaired due to illness at the time of the incident that led to his dismissal. Because relator did not submit evidence to support this claim and the record provides substantial support for the ULJ's decision, we affirm.

### FACTS

Relator Roger Porter worked as the shipping and receiving lead person for Owens & Minor Distribution, Inc. (O & M) from October 1993 to 20 October 2011. On 18 October 2011, relator became involved in an altercation at work that resulted in his dismissal two days later. After initially being determined ineligible to receive unemployment benefits, relator appealed and proceeded to a hearing before a ULJ.

At the hearing, Robert Pavlisich, O & M shift supervisor for the receiving team, testified for the employer. He stated that on 18 October, a truck driver attempted to deliver a load of medical supplies and began to unload his own truck, but O & M receives deliveries only by appointment. Pavlisich told the driver that O & M would not accept delivery because the driver did not have an appointment, ordered him to put an unloaded pallet back on his truck, and walked away. Soon after, when the driver refused to reload his truck, relator ordered the driver to reload his truck, whistled to Pavlisich for

assistance, swore at the driver, and told him he was going to call police; relator then placed the pallet on a 9,000 lb. stand-up forklift, and when the driver blocked him from the truck, “proceeded to push the pallet into the driver.” After the incident, relator told Pavlisich that he was never so mad and he “blew his cork.” Pavlisich also testified that relator had been warned about having outbursts at work on a prior occasion. O & M offered into evidence an employee handbook that prohibits discourtesy or impatience towards customers, “use of abusive language,” willful violations of company regulations, and “causing bodily injury to another or threatening violence in the workplace.”

During his testimony, relator admitted that he “pushed” the driver with his forklift “[t]o get him to move.” He also admitted that he had been warned previously about his behavior. When asked about his conduct, relator stated:

I was admitted into Mercy Hospital the day after the incident and I was diagnosed with Korsakoff’s Syndrome and Wernicke’s Syndrome . . . [S]ome of the symptoms include lack of insight, apathy, amnesia, major content in conversation. Yes, I spent four days in detox and also with Wernicke’s disease.

Relator admitted that (1) he did not have a statement from a physician showing that he suffered from a medical condition that would have caused his behavior; (2) he had been instructed to bring all relevant documents to the ULJ hearing; and (3) he did not know why he had failed to bring such documentation. The ULJ ruled that relator was dismissed from employment for misconduct and therefore ineligible to receive benefits.

In an order affirming the original decision following relator's request for reconsideration, the ULJ<sup>1</sup> noted that relator "failed to provide any new testimony or evidence that he did not have an opportunity to present at the [original] hearing," and that even if relator had presented such evidence, it was insufficient to change the outcome.

Relator died during the pendency of this appeal. Because the issue is whether benefits were "due and payable" at the time of his death, this appeal survives relator's death and is not subject to automatic dismissal. *See* Minn. Stat. § 268.087 (2010) (if unemployment benefits are "due and payable" at the time of the applicant's death, the benefits must be paid to the personal representative of relator's estate, or, if the estate lacks a personal representative, to the next of kin upon proper application).

## D E C I S I O N

This court may reverse a ULJ decision if it is "made upon unlawful procedure," "unsupported by substantial evidence," or is "arbitrary and capricious." Minn. Stat. § 268.105, subd. 7(d)(3), (5)-(6) (2010). Whether an employee engaged in employment misconduct is a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). Whether specific conduct amounts to misconduct is a question of law subject to de novo review, *id.*, but "[w]hether the employee committed a particular act is a question of fact." *Brisson v. City of Hewitt*, 789 N.W.2d 694, 696 (Minn. App. 2010) (quotation omitted). We view questions of fact in

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<sup>1</sup>Although relator refers to his case being decided by two ULJ's, the same ULJ considered both relator's appeal from the original determination of ineligibility and relator's request for reconsideration, as required by Minn. Stat. § 268.105, subd. 2(e) (2010).

the light most favorable to the ULJ's decision and defer to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. 2006).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Misconduct is defined as “any intentional, negligent, or indifferent conduct . . . that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect . . . or (2) a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2010). An employee's failure to abide by the employer's reasonable policies ordinarily constitutes employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

In his four-sentence brief filed with this court, relator claims that he was unaware that relevant evidence “had to be in writing” until after the first ULJ hearing, that he later obtained written evidence “confirm[ing] the illness [he] had at the time of the incident,” and that the ULJ would have ruled in his favor if the record included that evidence. Relator does not challenge on appeal the ULJ's determination that his conduct constituted employment misconduct. There is little doubt that relator's conduct of pushing the truck driver with a forklift and swearing at the driver constituted employment misconduct. *See Potter v. N. Empire Pizza, Inc.*, 805 N.W.2d 872, 876, 878 (Minn. App. 2011) (affirming a ULJ conclusion that “poking a coworker in the ribcage” constituted employment misconduct, and stating that “violence in the workplace, however minor, is a serious violation of an employer's reasonable expectations”), *review denied* (Minn. Nov. 15,

2011); *Isse v. Alamo Rent-A-Car*, 590 N.W.2d 137, 139 (Minn. App. 1999) (ULJ conclusion that swearing at, grabbing, and pushing a coworker against a wall constituted employment misconduct), *review denied* (Minn. Apr. 20, 1999); *see also Shell v. Host Int'l (Corp)*, 513 N.W.2d 15, 17 (Minn. App. 1994) (“[b]ecause violent behavior interferes with the normal operations of a business, it constitutes misconduct”). The fact that relator was previously warned about his behavior and violated several of the employer’s policies when he acted as he did lends further support to the conclusion that relator committed misconduct. *See Schmidgall*, 644 N.W.2d at 805.

Relator appears to argue that even if his conduct amounted to misconduct, it was excused under Minn. Stat. § 268.095, subd. 6(b)(1) (2010), which excludes from the statutory definition of misconduct “conduct that was a consequence of the applicant’s mental illness or impairment.” At the ULJ hearing, relator referred to being diagnosed with Korsakoff’s Syndrome and Wernicke’s Syndrome, and he described some of the purported symptoms for these syndromes. However, relator failed to offer any evidentiary link between his claimed illnesses and the conduct that led to his dismissal. When asked by the ULJ about why he provided no evidentiary support for his contention that the incident was a consequence of his mental illness or impairment, relator replied, “I don’t know[.]” Further, in his request for reconsideration, relator failed to include any evidence that would change the outcome of the ULJ’s original decision. Without such a submission, the ULJ was under no duty to order an evidentiary reconsideration hearing or to alter its original decision. *See Minn. Stat. § 268.105, subd. 2(c)* (2010). The record

includes substantial evidence to support the ULJ's decision that relator was lawfully dismissed from his employment because he committed misconduct.

**Affirmed.**