

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-2024**

Robbin Schmitt,  
Relator,

vs.

Cosmopolitan Orthodontics,  
Respondent,  
Department of Employment and Economic Development,  
Respondent

**Filed June 13, 2011  
Affirmed  
Stauber, Judge**

Department of Employment and Economic Development  
File No. 25688837-3

Robbin Schmitt, Shakopee, Minnesota (pro se relator)

Cosmopolitan Orthodontics, Mendota Heights, Minnesota (respondent employer)

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

Considered and decided by Worke, Presiding Judge; Stauber, Judge; and  
Willis, Judge.\*

---

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

## **UNPUBLISHED OPINION**

**STAUBER, Judge**

On certiorari appeal from the decision of the unemployment-law judge (ULJ) that relator was ineligible for unemployment benefits because she was discharged for employment misconduct based upon repeated tardiness, relator argues that the ULJ erred by denying her benefits because she was not told to be at work at 7:45 a.m.. We affirm.

### **FACTS**

In June 2010, relator Robbin Schmitt began working for respondent Cosmopolitan Orthodontics (Cosmopolitan), an orthodontic clinic with office locations in Lakeville, Savage, and Eagan. At the time relator was hired, she was provided an employee handbook, which stated that office hours were typically from 8:00 a.m. to 5:00 p.m. The handbook also stated that “[a]ll employees are required to be in the office 15 minutes before the first appointment.” According to Cosmopolitan’s office manager Peter Eisenhuth, employees were required to be at the office at 7:45 a.m. to “have a team huddle” where the day’s schedule is reviewed. Employees who did not arrive at the office by 7:45 a.m. were considered tardy, and the employee handbook stated that excessive tardiness may “lead to discipline or action including dismissal.”

Eisenhuth claimed that relator arrived at 8:15 a.m. on her first day of work. Because she was supposed to be at work by 7:45 a.m., Eisenhuth had a discussion with relator about her tardiness. The next day, relator arrived at work at 8:09 a.m. Consequently, Dr. Jennifer Eisenhuth, the office’s orthodontist, stressed to relator the importance of arriving to work on time.

Over the course of the next few weeks, relator consistently arrived at work after 8:00 a.m. On July 12, 2010, relator was scheduled to work at the Savage clinic. Relator forgot, and instead drove to the Lakeville clinic. Shortly before 8:00 a.m., relator called Eisenhuth and informed him of her mistake. Eisenhuth then instructed relator to go to the Eagan clinic, where she arrived at 8:11 a.m. Relator was discharged that day for excessive tardiness.

Respondent Minnesota Department of Employment and Economic Development (department) initially determined that relator was eligible for unemployment benefits because she was discharged for reasons other than employment misconduct. Cosmopolitan appealed that determination, and, following a de novo hearing, the ULJ determined that relator was not eligible for unemployment benefits because her excessive tardiness constituted employment misconduct. Relator then filed a request for reconsideration with the ULJ, who affirmed. This certiorari appeal followed.

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

On certiorari appeal, this court reviews the ULJ's decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence in view of the whole record. Minn. Stat. § 268.105, subd. 7(d) (2010).

Employees discharged for misconduct are disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd., 4(1) (2010). “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 S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court defers to the ULJ's credibility determinations and findings of fact. *Ywsyf 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 “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.” Minn. Stat. § 268.095, subd. 6(a) (2010). Employment misconduct is not “inefficiency or inadvertence,” “simple unsatisfactory conduct,” “poor performance because of inability or incapacity,” or “good faith errors in judgment if judgment was required.” *Id.*, subd. 6(b) (Supp. 2009).

Relator argues that the ULJ erred by concluding that she was discharged for employment misconduct because she was never told that she needed to be at work before 8:00 a.m. We disagree. As a general rule, an employee's knowing violation of an employer's policies, rules, or reasonable requests constitutes employment misconduct. *Montgomery v. F & M Marquette Nat'l Bank*, 384 N.W.2d 602, 604 (Minn. App. 1986), review denied (Minn. June 13, 1986). “[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).

Here, Eisenhuth testified that relator was expected to be at work at 7:45 a.m. and that relator was informed of this expectation. Eisenhuth also testified that relator arrived at work: at 8:15 a.m. on June 14; at 8:09 a.m. on June 15; at 8:02 a.m. on June 16; at 7:49 a.m. on June 17; at 7:59 a.m. on June 18; at 7:52 a.m. on June 23; at 8:06 a.m. on June 24; at 8:00 a.m. on June 25; at 7:58 a.m. on July 8; at 7:57 a.m. on July 9; and at 8:11 a.m. on July 12. According to Eisenhuth, relator was considered tardy on each of those days. Although relator claims that she was never told she needed to be at work at 7:45, the ULJ specifically found her testimony to be incredible and found Eisenhuth's testimony to be credible. *See Ywswf*, 726 N.W.2d at 529 (stating that this court defers to the ULJ's credibility findings). Eisenhuth's testimony supports the ULJ's finding that relator violated Cosmopolitan's reasonable policy by being repeatedly late to work. Accordingly, the ULJ did not err by concluding that relator was ineligible to receive unemployment benefits.

**Affirmed.**