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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1666**

Adam Jungwirth,
Relator,

vs.

Hubbs Construction Inc.,
Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed June 29, 2010
Affirmed
Stauber, Judge**

Department of Employment and Economic Development
File No. 22393017-4

Adam J. Jungwirth, Wyoming, Minnesota (pro se relator)

Corie J. Tarara, Seaton, Beck, Peters, Minneapolis, Minnesota (for respondent employer)

Lee B. Nelson, Britt K. Lindsay-Waterman, Minnesota Department of Employment and
Economic Development, St. Paul, Minnesota (for respondent DEED)

Considered and decided by Peterson, Presiding Judge; Lansing, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

This is an appeal from a decision by an unemployment law judge (ULJ) that
relator was discharged for employment misconduct and ineligible for unemployment

benefits because, during his probationary period, relator was arrested for test refusal and did not call his employer personally to report that he would be absent from work due to his incarceration. Relator argues that (1) he did notify his foreman that he would be unable to attend work and (2) the procedures for discipline in the employee handbook should have applied to him. We affirm.

FACTS

On September 4, 2007, relator Adam Jungwirth began working as a laborer for respondent Hubbs Construction, Inc. As a new employee, relator was placed on a 90-day probationary period. In order to be considered a full-time employee, the new employee must successfully complete the 90-day probationary period without incident. According to Hubbs Construction's president, Richard Hubbs, after the new employee completes the probationary period, Hubbs Construction's employee handbook becomes applicable. The employee handbook includes an attendance policy that allows for a warning after the first unreported absence.

During his probation period, relator was arrested and jailed for refusing to submit to a breathalyzer test. Relator was still in jail on Monday morning, October, 8, 2007, the time of his next scheduled shift. Relator's employment with Hubbs Construction was subsequently terminated because relator failed to report for work and failed to call to report his absence. Relator was ultimately convicted of a gross misdemeanor related to his arrest for test refusal.

Relator established a benefit account with respondent Minnesota Department of Employment and Economic Development, and a department adjudicator initially

determined that relator was ineligible for unemployment benefits because he had been discharged for employment misconduct. Relator appealed that determination and a de novo hearing was held on the matter.

At the hearing, Hubbs testified that on Monday, October 8, 2007, relator failed to report for his scheduled shift. Hubbs claimed that relator did not call to report his absence, nor did anyone call on his behalf. In contrast, relator testified that he had one phone call from jail, and that he called his girlfriend. According to relator, his “girlfriend’s sister’s boyfriend was the foreman” at Hubbs Construction at the time of his discharge, and his girlfriend informed the foreman, who, in turn, informed Richard Hubbs that relator was not going to be at work because he was in jail.

Following the hearing, the unemployment law judge (ULJ) determined that relator was discharged for employment misconduct because he failed to report to work and failed to notify his employer of his pending absence. Thus, the ULJ concluded that relator was not eligible for unemployment benefits. Relator subsequently filed a request for reconsideration with the ULJ, who affirmed. This certiorari appeal followed

D E C I S I O N

This court may reverse or modify the decision of a ULJ if the substantial rights of the petitioner may have been prejudiced because the ULJ’s findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4)-(5) (Supp. 2007). Substantial evidence means “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence;

(4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. For Env'tl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Employees discharged for misconduct are ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). “Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed the alleged act is a fact question. *Scheunemann v. Radisson South Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court defers to the ULJ’s credibility determinations and findings of fact. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But whether a particular act constitutes employment misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

Employment misconduct is defined as

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.

Minn. Stat. § 268.095, subd. 6(a) (Supp. 2007).

Relator argues that the ULJ erred in concluding that he was discharged for employment misconduct. Although relator admits that he missed work on October 8, 2007, due to his incarceration, he contends that he called the foreman and told him that he would not be able to attend work on that date.¹ Relator asserts that the foreman then apprised Hubbs of the situation. Thus, relator argues that he is entitled to unemployment benefits.

The employer has a right to expect an employee to work when scheduled. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. App. 1984). In fact, “a single absence from work may constitute misconduct.” *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986). Moreover, “[a]bsence from work under circumstances within the control of the employee, including incarceration following a conviction for a crime, has been determined to be misconduct sufficient to deny benefits.” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006); *see also Smith*, 343 N.W.2d at 45 (holding that an employee’s unavailability due to incarceration “amounted to disregard of attendance standards which his employer had a right to expect him to obey.”). Similarly, an employee’s failure to

¹ Attached to relator’s brief is an affidavit from Terrance Parenteau, the foreman at Hubbs Construction at the time of relator’s discharge. In the affidavit, Parenteau claims that he informed Hubbs that relator would be absent due to his arrest. The affidavit was not part of the record below and, therefore, it is not properly before this court. *See Appelhof v. Comm’r of Jobs & Training*, 450 N.W.2d 589, 591 (Minn. App. 1990) (stating that “evidence which was not received below may not be reviewed as part of the record on appeal”).

give proper notice of an absence constitutes disqualifying misconduct. *Edwards v. Yellow Freight Sys.*, 342 N.W.2d 357, 359 (Minn. App. 1984).

Here, it is undisputed that relator was in jail on October 8, 2007, and that his incarceration caused him to be absent from work on that date. It is also undisputed that relator was later convicted of a gross misdemeanor related to the offense that caused him to miss work. Moreover, Hubbs testified that relator did not call to report his absence, nor did anyone call on his behalf. Relator's conduct caused him to be incarcerated during the time he was supposed to be at work, and his failure to notify his employer of his pending absence was also the result of his own conduct. Relator's failure to report to work due to incarceration without notifying his employer displays clearly a substantial lack of concern for his employment. Although relator contends that he called the foreman who, in turn contacted Hubbs, relator's claim is inconsistent with his testimony at the de novo hearing. At the hearing, relator testified that he called his girlfriend from jail, and his girlfriend relayed the information to the foreman, who, in turn, told Hubbs that relator would not be at work on October 8, 2007. The ULJ apparently found relator's testimony to be incredible and this court defers to the ULJ's credibility determinations. *See Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Therefore, the ULJ did not err in concluding that relator was discharged for employment misconduct.

Relator also contends that his absence should not have resulted in termination because Hubbs Construction's attendance policy states that a first offense will only result in a verbal warning. But Hubbs testified that the policy did not apply to relator because

relator was still on probation. Moreover, an employer is not required to give a warning before discharging an employee for employment misconduct. *Auger v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981). Thus, the ULJ did not err in concluding that relator was not entitled to unemployment benefits.

Affirmed.