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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2132**

David Luckow,
Relator,

vs.

City of Saint Paul,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 3, 2019
Affirmed
Worke, Judge**

Department of Employment and Economic Development
File No. 36675096-3

David Luckow, St. Paul, Minnesota (pro se relator)

Lyndsey Olson, St. Paul City Attorney, Gail Langfield-Seiberlich, Assistant City Attorney,
St. Paul, Minnesota (for respondent employer)

Anne Froelich, Minnesota Department of Employment and Economic Development,
St. Paul, Minnesota (for respondent department)

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for unemployment misconduct. We affirm.

DECISION

In June 2018, relator David Luckow resigned from his employment with respondent City of Saint Paul (the city). Luckow later attempted to rescind his resignation, but the city did not accept. Luckow established an unemployment-benefits account with respondent Department of Employment and Economic Development (DEED). After DEED determined that Luckow was ineligible for unemployment benefits and he appealed, a ULJ decided that Luckow had been discharged for misconduct and was ineligible for unemployment benefits. Luckow now challenges the ULJ's decision.

This court reviews a ULJ's decision to determine if the findings, inferences, conclusion, or decision are: "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d) (2018). Substantial evidence is "(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).

The ULJ determined that Luckow committed employment misconduct, due to his attendance issues and poor performance, and was ineligible for unemployment benefits. *See* Minn. Stat. § 268.095, subd. 4(1) (2018) (stating that an employee is ineligible for unemployment benefits if discharged for employment misconduct). “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 the employee committed a specific act is an issue of fact, which this court views in the light most favorable to the ULJ’s decision. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). “[W]hether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo.” *Id.*

Employment misconduct is “any intentional, negligent, or indifferent conduct” that clearly displays “(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) (2018). An “employer has a right to expect an employee to work when scheduled,” and the “[f]ailure to report to work is misconduct” under Minnesota unemployment-insurance law. *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 417 (Minn. App. 1986) (quotation omitted). “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 v. Vintage Place, Inc., 796 N.W.2d 312, 316 (Minn. 2011); *see also Del Dee Foods*, 390 N.W.2d at 418 (stating that in certain circumstances, it is employment misconduct to be absent even once without notice to the employer).

Luckow was an hour late for work on June 5, 2018. The city notified Luckow that it was considering termination because of his tardiness on June 5 and because he was a few minutes late on January 25, 2018. Luckow was informed that he violated the city's rule regarding "incompetent or inefficient performance." The city further informed Luckow that, as a supervisor, Luckow was required to submit supervisor notes, which he failed to regularly provide. The city advised that Luckow's deficiency was contrary to the city's expectations. Finally, the city noted that it attempted to correct Luckow's conduct in the past, including suspensions in 2015, 2016, and 2017.

Luckow argues that he should not be ineligible for unemployment benefits because his "overall performance was satisfactory and did not demonstrate lack of concern." He also claims that his attendance issue did not violate the city's expectation because the city allowed three late occurrences in a 12-month period, and he was only late twice in 2018. But at the hearing before the ULJ, Luckow admitted that he had previous warnings and disciplinary action regarding his attendance. A "decision to violate knowingly a reasonable policy of the employer is misconduct," which is "particularly true when there are multiple violations of the same rule involving warnings or progressive discipline." *Schmidgall*, 644 N.W.2d at 806-07.

Additionally, Luckow was discharged because he failed to submit required supervisor notes. Luckow admitted that he failed to complete the required supervisor notes.

“[R]efusing to abide by an employer’s reasonable policies and requests amounts to disqualifying misconduct.” *Id.* at 804. Multiple violations of the same rule demonstrates an employee’s substantial lack of concern for the employment. *See Gilkeson v. Indus. Parts & Serv., Inc.*, 383 N.W.2d 448, 452 (Minn. App. 1986) (noting employee’s pattern of rule violations constituted misconduct).

The ULJ did not err in finding that Luckow had tardiness issues and that he failed to submit his required supervisor notes. Under the law, the act of being tardy and the failure to abide by an employer’s reasonable policy amount to disqualifying employment misconduct. Accordingly, the ULJ did not err in determining that Luckow was discharged for employment misconduct and ineligible for unemployment benefits.

Affirmed.