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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1611**

Eric Rabideaux,
Relator,

vs.

Fond Du Lac Management, Inc.
Black Bear Casino & Hotel,
Respondent,

Department of Employment and
Economic Development,
Respondent.

**Filed June 3, 2013
Affirmed
Hudson, Judge**

Department of Employment and
Economic Development
File No. 29908632-3

Eric Rabideaux, Wrenshall, Minnesota (pro se relator)

Fond Du Lac Management, Inc., Black Bear Casino & Hotel, Cloquet, Minnesota
(respondent)

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

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Relator challenges the decision by an unemployment-law judge (ULJ) that he was ineligible for unemployment-insurance benefits because he was discharged for employment misconduct. Because the ULJ did not err by concluding that relator's absence from work without notice constituted employment misconduct, and because his incarceration for violating probation following a conviction of driving while impaired did not fall within the statutory exception for "conduct that was a consequence of chemical dependency" under Minn. Stat. § 268.095, subd. 6(b)(9) (2012), we affirm.

FACTS

Relator Eric Rabideaux began work as a waiter for the Fond du Lac Reservation at Black Bear Casino in 1994. In about 2009, after Rabideaux was convicted of driving while impaired (DWI), he was diagnosed as chemically dependent; he cut back on drinking and attended AA meetings. In November 2011, he was again convicted of DWI and placed on probation, which included a condition that he abstain from alcohol. He entered a treatment program and continued to go to AA meetings.

Fond du Lac has a policy that employees are required to call in before the start of a shift to report an absence. On May 18, 2012, Rabideaux consumed alcohol at a family gathering and was reported for violating the terms of probation. He was arrested and incarcerated until May 31. On May 23, he called and informed his employer that he was absent because of his incarceration. Although Rabideaux completed a drug screen and

returned to work on June 7, he was discharged the next day because of his previous unreported absence.

Rabideaux established an unemployment-benefits account, and after an adjudicator with the Minnesota Department of Employment and Economic Development (DEED) determined him ineligible for benefits, he sought a hearing before a ULJ. At the hearing, Rabideaux testified that he had been in recovery for six months when he consumed alcohol in May 2012. He testified that he had been unable to report his absence earlier because he did not understand that he would have to purchase a phone card to make a call from jail, and he lacked money to do so. He also testified that he had sufficient vacation time accrued to cover the absence and that his employment situation had been confusing because he was initially told he could return to work, but was then terminated.

The ULJ determined that Rabideaux was ineligible for unemployment benefits because of employment misconduct, based on his multi-day absence from work. The ULJ found that Rabideaux's incarceration was not a good reason for his absence and that, by failing to report to work for nine shifts, he committed a serious violation of the standards of behavior his employer had a right to reasonably expect. The ULJ found that although Rabideaux's chemical dependency may have caused him to drink, it did not directly cause his absence, and his incarceration was not a direct cause of his chemical dependency under Minnesota unemployment-insurance law. Rabideaux requested reconsideration and submitted additional information, including that his employer was aware of his chemical dependency and had previously scheduled flexible hours to

accommodate his treatment; his girlfriend had notified his employer of his incarceration on May 20; he had filed a grievance attempting to obtain re-employment, which was denied; and he was receiving continued treatment for mental health and chemical-dependency issues. On reconsideration, the ULJ affirmed the decision, and this certiorari appeal follows.

D E C I S I O N

In reviewing a ULJ's decision relating to eligibility for unemployment benefits, this court examines whether a party's substantial rights were prejudiced because the findings, inferences, conclusion, or decision are unsupported by substantial evidence in view of the record as a whole or affected by legal error. Minn. Stat. § 268.105, subd. 7(d) (2012). Whether an employee committed misconduct sufficient to disqualify him from receipt of unemployment benefits is a mixed question of law and fact. *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). "Determining whether a particular act constitutes disqualifying misconduct is a question of law," which we review *de novo*. *Stagg*, 796 N.W.2d at 315.

"Employment misconduct means 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) (2012). Refusing to abide by an employer's reasonable policies, including those

governing absences from work, generally constitutes disqualifying employment misconduct. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002); *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). “Absence from work under circumstances within the control of the employee, including incarceration following a conviction for a crime, has been determined to be misconduct sufficient to deny benefits.” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006). Whether an employee’s failure to report to work while incarcerated amounts to employment misconduct is a fact-based inquiry. *See id.* at 291 (noting that an employee may commit misconduct if the employee “simply fail[s] to show up at work” because he or she is incarcerated); *see also Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 44 (Minn. App. 1984) (affirming disqualification from benefits due to three-day unexcused absence from work caused by applicant’s incarceration).

The ULJ found that Rabideaux violated his employer’s reasonable expectations when he was absent for nine shifts because of his incarceration. Rabideaux admitted that the employer’s policy required him to call in before a shift to report an expected absence. The employer had no advance notice of the incarceration, and Rabideaux missed two days of scheduled work before reporting the absence. *See Smith*, 343 N.W.2d at 45 (holding that an employee’s unavailability due to incarceration “amounted to disregard of attendance standards which his employer had a right to expect him to obey”). On this record, the ULJ did not err by concluding that Rabideaux’s absences from work due to

his incarceration constituted employment misconduct, which rendered him ineligible for unemployment benefits.

Rabideaux maintains that his absence was unrelated to his work performance and argues that his conduct fell within the statutory exception to ineligibility for conduct resulting from chemical dependency. Employment misconduct does not include “conduct that was a consequence of the applicant’s chemical dependency, unless the applicant was previously diagnosed chemically dependent or had treatment for chemical dependency, and since that diagnosis or treatment has failed to make consistent efforts to control the chemical dependency.” Minn. Stat. § 268.095, subd. 6(b)(9). Rabideaux asserts that the ULJ erred by determining that the chemical-dependency exception did not apply because his employer was aware of his chemical dependency. But the ULJ based the determination of employment misconduct on Rabideaux’s absence from work due to incarceration, not the reason for the probation violation that led to his incarceration. And even if we were to conclude that Rabideaux’s misconduct related to his chemical dependency, we note that under the unemployment-insurance statutes, behavior relating to DWI convictions that interferes with employment does not qualify under the chemical-dependency exception. *See* Minn. Stat. § 268.095, subd. 6(c) (“Regardless of [subdivision 6(b)(9)], conduct in violation of sections 169A.20, 169A.31, or 169A.50 to 169A.53 that interferes with or adversely affects the employment is employment misconduct.”). Because Rabideaux’s conduct of missing work resulted from a probation violation after his conviction of DWI under Minn. Stat. § 169A.20 (2008), that conduct

would not meet the requirements for applying the chemical-dependency exception under Minn. Stat. § 268.095, subd. 6(b)(9). *See id.*

At the hearing, Rabideaux submitted equitable arguments in favor of granting benefits, including financial hardship and a long work history with the employer. But unfortunately, there is no common-law or equitable basis for allowing unemployment benefits. Minn. Stat. § 268.069, subd. 3 (2012).

On reconsideration, the ULJ noted that Rabideaux had submitted additional evidence relating to his claim, but concluded that the evidence would not likely change the outcome of the decision. *Cf.* Minn. Stat. § 268.105, subd. 2(c)(1) (2012) (stating that a ULJ “must order an additional evidentiary hearing” if a party shows that additional evidence “would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence”). We agree. Although the additional information is more detailed, Rabideaux has not shown that he had good cause for failing to submit it earlier or that it would likely change the result. The ULJ did not err by affirming the decision denying benefits.

Affirmed.