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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1088**

James M. Hoye,
Relator,

vs.

Automotion of Maplewood Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 8, 2008
Affirmed
Wright, Judge**

Minnesota Department of Employment and Economic Development
File No. 904 07

James M. Hoye, 1228 Galtier Street, St. Paul, MN 55117 (pro se relator)

Automotion of Maplewood, 1728 Rice Street, Maplewood, MN 55113 (respondent)

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Development, 1st National Bank Building, 332 Minnesota Street, Suite E200, St. Paul,
MN 55101 (for respondent department)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Wright,
Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Relator challenges the unemployment law judge's determination that relator is disqualified from receiving unemployment benefits because he was discharged from his employment for employment misconduct. We affirm.

FACTS

Relator James Hoye was employed as an automotive technician with respondent Automotion of Maplewood, Inc. (Automotion). At approximately 7:20 a.m. on Friday, December 8, 2006, Hoye called Automotion's owner, Daniel Balthazor, and told Balthazor that he was not feeling well. Balthazor told Hoye that he needed Hoye's help that day, and Hoye replied that he would either report to work or call back by 9:00 a.m. Hoye did neither. Consequently, Hoye's employment was terminated when he returned to work the following Tuesday.

Hoye applied for unemployment benefits. An adjudicator with respondent Department of Employment and Economic Development (the department) determined that Hoye was discharged from his employment for employment misconduct and, therefore, is disqualified from receiving unemployment benefits. Hoye appealed, and a telephonic hearing was held before an unemployment law judge (ULJ). In his findings of fact and decision, the ULJ determined that Hoye engaged in employment misconduct and, therefore, is disqualified from receiving unemployment benefits. Hoye requested

reconsideration, and a different ULJ affirmed the earlier decision.¹ This certiorari appeal followed.

DECISION

Hoye challenges the ULJ's determination that he was discharged for employment misconduct. Whether an employee was discharged for employment misconduct presents a mixed question of law and fact. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 27 (Minn. App. 2007). Whether the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). We will not disturb the ULJ's factual findings on appeal if, when viewed in the light most favorable to the decision, "the evidence substantially sustains them." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether a particular act constitutes employment misconduct, however, presents a question of law, which we review de novo. *Id.*

An employee who is discharged for employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). "Employment misconduct" is "intentional, negligent, or indifferent" conduct that clearly displays a serious violation of the standards of behavior that an employer has a right to expect of the employee or that clearly displays a lack of concern for the employment. *Id.*, subd. 6(a) (2006). An employee's conduct is intentional if it is "deliberate and not

¹ Ordinarily, a request for reconsideration must be decided by the same ULJ who rendered the original findings and decision. Minn. Stat. § 268.105, subd. 2(e) (2006). But because the ULJ who heard Hoye's case initially was no longer employed by the department, a different ULJ decided the request for reconsideration. *Id.*

accidental.” *Houston v. Int’l Data Transfer Corp.*, 645 N.W.2d 144, 149 (Minn. 2002) (citation omitted).

“An employer has the right to establish and enforce reasonable rules governing absences from work.” *Wichmann*, 729 N.W.2d at 28. It is reasonable for an employer to require its employees to give notice if they will be absent. *See Winkler v. Park Refuse Serv., Inc.*, 361 N.W.2d 120, 123 (Minn. App. 1985) (stating that employer reasonably can expect employee to keep employer apprised of whereabouts). “Without this information, an employer cannot adequately plan its staffing needs.” *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986) (quotation omitted). Indeed, we have held that, “except in certain limited circumstances, an employee engages in misconduct if he is absent *even once* without notifying his employer.” *Id.* at 418 (emphasis added). Hoye was aware that his employer required him to provide notice of his absences. In fact, he had been reprimanded for a previous “no-call, no-show” in late July, less than six months earlier.

Hoye argues that his absence on December 8, 2006 was due to illness and, therefore, was not employment misconduct. The definition of “employment misconduct” specifically excludes “absence because of illness or injury *with proper notice to the employer.*” Minn. Stat. § 268.095, subd. 6(a) (emphasis added). But the ULJ found that Hoye did not give proper notice to his employer when he spoke to Balthazor at approximately 7:20 a.m. According to Balthazor, Hoye did not say that he would be absent. Rather, Hoye said that he would be either arriving late or that he would call back.

Hoye neither arrived for work nor called back to inform his employer that he would be absent.

Although Hoye claims that he gave proper notice, denying that he told Balthazor that he would either be in or call back, the ULJ found Balthazor's testimony "more persuasive" than Hoye's. Credibility determinations are the exclusive province of the ULJ. *Munro Holding, LLC v. Cook*, 695 N.W.2d 379, 384 (Minn. App. 2005). When the ULJ's decision provides the necessary support for any significant credibility determinations, Minn. Stat. § 268.105, subd. 1(c) (2006), we defer to those determinations if they are supported by substantial evidence, *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 533 (Minn. App. 2007). Here, the ULJ considered Hoye's version of the events in light of a similar incident involving Hoye less than six months before he was discharged. In late July 2006, Hoye called to advise his employer that he was drunk and, therefore, would be late to work. According to Hoye's message, he would call back the following morning, after he had gotten some sleep. But like the December 8 incident, Hoye neither called back nor reported to work. When Hoye returned, Balthazor warned Hoye that he would be terminated if it happened again. Thus, there is substantial evidence to support the ULJ's finding that Hoye committed the acts alleged by his employer. Hoye's argument that the second ULJ erred by relying on this credibility determination when affirming the first ULJ's decision fails for the same reason.

In addition to his unexcused absence, the ULJ also made findings regarding Hoye's inadequate performance in diagnosing and servicing vehicles. Hoye correctly argues that inadequate performance does not constitute employment misconduct. *See Bray v. Dogs & Cats Ltd. (1997)*, 679 N.W.2d 182, 185 (Minn. App. 2004) (reversing ULJ's finding of employment misconduct when "relator attempted to be a good employee but just wasn't up to the job"). But any error in relying on these findings is harmless because Hoye's failure to notify his employer that he would be absent is a sufficient independent basis for the ULJ's determination that Hoye was discharged for employment misconduct.

Affirmed.