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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1691**

Fidelis Akonu,  
Relator,

vs.

Wells Fargo Bank NA,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed August 10, 2010  
Affirmed  
Willis, Judge\***

Department of Employment and Economic Development  
File No. 22528232-3

Fidelis Akonu, Lakeville, Minnesota (pro se relator)

Joan Harris, Senior Counsel, Wells Fargo & Company, Minneapolis, Minnesota (for  
respondent Wells Fargo Bank NA)

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

Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Willis,  
Judge.

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\*Retired judge of the Minnesota Court of Appeals, serving by appointment  
pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**WILLIS**, Judge

By writ of certiorari, relator challenges the decision of an unemployment-law judge that he was discharged for employment misconduct, that he was therefore ineligible for unemployment benefits, and that he must repay unemployment benefits he received to which he was not entitled. Because the ULJ's findings are supported by substantial evidence and the ULJ correctly applied the law, we affirm.

### FACTS

Relator Fidelis Akonu was employed as a work director by respondent Wells Fargo Bank from May 1, 2006, to April 20, 2009. Akonu, who was repeatedly late for work, was given a written warning in October 2008 in the form of a performance-improvement plan and a final written warning based on his tardiness in December 2008. Between January and April 20, 2009, Akonu had nine unexcused late arrivals at work, leading to his discharge for excessive tardiness.

Akonu applied for unemployment benefits, and the Minnesota Department of Employment and Economic Development (DEED) issued a determination of eligibility. Wells Fargo appealed, and, after a hearing, the ULJ ruled that Akonu had been discharged for misconduct based on excessive tardiness, that he was ineligible for unemployment benefits, and that he had been overpaid \$3,808 in unemployment benefits. The ULJ affirmed on reconsideration, and Akonu brought this certiorari appeal.

## DECISION

This court may affirm a ULJ's decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights were prejudiced because the findings, inferences, conclusions, or decision were erroneous as a matter of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (4), (5) (2008).

Whether an employee has engaged in employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Findings of fact are viewed in the light most favorable to the ULJ's decision and are upheld if they are supported by substantial evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether particular acts constitute employment misconduct is a question of law reviewed de novo by the appellate court. *Schmidgall*, 644 N.W.2d at 804.

An employee who is discharged for misconduct is not eligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). 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.

Minn. Stat. § 268.095, subd. 6(a) (2008). Misconduct does not include absences due to illness or injury with proper notice to the employer. *Id.*

An employer may establish and enforce reasonable rules governing employee absences, and refusal to abide by these policies generally constitutes misconduct.

*Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). “[C]ontinued tardiness, combined with several warnings, evidences disregard by the employee of the employer’s interest. It is a violation of standards of behavior which the employer [has] a right to expect of its employees.” *Evenson v. Omnetic’s*, 344 N.W.2d 881, 883 (Minn. App. 1984).

Akonu disputes a number of findings by the ULJ. First, he challenges the ULJ’s finding that his employer gave him warnings about his tardiness twice, arguing that he received a warning only once. The record shows that his manager gave him a written warning in the form of a performance-improvement plan in October 2008 and then gave him a final written warning in December 2008.

Next, Akonu asserts that his manager approved his late arrivals at work based on her knowledge of his health condition. Akonu’s manager excused his late arrivals due to illness, as well as those caused by bad weather. The ULJ found, based on relator’s own testimony, that some of his tardy arrivals occurred because he was just running late, and these were not excused.

Akonu next asserts that he notified his manager when he would be late, as she requested, for almost all of his instances of tardiness and that he stayed late on many occasions to make up for time lost from being late. The ULJ ruled that Akonu’s belief that his tardiness would be excused just because he notified his manager was not reasonable, especially after being warned on two previous occasions not to be late, as well as being reminded of company policy of being on time. Further, the ULJ ruled that if he was ignorant of the policy, he was willfully ignorant and appeared to have made no

attempt to understand the policy to avoid being tardy in the future. Finally, the fact that Akonu worked extra hours when he arrived late at work is irrelevant, because his discharge was not based on missing work hours; it was based on his repeated failure to report to work on time.

Finally, Akonu argues that he was not late on April 20, the day of his discharge, because he arrived on time at his work building, although he was at the security guard's desk, rather than at his work station, because he had forgotten his work badge at home and needed to obtain a substitute. He did not call his manager because he was already in the building. The employer's policy, however, required Akonu to be at his work station at the beginning of his work day. The manager testified that when Akonu arrived at work 30 minutes late that day, without notifying her that he would be late, she discharged him for excessive tardiness. The record supports the determination that Akonu arrived 30 minutes late on April 20.

In conclusion, the ULJ's findings regarding Akonu's unexcused late arrivals and the two warnings that he received are supported by substantial evidence, and the ULJ did not err as a matter of law in ruling that Akonu was discharged for misconduct based on his excessive tardiness after two warnings.

Akonu next challenges the overpayment determination by the ULJ. DEED initially issued a determination of eligibility and relator received unemployment benefits. After the ULJ ruled that Akonu was ineligible for benefits, he determined that Akonu had been overpaid in the amount of \$3,808.

Akonu argues essentially that DEED is bound by its initial determination of ineligibility because he had been honest in stating to DEED that he had been laid off due to tardiness. The determination of eligibility, however, specifically advised Akonu that: “This determination will become final unless an appeal is filed by Monday, June 8, 2009.” *See* Minn. Stat. § 268.101, subd. 2(f) (2008) (providing that a determination of eligibility or ineligibility is final unless an appeal is filed by the applicant or notified employer within 20 calendar days after the determination was sent). Wells Fargo appealed, preventing the determination from becoming final. Thus, Akonu cannot prevail in his argument that DEED is bound by the initial determination. Further, when an applicant receives any benefits that the applicant is held not entitled to, including after a determination under section 268.101, the applicant must repay those benefits. Minn. Stat. § 268.18, subd. 1(a) (2008). Here, the ULJ ruled Akonu was ineligible for benefits and must repay the benefits. This decision was correct as a matter of law.

**Affirmed.**