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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0299**

Fred Wiggins,
Relator,

vs.

Arctic Fox LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed October 28, 2013
Affirmed
Bjorkman, Judge**

Department of Employment and Economic Development
File No. 30400882-3

Fred Wiggins, St. Cloud, Minnesota (pro se relator)

Arctic Fox LLC, Delano, Minnesota (respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Relator challenges the unemployment-law judge's (ULJ) determination that he is ineligible for benefits because he was discharged for employment misconduct after many unreported absences. We affirm.

FACTS

Relator Fred Wiggins worked for respondent Arctic Fox LLC for about seven months until he was terminated on October 17, 2012, for excessive unreported absences. Wiggins applied to respondent Minnesota Department of Employment and Economic Development (DEED) for unemployment benefits. DEED determined that Wiggins is ineligible for benefits because he was discharged for employment misconduct. Wiggins appealed, and the ULJ conducted an evidentiary hearing.

Evidence adduced during the hearing shows that Wiggins missed many days of work, including some days where he did not report in advance that he would be absent for his shift, as required by Arctic Fox's policy. Wiggins missed work for many reasons, including his unreported absences on September 24-26, 2012, while he was incarcerated for driving without a license and without insurance. Wiggins received three written warnings about his absences, the last on September 27, 2012. He was absent again on October 17, 2012, because of transportation issues. Arctic Fox terminated his employment based on the number of unreported absences.

The ULJ determined that Wiggins is ineligible for benefits because he was discharged for employment misconduct. The decision was affirmed on reconsideration. This certiorari appeal follows.

D E C I S I O N

We review a ULJ's decision to determine whether a party's substantial rights were prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence in view of the record as a whole or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2012). Whether Wiggins engaged in conduct that makes him ineligible for unemployment benefits is a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether an employee committed the act is an issue of fact, which this court reviews for substantial evidence, but whether the act constitutes employment misconduct is a legal question that we review de novo. *Id.*; see also Minn. Stat. § 268.105, subd. 7(d).

I. Substantial evidence supports the ULJ's finding that Wiggins was terminated for excessive absenteeism.

On appeal, we review the ULJ's factual findings in the light most favorable to the decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We defer to the ULJ's credibility determinations, and will not disturb findings that are supported by substantial evidence. *Id.*

Wiggins challenges the ULJ's finding that he had unreported absences, arguing that, with the exception of the three days he was incarcerated, he called in to report his absences. We are not persuaded. Artic Fox's attendance records show Wiggins had ten

unreported absences, and the ULJ found that several absences were unreported. Wiggins acknowledged that Artic Fox required him to call in on days that he was absent and he admitted that he did not do so on the three days that he was incarcerated. He contends that Artic Fox manipulated the absence log or did not record his telephone calls, but the ULJ expressly found that the testimony of the three Artic Fox representatives was more credible “because [it] was more specific as to the dates of the absences, and because it followed a more logical chain of events.” We defer to the ULJ’s credibility determinations. *Id.* In sum, substantial evidence supports the ULJ’s determination that Wiggins was terminated because of his unreported absences.

II. Wiggins’s conduct constitutes employment misconduct.

An employee is ineligible for unemployment benefits if he is discharged for employment misconduct, which refers to any intentional, negligent, or indifferent conduct, on or off the job that displays “a serious violation of the standards of behavior the employer has the right to reasonably expect” or “a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subds. 4(1), 6(a) (2012). Whether an employee’s absenteeism is a serious violation of the employer’s expected standards depends on the circumstances of the case. *Stagg*, 796 N.W.2d at 316. Absence due to circumstances within an employee’s control, including incarceration, is sufficient misconduct to deny benefits. *See Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 291 (Minn. 2006); *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 44 (Minn. App. 1984) (affirming that three-day absence from work for incarceration is misconduct).

Wiggins argues that he called in when he missed work due to his mental illness, and that those absences are not misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(1) (2012). But the ULJ found that Wiggins was absent without notice on other days for reasons unrelated to his health that are sufficient to establish misconduct.¹ *See Jenkins*, 721 N.W.2d at 291. And the ULJ found that Wiggins's absences while incarcerated were avoidable because Wiggins was aware that it was illegal to drive without a valid license or insurance but chose to do so anyway.

Because absence from work under circumstances that an employee could avoid is sufficient misconduct to deny benefits, the ULJ did not err by determining Wiggins is not eligible for benefits.

Affirmed.

¹ Wiggins also argues that the ULJ denied his claim because he did not have a valid driver's license, and that this is not misconduct. There is no evidence to support this assertion because the ULJ found Wiggins was terminated for attendance issues, not because he lacks a driver's license.