

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1674**

Liban Mohamed,
Relator,

vs.

Jennie-O Turkey Store, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 16, 2014
Affirmed
Willis, Judge***

Department of Employment and Economic Development
File No. 31144511-3

Liban Mohamed, Minneapolis, Minnesota (pro se relator)

Jennie-O Turkey Store, Inc., Willmar, Minnesota (respondent)

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

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Willis,
Judge.

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

UNPUBLISHED OPINION

WILLIS, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible to receive unemployment benefits, arguing that the ULJ erred by determining that relator was discharged for employment misconduct. We affirm.

FACTS

Relator Liban Mohamed worked for respondent-employer Jennie-O Turkey Store, Inc. for approximately five years before his discharge in April 2013. Mohamed was discharged for excessive absenteeism under Jennie-O's attendance policy.

After his discharge, Mohamed established an unemployment-benefits account with the Minnesota Department of Employment and Economic Development (DEED). Initially, DEED concluded that Mohamed was eligible for unemployment benefits, and he received \$2,751 in benefits. Jennie-O appealed the eligibility determination. A telephonic hearing occurred on June 18, 2013. A Jennie-O human-resources representative testified on Jennie-O's behalf, and Mohamed testified with the assistance of an interpreter.

Jennie-O has a no-fault attendance policy, which counts as an absence any occasion when an employee does not report for work. Written warnings are issued to employees on the fourth, sixth, and ninth occurrences. After the tenth absence, the employee is suspended with intent to discharge. Employees are allowed ten absences during each 12-month rolling period. Under the attendance policy, employees are required to call at least 30 minutes before the scheduled start of a shift if they are going to

be absent. Failure to provide timely notification results in a written warning. Mohamed was furnished with this policy at orientation, and the policy was referred to in each of the written warnings that he received.

During the hearing, the Jennie-O representative testified that Mohamed received four attendance-related warnings before his discharge, as a result of more than ten absences in the 12 months before his discharge. More than half of Mohamed's absences were not preceded by timely notification, and some of the others were attributed to sickness.

In January 2013, Mohamed was placed on suspension after accruing more than ten absences during the preceding 12 months. Mohamed was later taken off suspension and allowed to continue working. On March 8 and March 22, 2013, Mohamed did not show up for work and did not provide notice to Jennie-O before his absences. Mohamed's employment was terminated on April 3, 2013.

The ULJ found that the frequency of Mohamed's absences without notice was a serious violation of the standards of behavior that Jennie-O had a right to reasonably expect. Thus, the ULJ determined that Mohamed had committed employment misconduct and was ineligible for unemployment benefits. Mohamed requested reconsideration, arguing that his employer had reasons other than attendance for discharging him. The ULJ affirmed the original order, stating that Mohamed's unspecified alternative reasons for discharge and lack of evidence regarding these claimed reasons did not require a new hearing. Mohamed now appeals by writ of certiorari.

DECISION

This court may affirm, remand to the ULJ for further proceedings, reverse, or modify the decision of the ULJ if the substantial rights of Mohamed are prejudiced because the findings, conclusions, or decision are affected by an error of law, are unsupported by substantial evidence, or are arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2012).

An employee who is discharged for employment misconduct is not eligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Employment misconduct is defined as “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly” either “a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee” or “a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2012). It is a mixed question of fact and law whether an employee engages in conduct that makes him ineligible for unemployment benefits. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). “Whether [an] employee committed a particular act is a question of fact.” *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). But whether the act constitutes employment misconduct is a legal question, which we review de novo. *Stagg*, 796 N.W.2d at 315.

This court views the ULJ’s factual findings in the light most favorable to the decision and gives deference to the credibility determinations made by the ULJ. *Peterson*, 753 N.W.2d at 774. Accordingly, this court will not disturb the ULJ’s factual findings when the evidence substantially sustains them. *Id.*

Mohamed challenges the reason for his discharge. After hearing contradictory testimony from Jennie-O and Mohamed, the ULJ found that as of January 2013, Mohamed had accrued more than ten absences in a 12-month period, at least half of which were not preceded by proper notification. These findings of fact were primarily based on exhibits and testimony provided by Jennie-O. Jennie-O and Mohamed, however, gave testimony that conflicted regarding the dates and reasons for the absences. Mohamed testified that he was absent only six times in the preceding 12-month period and that on at least two of the occasions counted by Jennie-O as absences, he reported to work but was sent home by his manager because of a lack of work. The ULJ credited Jennie-O's testimony, finding that it was consistent and based on employment records, while Mohamed's testimony was "inconsistent, vague, and evasive at times." *See* Minn. Stat. § 268.105, subd. 1(c) (2012) (requiring the ULJ to state the reasons for making a credibility determination where "the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision"). The evidence substantially supports the determination that Mohamed was absent more than ten times during the preceding 12-month period, frequently without giving proper notice.

Mohamed also claims that his conduct was not serious enough to support the ULJ's finding that it was employment misconduct. An employer has the 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). "Whether an employee's absenteeism and tardiness amounts to a serious violation of the standards of behavior an employer has a right to expect depends on the circumstances of each case." *Stagg*, 796 N.W.2d at 316.

Even a single absence without prior notification may constitute misconduct. *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986). A continuing pattern of absenteeism and tardiness may constitute misconduct because it tends to show disregard of the interests of the employer's or lack of concern for the employment. *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985). But absence due to illness or injury is not considered employment misconduct if the employee provides proper notice to the employer. Minn. Stat. § 268.095, subd. 6(a) (2012). While Jennie-O has a no-fault attendance policy, an employee's conduct must be evaluated under the statutory standard for employment misconduct, not the employer's policy. *Stagg*, 796 N.W.2d at 316.

Although some of Mohamed's absences over the 12-month period were due to sickness, the record shows that during the four months preceding the date of his termination, Mohamed had six no-call, no-show absences. We hold that this frequent pattern of absenteeism without notice was a serious violation of the standards of behavior Jennie-O had a right to reasonably expect. Therefore, the ULJ did not err by determining that Mohamed was discharged for employment misconduct.

Lastly, Mohamed claims that because he is destitute, he deserves unemployment benefits, and he argues that his limited ability to understand English warrants relief. First, there is no equitable denial or allowance of benefits. Minn. Stat. § 268.069, subd. 3 (2012). Thus, Mohamed cannot prevail on his argument that he should receive unemployment benefits as a matter of equity. Second, Mohamed fails to allege how his limited English proficiency warrants reversal. Mohamed was provided with an

interpreter at the telephonic hearing, and a review of the transcripts reveals that he actively participated and understood what was being said at the hearing. His limited English proficiency does not warrant relief.

Affirmed.