

No. A08-2057

State of Minnesota
In Court of Appeals

STEVEN M. HANSON,

Relator,

vs.

CRESTLINER INC.,

Respondent,

and

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT,

Respondent.

RESPONDENT-DEPARTMENT'S BRIEF AND APPENDIX

STEVEN M. HANSON
8101 OAKWOOD AVENUE
OTSEGO, MINNESOTA 55330
(763) 421-5618
Relator - Pro se

CRESTLINER INC.
609 13TH AVENUE NE
LITTLE FALLS, MINNESOTA 56345-2221
(320) 616-5603
Respondent- Employer -Pro se

Lee B Nelson (#77999)
Katrina I. Gulstad (#0322891)
MINNESOTA DEPARTMENT OF EMPLOYMENT
AND ECONOMIC DEVELOPMENT
1ST NATIONAL BANK BUILDING
332 MINNESOTA STREET, SUITE E200
ST. PAUL, MINNESOTA 55101-1351
(651) 259-7117
Attorneys for Respondent-Department

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

I. LEGAL ISSUE1

II. STATEMENT OF THE CASE1

III. DEPARTMENT’S RELATIONSHIP TO THE CASE.....2

IV. STATEMENT OF FACTS3

V. ARGUMENT4

A. STANDARD OF REVIEW4

B. ARGUMENT FOR INELIGIBILITY5

C. HANSON’S ARGUMENTS8

VI. CONCLUSION.....9

APPENDIX.....10

TABLE OF AUTHORITIES

CASES

<i>Del Dee Foods, Inc. v. Miller</i> , 390 N.W. 2d 415 (Minn. App. 1986)-----	7
<i>Duc Van Luu v. Carley Foundry Co.</i> , 374 N.W. 2d 582 (Minn. App. 1985) -----	7
<i>Imprint Technologies, Inc. v. Commissioner of Economic Security</i> , 535 N.W.2d 372 (Minn. App. 1995)-----	8
<i>Jenson v. Dep't of Econ. Sec.</i> , 617 N.W.2d 627 (Minn. App. 2000), <i>review denied</i> (Minn. Dec. 20, 2000)-----	5
<i>Lolling v. Midwest Patrol</i> , 545 N.W.2d 372 (Minn. 1996)-----	5
<i>Petterssen v. Commissioner of Employment Services</i> , 236 N.W.2d 168 (Minn. 1975)-----	8
<i>Scheunemann v. Radisson S. Hotel</i> , 562 N.W.2d 32 (Minn. App. 1997)-----	5
<i>Skarhus v. Davannis</i> , 721 N.W.2d 340 (Minn. App. 2006)-----	5
<i>Vargas v. Northwest Area Foundation</i> , 673 N.W. 2d 200 (Minn. App. 2004)-----	6

STATUTES

Minn. Stat. § 116J.401, subd. 1(18) (2004) -----	2
Minn. Stat. § 268.069, subd. 2 (2008)-----	2
Minn. Stat. § 268.095, subd. 4 (2008)-----	6
Minn. Stat. § 268.095, subd. 6 (2008)-----	6
Minn. Stat. § 268.105, subd. 7 (2008)-----	2, 4, 5

RULES

Minn. R. Civ. App. P. 115 -----	2
---------------------------------	---

I. LEGAL ISSUE

Employees, who are discharged due to employment misconduct, that is, conduct that shows a serious violation of the employer's reasonable expectations, or conduct that shows a substantial lack of concern for their employment, are ineligible for all unemployment benefits. Steven Hanson did not report for work or call in on the day he was due back after serving a three-day suspension for attendance problems. While he may have had a good reason for not reporting for work, did his failure to call in amount to employment misconduct?

The Unemployment Law Judge found that Hanson was discharged for reasons of employment misconduct and that he was ineligible for all unemployment benefits.

II. STATEMENT OF THE CASE

This case involves whether Relator Steven M. Hanson is entitled to unemployment benefits. Hanson established a benefit account with the Minnesota Department of Employment and Economic Development (the "Department"). A Department adjudicator initially determined that Hanson quit employment to take care of his mother and held him ineligible for all unemployment benefits.¹ Hanson appealed that determination, and a de novo hearing was held. A Department Unemployment Law Judge ("ULJ") modified the initial determination, finding that

¹(E1) Transcript references will be indicated as "T." Exhibits in the record will be "Ex," with the number following.

Hanson was discharged from employment because of employment misconduct, and that he was ineligible for unemployment benefits.² Hanson filed a request for reconsideration with the ULJ, who affirmed the decision that Hanson was discharged for employment misconduct.³

This matter comes before the Minnesota Court of Appeals on a writ of certiorari obtained by Hanson under Minn. Stat. § 268.105, subd. 7(a) and Minn. R. Civ. App. P. 115.

III. DEPARTMENT'S RELATIONSHIP TO THE CASE

The Department is charged with the responsibility of administering and supervising the unemployment insurance program.⁴ Unemployment benefits paid are paid from state funds, the Minnesota Unemployment Insurance Trust Fund, not from the employer or employer funds.⁵ The Department's interest therefore carries over to the Court of Appeals' interpretation and application of the Minnesota Unemployment Insurance Law. So, the Department is considered the primary responding party to any judicial action involving an Unemployment Law Judge's decision.⁶

The Department does not represent the employer in this proceeding and this brief should not be considered advocacy for Crestliner, Inc.

² Appendix to Department's Brief, A5-A8

³ Appendix, A1-A4

⁴ Minn. Stat. § 116J.401, subd. 1(18).

⁵ Minn. Stat. § 268.069, subd. 2.

⁶ Minn. Stat. § 268.105, subd. 7(e).

IV. STATEMENT OF FACTS

Steven Hanson started working for Crestliner, Inc. in mid-May 2007 as a boat finisher, working four 10-hour days a week.⁷

On August 14, 2008, Hanson called in saying he was looking for assisted living for his mother.⁸ On the 18th, he called, saying he wouldn't be in, and on the 19th he called saying he'd be in late, because his mother was going in a nursing home.⁹

On August 20th, Hanson met with his supervisor and said that his mother had fallen, and he asked for three days off.¹⁰ His supervisor said he was going to suspend Hanson for three days because of attendance problems, writing up the paperwork to suspend Hanson for the 20th, 21st, and 25th.¹¹ At the end of the conversation, Hanson said he would be at work on the 26th, and his supervisor said that if anything changes "just let me know." As they shook hands, Hanson said he'd be there because he needed the money.¹²

On August 25, Hanson called and spoke with the human resources manager about accessing his 401K plan, and she said he couldn't do that because he was employed.¹³

⁷ T.6, 9

⁸ T.9

⁹ T.9

¹⁰ T.4

¹¹ T.12, 15

¹² T.12, 17

¹³ T.14

Hanson did not report for work on August 26, and he did not call in.¹⁴ His mother had fallen again and was taken to a hospital.¹⁵

Because Hanson had not reported for work or called in on August 26, Crestliner processed termination papers and mailed those to Hanson.¹⁶ Hanson never subsequently contacted Crestliner.¹⁷

Hanson later applied for unemployment benefits indicating that he quit his employment with Crestliner in order to care for his mother.¹⁸

V. ARGUMENT

A. STANDARD OF REVIEW

The standard of review for unemployment insurance matters is set out in the statute as follows:

(d) The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are:

- (1) in violation of constitutional provisions;
- (2) in excess of the statutory authority or jurisdiction of the department;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) unsupported by substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious.¹⁹

¹⁴ T.12, 13

¹⁵ T.12

¹⁶ T.14, 17

¹⁷ T.8, 12

¹⁸ T.6, 8; Ex. 3

¹⁹ Minn. Stat. § 268.105, subd. 7(d) (2008).

The Court of Appeals held in *Skarhus v. Davannis*, that the issue of whether an employee committed employment misconduct is a mixed question of fact and law.²⁰ Whether the employee committed a particular act is a fact question.²¹ And whether the employee's acts constitute employment misconduct is a question of law.²²

The *Skarhus* Court reiterated the long-held standard that it views the ULJ's factual findings "in the light most favorable to the decision,"²³ and gives deference to the ULJ's credibility determinations.²⁴ The Court also stated that it will not disturb the ULJ's factual findings when the evidence substantially sustains them.²⁵ The Court, however, reviews de novo the legal question of whether the employee's acts constitute employment misconduct.²⁶

B. ARGUMENT FOR INELIGIBILITY

An applicant who is discharged from employment is ineligible for benefits only if the conduct for which the applicant was discharged amounts to employment misconduct. The statute provides:

²⁰ 721 N.W.2d 340, 344 (Minn. App. 2006).

²¹ *Id.* (citing *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997)).

²² *Id.*

²³ *Id.* (citing *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996)).

²⁴ *Id.* (citing *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000)).

²⁵ *Id.* (citing Minn. Stat. §268.105, subd. 7(d)).

²⁶ *Id.* (citing *Scheunemann*, 562 N.W.2d at 34).

Subd. 4. **Discharge.** An applicant who was discharged from employment by an employer is ineligible for all unemployment benefits according to subdivision 10 only if:

(1) the applicant was discharged because of employment misconduct as defined in subdivision 6, or

(2) the applicant was discharged because of aggravated employment misconduct as defined under subdivision 6a.²⁷

The definition of "employment misconduct" reads:

"Subd. 6. **Employment misconduct defined.**

(a) Employment misconduct means 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 the employment.

Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

* * *

(e) The definition of employment misconduct provided by this subdivision is exclusive and no other definition applies."²⁸

In *Vargas v. Northwest Area Foundation*, the Court of Appeals, citing a number of statutory provisions, stated that employment misconduct is determined based upon a preponderance of the available evidence without regard to any burden of proof.²⁹ A preponderance of the available evidence shows that Hanson was discharged for misconduct and is ineligible for all unemployment benefits.

²⁷ Minn. Stat. §268.095, subd. 4 (2008).

²⁸ Minn. Stat. §268.095, subd. 6 (2008).

²⁹ 673 N.W. 2d 200 (Minn. App. 2004).

Hanson, on August 20, when he shook hands with his supervisor indicated he would be reporting for work on August 26. His supervisor indicated that if there was any problem, let him know. While the issues in dealing with his mother are understandable, Hanson didn't even call Crestliner to tell them he wouldn't be in. This had occurred just after Hanson had been suspended for three days because of attendance problems. Hanson's testimony is that he knew he would be discharged. That is probably why when Hanson originally filed for benefits, he indicated that he quit, because he knew what the repercussions would be, a loss of his employment.

In *Del Dee Foods, Inc. v. Miller*, the Court of Appeals held that even a single unexcused absence from work may constitute misconduct when an employee specifically tells the employer they will be in to work and then fails to report.³⁰ In the case of *Duc Van Luu v. Carley Foundry Co.*, the Court of Appeals held that an applicant, who perceived suspension for unexcused absence, who then was arrested and failed to call in, committed employment misconduct because regardless of his reasons for not reporting for work he still had an obligation to notify his employer of his inability to report for work.³¹

Hanson violated the standards of behavior Crestliner had a right to expect of him as an employee when he failed to call in on August 26. Additionally, his failure to call in shows a lack of concern for the employment. Given that he was

³⁰ 390 N.W. 2d 415 (Minn. App. 1986)

³¹ 374 N.W. 2d 582 (Minn. App. 1985)

just coming off a three-day suspension for attendance problems, his conduct amounts to employment misconduct under the Minnesota Unemployment Insurance Law.

C. HANSON'S ARGUMENTS

Hanson's informal brief sets out a conversation he contends he had with the human resources director, but there is nothing in the record to support that. The only thing referenced in the record is a conversation Hanson had with the HR director on August 25 about getting a payout of his 401K. Because there is no support in the record for his contentions regarding such a conversation, it must be disregarded. As the Court of Appeals held in *Imprint Technologies, Inc. v. Commissioner of Economic Security*, the law is clear that matters not received into evidence at the hearing may not be considered on appeal before the Court of Appeals.³²

Hanson, on appeal before the Court of Appeals, for the first time raises an issue under the Family and Medical Leave Act (FMLA). Because it is raised for the first time on appeal before the Court of Appeals, it should be disregarded.³³ Additionally, the record shows that when Hanson, on August 20, told his direct supervisor he had to attend to his mother, he was asked how much time off he needed, and he indicated three days. If Hanson needed longer, he could have

³² 535 N.W.2d 372 (Minn. App. 1995).

³³ See, *Petterssen v. Commissioner of Employment Services*, 236 N.W.2d 168 (Minn. 1975).

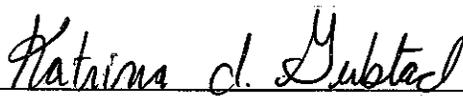
asked for it. It was at that point that the supervisor indicated that he was going to suspend Hanson for the three days. While he didn't get unpaid leave of three days under the FMLA, he did get three days off. But regardless, any issue regarding the FMLA does not excuse Hanson's failure to call in on August 26, a day he indicated he would be in to work.

The employer knew nothing about the additional problems Hanson's mother encountered. He didn't keep them apprised. It is this failure to communicate that displays clearly a serious violation of the standards of behavior Crestliner had a right to reasonably expect.

VI. CONCLUSION

The Unemployment Law Judge correctly concluded that Hanson was discharged for employment misconduct. The Department requests that the Court affirm the agency decision.

Dated this 25th day of March, 2009.



Katrina I. Gulstad (# 0322891)
Lee B. Nelson (#77999)

Department of Employment and
Economic Development
1st National Bank Building
332 Minnesota Street, Suite E200
Saint Paul, Minnesota 55101-1351
(651) 259-7117
Attorneys for Respondent Department