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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-2200**

Hawi Genemo,  
Relator,

vs.

Donatelle Plastics, Inc. (Joint Account),  
Respondent,  
Department of Employment and Economic Development,  
Respondent.

**Filed August 29, 2011  
Reversed  
Stauber, Judge**

Department of Employment and Economic Development  
File No. 25786967-3

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Donatelle Plastics, Inc., New Brighton, Minnesota (respondent employer)

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Considered and decided by Kalitowski, Presiding Judge; Wright, Judge; and  
Stauber, Judge.

## UNPUBLISHED OPINION

**STAUBER**, Judge

Relator challenges the decision of the unemployment- law judge (ULJ) that relator was discharged for employment misconduct because she was absent from work after her approved leave expired and she failed to contact her employer. Relator argues that the ULJ erred by concluding that her conduct constitutes employment misconduct because she was absent from work to care for her ill mother and she provided proper notice under the circumstances. Because relator's conduct falls within the narrow exception to employment misconduct contained in Minn. Stat. § 268.095, subd. 6(b)(8) (2010), we reverse.

### FACTS

Relator Hawi Genemo was employed full-time with respondent Donatelle Plastics, Inc. (Donatelle). In April 2010, relator called her cousin in Africa and learned that her mother was very sick. Relator then requested and was granted an immediate leave of absence so that she could travel to Africa to assist her mother. Relator was informed that she needed to return to work by May 19, 2010, or she would be subject to the accumulation of attendance points that could result in termination. Relator was also informed that she could extend her leave of absence by contacting her employer and requesting additional time off under the Family Medical Leave Act (FMLA). Relator told her employer that she would be traveling to rural Ethiopia where communication would be difficult, but believed that she would be able to access a telephone or a fax machine.

Relator left for Africa on April 21, 2010, and was picked up by her cousin at the airport in Addis Ababa, Ethiopia's capitol city. Relator then traveled by bus to Dodola, and from there, she walked four to five hours to the village of Arsi, where her mother lived. According to relator, it took about four to five days to get from Minnesota to Arsi. Relator also claimed that there was no electricity, telephone, Internet, or mail service in Arsi. And, at the time relator visited Ethiopia, there was civil unrest throughout the country because national elections were being held. Due to the civil unrest, the United States Department of State had issued a statement alerting United States citizens of the risks of travel and recommended against all but essential travel to Ethiopia during this period.

Shortly after arriving in Arsi, relator traveled back to Addis Ababa with her mother to see a doctor. Relator arranged for her mother to make the trip by horseback while relator walked alongside the horse. However, when they arrived at the medical facility, no doctor was present, and relator was told that it might be several weeks before a doctor would be at the office. Relator and her mother stayed overnight in Addis Ababa, but left the next day without seeing a doctor because relator's mother did not want to remain in the city. While she was in the city, relator asked the health care worker at the medical facility to sign the FMLA paperwork, which was necessary to extend her leave of absence from employment. The healthcare worker refused to sign the paperwork because he was not a doctor. Relator also claimed that she attempted to contact Donatelle when she traveled through Dodola, but the long distance communication could not be made.

Relator and her mother returned to Arsi where she stayed until her mother's health improved in July 2010. Relator did not make any additional attempts to contact Donatelle. Consequently, relator's employment with Donatelle was terminated effective May 27, 2010, for relator's repeated absences and failure to contact her employer.

Upon returning to the United States, relator learned that her employment with Donatelle had been terminated. Relator subsequently established a benefit account with respondent Minnesota Department of Employment and Economic Development (department), and a department adjudicator initially determined that relator was ineligible for unemployment benefits because she had been discharged for employment misconduct. Relator appealed that decision and, following a de novo hearing, the ULJ found that relator was told that her employment could be terminated if she failed to return within a month without contacting Donatelle in advance. The ULJ also found that "it is simply not plausible that [relator's] circumstances made it impossible to contact Donatelle at any point for the entire three months she was in Ethiopia." The ULJ found that that "Donatelle has the right to reasonably expect its employees to notify the employer when they are going to be absent," and that relator's failure to contact Donatelle during her time in Ethiopia constituted employment misconduct. Thus, the ULJ concluded that relator was discharged for employment misconduct and, therefore, is ineligible for benefits. Relator filed a request for reconsideration with the ULJ, who affirmed. This certiorari appeal followed.

## DECISION

On certiorari appeal, this court reviews the ULJ's decision to determine whether a petitioner's 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. *Ywswf 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.

Relator argues that the ULJ erred by concluding that she was terminated for employment misconduct. We agree. 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). But employment misconduct is not "absence, with

proper notice to the employer, in order to provide necessary care because of the illness, injury, or disability of an immediate family member of the applicant.” *Id.*, subd. 6(b)(8).

Here, the record reflects that relator was granted a leave of absence to travel to Ethiopia to care for her ailing mother. The record also reflects that although relator was instructed to contact her employer by May 19, 2010, in order to qualify for additional time off, relator informed her employer that communication from rural Ethiopia could be difficult. Relator testified that there is no electricity, telephone, Internet, or mail service in Arsi and that despite her efforts to call her employer from Dodola, the long distance communication could not be made. Relator also testified that there was civil unrest throughout the country due to national elections, and that the civil unrest made it difficult and dangerous to travel. Relator further testified that after her initial trip to Addis Ababa with her mother, she was unable to travel to another city to attempt to contact her employer due to her mother’s need for constant care. Relator’s testimony was un rebutted, and her testimony regarding the civil unrest in Ethiopia was corroborated by the statement issued by the United States Department of State warning U.S. citizens of the civil unrest in Ethiopia and recommending that all travel to that country be suspended unless absolutely necessary. The un rebutted and undisputed evidence and testimony relator presented at the hearing demonstrates that relator was absent from her employment to care for her ill mother, that her employer was notified of the situation, and that further notice to the employer was impractical if not impossible. Thus, relator’s conduct falls within the exception to employment misconduct under Minn. Stat.

§ 268.095, subd. 6(b)(8), because, under the circumstances, relator provided proper notice of her absence to her employer.

We acknowledge that Donatelle's termination of relator's employment was reasonable; relator failed to return to work or contact her employer by the May 19, 2010 deadline, and an employer cannot reasonably be expected retain an employee if the employer has no idea if or when the employer will return to work. But the issue before us is whether relator's conduct constitutes employment misconduct for purposes of unemployment benefits under Minn. Stat. § 268.095, subd. (a), not whether the employer's discharge was reasonable. *See Brown v. Nat'l Am. Univ.*, 686 N.W.2d 329, 332 (Minn. App. 2004) (stating that concern is not whether employer should have discharged the employee, but whether employee, once discharged, is eligible for unemployment benefits), *review denied* (Minn. Nov. 16, 2004). Under the unique facts of this case, relator's conduct did not constitute employment misconduct. Therefore, we conclude that relator is entitled to unemployment benefits.

**Reversed.**