**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-2371**

Carrol P. Peterson,
Relator,

vs.

AlliedBarton Security Services LLC,
Respondent,
Department of Employment and Economic Development,
Respondent.

**Filed September 2, 2008**
**Affirmed**
**Stoneburner, Judge**

Department of Employment and Economic Development
File No. 11970 07

Carrol P. Peterson, 11311 Hanson Boulevard Northwest, Coon Rapids, MN 55433-7435 (pro se relator)

AlliedBarton Security Services, L.L.C., c/o Barnett Associates, Inc., P.O. Box 7340, Garden City , NY 11530-2895 (respondent employer)

Lee B. Nelson, Katrina I. Gulstad, Minnesota Department of Employment and Economic Development, Suite E200, 1st National Bank Building, 332 Minnesota Street, St. Paul, MN 55101-1351 (for respondent DEED)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Huspeni, Judge.[*]

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

## U N P U B L I S H E D  O P I N I O N

**STONEBURNER,** Judge

Relator challenges the decision by an unemployment law judge (ULJ) that he was disqualified from receiving unemployment benefits because he engaged in employment misconduct, arguing that his behavior was not misconduct but merely an error in judgment. Because relator acknowledges that he sunbathed shirtless while on duty as a uniformed security guard and we conclude that this conduct displayed disregard for the reasonable expectations of his employer constituting misconduct, we affirm.

## FACTS

Relator Carrol P. Peterson worked full time for respondent AlliedBarton Security Services, LLC (AlliedBarton) from October 31, 2006 through July 20, 2007.[1] Through AlliedBarton, Peterson was assigned to work as a security officer at a Federal Express facility. Peterson was required to wear a uniform while on duty.

On July 20, 2007, Peterson was discharged from employment after he was twice seen sunbathing shirtless while at his post. He had been warned after the first sighting that he was to wear his uniform on duty.

Peterson applied to respondent Department of Employment and Economic Development (the department) for unemployment benefits. The department determined that Peterson was discharged for misconduct and therefore disqualified from receiving benefits. Peterson appealed. A de novo hearing before a ULJ was scheduled for

[1] Starting January 25, 2003, Peterson was employed by Initial Security, which AlliedBarton bought in October 2006.

September 5, 2007. Peterson wrote to the ULJ, stating that he would not be available to testify at the hearing due to "another opportunity." Peterson instructed the ULJ to "make decisions on what [was] already in [his] case file," stating that he "already spent a lot of time in sending those several letters to [the ULJ's] office, either written or typed."

The ULJ conducted the scheduled hearing without Peterson's participation and took testimony from Patrick Bernstrom, the district operations manager for AlliedBarton. The ULJ concluded that Peterson's conduct "display[s] clearly a serious violation of a standard of behavior that AlliedBarton had the right to reasonably expect of its security officer" and therefore disqualifies him from receiving unemployment benefits. Peterson requested reconsideration and an additional evidentiary hearing. The ULJ denied Peterson's request for an additional evidentiary hearing and affirmed the decision as legally correct. This appeal by writ of certiorari followed.

**D E C I S I O N**

The ULJ's determination must be affirmed unless the decision derives from unlawful procedure, relies on an error of law, is unsupported by substantial evidence, or is arbitrary and capricious. Minn. Stat. § 268.105, subd. 7(d)(3)-(6) (2006). An applicant for unemployment benefits is disqualified from receiving benefits if "the applicant was discharged because of employment misconduct." Minn. Stat. § 268.095, subd. 4(1) (2006). Whether an employee committed employment misconduct is a mixed question of fact and law. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether the employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). But whether the act

committed by the employee constitutes employment misconduct is a question of law reviewed de novo. *Id.* This court reviews factual findings in the light most favorable to the decision and will not disturb them as long as they are supported by substantial evidence. *Skarhus v. Davanni's Inc*., 721 N.W.2d 340, 344 (Minn. App. 2006).

**a. Additional evidentiary hearing**

Peterson argues that the ULJ erred by not granting him an additional evidentiary hearing based on his unavailability for the initial hearing. If an unemployment benefits applicant does not participate in the initial evidentiary hearing, "an order setting aside the findings of fact and decision and directing that an additional evidentiary hearing be conducted must be issued [upon a request for reconsideration] if the party who failed to participate had good cause for failing to do so." Minn. Stat. § 268.105, subd. 2(d) (2006). For purposes of this provision, good cause "is a reason that would have prevented a reasonable person acting with due diligence from participating at the evidentiary hearing." *Id.* "A reviewing court accords deference to a ULJ's decision not to hold an additional hearing and will reverse that decision only for an abuse of discretion." *Skarhus*, 721 N.W.2d at 345. Because Peterson did not request that the hearing be rescheduled and instructed the ULJ to proceed without his participation on the record he submitted, the ULJ's finding that Peterson did not show good cause for failure to participate is not an abuse of discretion and the ULJ's denial of an additional evidentiary hearing is affirmed.

**b. Finding of misconduct**

Peterson argues that he did not commit misconduct by sunbathing shirtless at work but merely made an error in judgment. "Employment misconduct" is

> 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) (2006) (emphasis added).

Peterson challenges the credibility of Bernstrom's testimony before the ULJ and contends that AlliedBarton and Federal Express employees gave false reports about his conduct. But the ULJ's finding that Peterson was sunbathing shirtless is supported by Peterson's own admissions that he took his shirt off while on duty. Peterson argues that in his prior work as a farmer "there was never anything wrong with taking a shirt off for a few minutes during the summer," and therefore, without further instruction from AlliedBarton, he could not have known that it was not acceptable to take his shirt off while at the guard post. This argument is without merit. Peterson was required to wear a uniform while on the job, and AlliedBarton had the right to reasonably expect that he

would comply. No judgment was required. Peterson's sunbathing shirtless while on the job as a uniformed security guard constituted unemployment misconduct.

**c. False wage information**

Peterson contends that AlliedBarton submitted false or inaccurate wage information in a form it filed with the department. This allegation is not relevant to whether Peterson was disqualified from receiving benefits for misconduct, and therefore is not be considered in this appeal.

**d. Age discrimination**

Peterson also asserts that his discharge for employment misconduct was pretext for age discrimination. But there is no evidence in the record to support this claim, and the conclusion that his termination was for employment misconduct is supported by the record.

**Affirmed.**