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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0637**

Shayne Hastings,
Relator,

vs.

Midwest Unlimited, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed January 13, 2014
Affirmed
Bjorkman, Judge**

Department of Employment and Economic Development
File No. 30774926-3

Shayne Hastings, Holmen, Wisconsin (pro se relator)

Midwest Unlimited, Inc., Platte City, Missouri (respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Relator challenges the determination by the unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Relator Shayne Hastings began working as a full-time driver for respondent Midwest Unlimited, Inc. in August 2011. Midwest is a contract carrier for FedEx and follows FedEx's criteria for driver eligibility and disqualification. The criteria include disqualifying drivers who have operated any vehicle while under the influence of alcohol or a controlled substance, or have refused to submit to or failed to pass a drug or alcohol screening test requested by a law-enforcement official in connection with the operation of any vehicle. Midwest incorporates these driver-disqualification criteria into its employee handbook.

Late in the evening on November 16, 2012, Hastings consumed ten cans of beer, then drove to a convenience store and decided to "take a nap in the parking lot." Shortly after midnight, police discovered Hastings sleeping in the driver's seat of his vehicle. Police arrested Hastings and ultimately obtained a blood sample, which revealed an alcohol concentration of .16. Hastings was charged with driving while impaired and refusal to submit to chemical testing.

Hastings reported the incident to Midwest, which immediately removed Hastings from his driving position and reported the incident to FedEx. FedEx confirmed that

Hastings met the driver-disqualification criteria and should not be permitted to drive for Midwest. But because the incident occurred at a peak time in Midwest's delivery schedule, Midwest permitted Hastings to continue his employment in a non-driving capacity to assist another driver with Hastings's routes. On January 11, 2013, once the peak season was over, Midwest discharged Hastings.

Hastings applied for unemployment benefits from respondent Minnesota Department of Unemployment and Economic Development (DEED). DEED determined that Hastings was discharged for employment misconduct and is ineligible for benefits. Hastings appealed. After a hearing, the ULJ found that Hastings was discharged because he failed an alcohol screening test requested by law enforcement in connection with driving, in violation of Midwest's policies. The ULJ determined that Hastings's action constitutes employment misconduct and that he is ineligible for unemployment benefits.¹ Hastings sought reconsideration, and the ULJ affirmed. This certiorari appeal follows.

D E C I S I O N

We review a ULJ's decision to determine whether it is "(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." Minn. Stat. § 268.105, subd. 7(d) (2012).

¹ Hastings characterizes the ULJ's decision as finding that Hastings was discharged because he "committed a crime." This language is only used in DEED's initial ineligibility determination and does not appear in the ULJ's decision.

An employee who is discharged for “employment misconduct” is not eligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Employment misconduct is “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2012). Generally, an employee’s failure or refusal to follow the employer’s reasonable policies and requests is employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

Whether an employee committed a particular act is a fact question, which we review for substantial evidence, giving deference to the ULJ’s credibility determinations. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). But whether an act constitutes employment misconduct is a question of law, which we review de novo. *Id.*

Hastings’s appeal focuses on the ULJ’s factual determinations. Specifically, he challenges the findings that he failed the alcohol screening test and that Midwest discharged him because of that failure. Hastings argues that these findings are based on insufficient or hearsay evidence and are inconsistent with his testimony that FedEx has historically permitted drivers to continue driving under similar circumstances until they are found guilty of a crime. We are not persuaded. A ULJ may rely on any competent and credible evidence in finding facts, including hearsay, and we defer to a ULJ’s findings so long as substantial evidence supports them. *Id.* at 344-45. Ample evidence supports the challenged findings.

First, Hastings acknowledged that he drank ten beers before driving to a convenience store where the police officers found him. And he testified that he provided a blood sample at the officers' request, which revealed an alcohol concentration above the legal limit. This undisputed evidence supports the finding that Hastings failed an alcohol test requested by law enforcement in connection with driving.²

Second, a Midwest representative testified that Midwest must adhere to FedEx's driver eligibility and disqualification policies to maintain its contract with FedEx. The representative also stated that Midwest directly informs its drivers of FedEx's requirements by incorporating them into its employee handbook. The ULJ found this testimony credible. The record also contains a portion of Midwest's employee handbook, which lists among disqualifying events failure to pass an alcohol screening test requested by a law-enforcement official in connection with the operation of any vehicle. Midwest provided Hastings a copy of the employee handbook, including the list of disqualifying events. The ULJ weighed this evidence, along with Hastings's testimony concerning FedEx's past treatment of other drivers under similar circumstances, and determined that Midwest discharged Hastings because he was disqualified from driving. Substantial evidence supports this finding.

² Hastings refers to "expert witness" testimony indicating that his alcohol concentration may not have exceeded the legal limit at the time that he drove to the convenience store. There is no such testimony in the record before us. Nor would any such testimony necessarily preclude a finding, based on all the circumstances, that Hastings failed an alcohol screening test requested by law enforcement in connection with operating a vehicle.

In sum, the record contains substantial evidence that Midwest discharged Hastings because he violated Midwest's reasonable policies regarding driving conduct off the job. Accordingly, we conclude the ULJ did not err by determining that Hastings was discharged for employment misconduct and is ineligible for unemployment benefits.

Affirmed.