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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2113**

David Smith,
Relator,

vs.

Sealy, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 5, 2013
Affirmed
Willis, Judge***

Department of Employment and Economic Development
File No. 30090985-3

Scott R. Martin, White Bear Lake, Minnesota (for relator)

Sealy, Inc., St. Paul, Minnesota (respondent)

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

Considered and decided by Hooten, Presiding Judge; Kalitowski, Judge; and
Willis, Judge.

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

UNPUBLISHED OPINION

WILLIS, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that he is ineligible to receive unemployment benefits, arguing that the ULJ erred by determining that relator was discharged for employment misconduct. We affirm.

FACTS

In February 2012, relator David Smith began working for respondent Sealy, Inc. as a mattress builder. Sealy tracks its employees' attendance using a points system. An employee accrues points for missing work without permission: one-half point is charged for arriving late or leaving early, one point is charged for a whole-day absence, points are doubled on Mondays and Fridays, and an additional point is charged if the employee does not notify a supervisor about the absence. If an employee has 30 days without an unexcused absence or tardy arrival, one point drops off the employee's point total. An employee is given oral and written warnings at the two-, four-, and six-point intervals, and is terminated after receiving eight points. When receiving a warning, an employee has a chance to contest any points accrued in that interval.

Smith started accruing points four days after he began working at Sealy. From February 17 to June 13, 2012, Smith was tardy seven times, left work early once, and was absent from work twice. On July 26, 2012, Smith had gone more than a month without an unexcused absence, so one point was dropped and he had a total of five and one-half points. On July 30, 2012, Smith was absent and received two points because it was a Monday. At the end of his shift on July 30, 2012, Smith's point total was seven and one-

half. During Smith's shift on July 31, 2012, a police officer arrived at the Sealy plant and arrested Smith, who did not have permission to leave early. Smith received one-half point for leaving early, which brought his point total to the eight-point limit. Smith was scheduled to work on August 1, 2012, but failed to report for his shift because he was incarcerated. Smith was discharged that day.

Smith applied for unemployment benefits, and the Minnesota Department of Employment and Economic Development issued a determination of ineligibility. Smith appealed the determination, and a telephone hearing was held before a ULJ in September 2012. Smith, Smith's mother, Sealy's director of manufacturing, and Sealy's plant superintendent all participated in the hearing.

During the hearing, Sealy's director of manufacturing testified about Smith's absences and explained the points system. He explained that it is a no-fault system and that Sealy does not question the "full details of the absenteeism." He noted that Smith had received oral and written warnings regarding his attendance. Smith also testified about his absences from February through June. He acknowledged that he had received two oral warnings but denied that he had received any written warning. Smith agreed that he was late on the seven days reported by Sealy; he explained that his tardiness was a result of traffic problems and that, at most, he arrived five minutes late. Smith stated that on the one day that he left early, he had informed his supervisor before he left. Smith stated that the two full days that he was absent were both occasions on which he was not feeling well and that he had called Sealy to notify his supervisor that he would not make it to work.

Regarding the final days of his employment, Smith testified that he had permission to be absent on July 30 because he had two medical appointments, and his supervisor told him to take the whole day off. Smith admitted that he left work early on July 31 because he was arrested, but he noted that he had arrived to work early that day to ask for a leave of absence because he knew there was a warrant out for his arrest and that he would be arrested “at any time or any day.” Smith explained that the warrant had been issued because he had an unpaid ticket for driving after revocation of his license. He admitted that he was aware of the ticket and that he simply neglected to pay it.

The ULJ issued a decision determining that Smith was discharged for employment misconduct and was ineligible to receive unemployment benefits. The ULJ determined that Smith’s full-day absences, including the absence on July 30, were not misconduct because they were due to illness or medical appointments. The ULJ also determined that Smith’s tardiness, early departure on July 31, and absence on August 1 constituted misconduct. She concluded that Smith “knew he needed to arrive to work on time and could have left his house earlier to avoid arriving to work late” and that he was aware of the ticket that led to his arrest and had failed to pay it.

Smith filed a request for reconsideration. The ULJ affirmed her decision, noting that the decision was factually and legally correct. This certiorari appeal follows.

DECISION

This court may affirm, remand to the ULJ for further proceedings, or reverse or modify the decision of the ULJ if the substantial rights of a petitioner are prejudiced because the findings, conclusions, or decision are affected by an error of law; are

unsupported by substantial evidence; or are arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2012).

An employee discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). Whether an employee engaged in conduct that disqualifies him 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 particular act is a fact question. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). This court views the ULJ's factual findings in the light most favorable to the decision and gives deference to the credibility determinations made by the ULJ. *Id.* Accordingly, this court will not disturb the ULJ's factual findings when the evidence substantially sustains them. *Id.* Whether a particular act committed by the employee constitutes disqualifying misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804.

“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 a 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). “Absence from work under circumstances within the control of the employee, including incarceration . . . has been determined to be misconduct sufficient to deny benefits.” *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 290 (Minn. 2006).

Smith argues that the ULJ erred by determining that he committed misconduct. He first contends that his behavior falls under the exception in Minn. Stat. § 268.095, subd. 6(b)(2)–(3) (2012), which states that “conduct that was a consequence of the applicant’s inefficiency or inadvertence” or “simple unsatisfactory conduct” is not considered employment misconduct.

In a similar case, an employee had a record of unexcused tardiness and absences. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 44 (Minn. App. 1984). The employee was arrested for failure to pay a speeding ticket and missed three days of work as a result of his incarceration. *Id.* The employee was suspended when he returned to work, and the suspension was eventually made permanent. *Id.* He applied for unemployment benefits, was determined to be ineligible, and he appealed the determination. *Id.* This court held that the employer had a right to expect its employee to work when he was scheduled. *Id.* at 45. The court determined that “public policy prohibits treating illegal failure to pay speeding tickets as ordinary negligence or inadvertence” and that the employee’s “unavailability for work due to his incarceration amounted to disregard of attendance standards which his employer had a right to expect him to obey.” *Id.*

Similarly here, Smith’s early departure on July 31 and absence on August 1 were the result of his failure to pay a traffic ticket. He admitted during the hearing that he knew about the ticket but that he “neglected” to pay it. Smith’s absence from work was within his control, and he committed misconduct by failing to report to work when he was scheduled, violating the attendance standards that Sealy had a right to expect of him.

Smith next contends that his behavior did not constitute misconduct because he was in constant communication with his employer regarding his absences and that he demonstrated great concern for his employment. Smith relies on that portion of the statute that defines misconduct as “a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a)(2). But as noted above, the full definition of employment misconduct is conduct 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.” *Id.*, subd. 6(a) (emphasis added). Even if Smith had demonstrated great concern for his employment, he still violated the standards that Sealy had a right to reasonably expect, and his behavior constituted misconduct. *See Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (stating that “we normally interpret the conjunction ‘or’ as disjunctive rather than ‘conjunctive’”). Behavior can constitute misconduct under either part of the statutory definition, and because Smith’s behavior violated the standards that Sealy reasonably expected, it is irrelevant whether he demonstrated great concern for his employment.

Affirmed.