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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0359**

Daniel Moravec,
Relator,

vs.

Faribault Foods, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed October 9, 2012
Affirmed
Chutich, Judge**

Department of Employment and Economic Development
File No. 28740209-3

Daniel Moravec, Faribault, Minnesota (pro se relator)

Holly M. Robbins, Rhiannon C. Beckendorf, Littler Mendelson, P.C., Minneapolis,
Minnesota (for respondent employer)

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

Considered and decided by Chutich, Presiding Judge; Stauber, Judge; and Cleary,
Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Relator Daniel Moravec challenges the decision of the unemployment law judge that he was discharged for employment misconduct and is therefore ineligible for unemployment benefits. Because the judge's findings are supported by substantial evidence and she did not err in her conclusions of law, we affirm.

FACTS

Moravec began working for respondent Faribault Foods in October 2002 as a maintenance worker. On October 22, 2011, Moravec arrived at work for his 2:00 p.m. shift and some of his coworkers noticed that he was "acting funny." They notified Vic Erickson, the maintenance supervisor, who immediately went and talked with Moravec. Erickson could tell something was wrong with Moravec, and smelled alcohol on him. He then asked the company's human resources manager, Sara David, to speak with Moravec.

Faribault Foods has a written alcohol policy and testing program that prohibits employees from being "under the influence of alcohol or hav[ing] detectable levels of alcohol in their systems when reporting to work or at any time during working hours." While speaking with Moravec, David became concerned that Moravec was under the influence of alcohol.

When an employee is suspected of being impaired at work, Faribault Foods' policy is to have two trained independent observers speak with the employee and complete "Observed Behavioral Indicators" forms. David, a trained observer, noted on her form that Moravec had slurred speech, bloodshot and glassy eyes, dry mouth, and

slowed thinking and reaction time. At 2:30 p.m., David asked Moravec to submit to a drug and alcohol test per company policy, and Moravec agreed to take the test.

Because the policy required two independent observers, David did not send Moravec for testing right away, but allowed him to return to work after cautioning him to stay off the heavy equipment. David then asked the company's quality assurance manager, Greg Nugent, to observe Moravec. After speaking with Moravec, Nugent completed the behavioral indicators form and noted that Moravec had slurred speech, glassy eyes, an unsteady walk, a lethargic appearance, and slowed thinking. After Nugent's observation, David told Moravec at 2:45 p.m. that she was sending him to get tested. Moravec refused the test at that point.

Under Faribault Foods' policy, an employee may refuse a drug or alcohol test, but "employees who refuse to undergo testing or who fail to cooperate with the testing procedures will be subject to discipline, up to and including immediate discharge." Moravec acknowledged receipt of this policy in 2009. David reminded Moravec of the policy when he refused the test, and she offered to initiate a conference call with the company's director of human resources. While she was setting up that call, Moravec left the building and did not return. Moravec was discharged two days later, on October 24, 2011, for refusing the drug and alcohol test.

Moravec applied for and was denied unemployment benefits. He appealed this determination, and the unemployment law judge held a telephone hearing at which David, Erickson, and Moravec testified. During the telephone hearing, Moravec acknowledged that he knew test refusal could lead to discharge. He claimed, however,

that he refused the test on the second request because he felt the employer was “harassing him” because they had let him go back to work after the first request. He also claimed that his discharge was not motivated by his test refusal, but because of an ongoing worker’s compensation matter he had with Faribault Foods. The employer denied these claims.

The unemployment law judge found that Moravec was discharged because of employment misconduct and was therefore ineligible for benefits. Moravec’s request for reconsideration was denied, and he filed this certiorari appeal.

D E C I S I O N

In reviewing an unemployment law judge’s determination that an employee engaged in employment misconduct, we review the judge’s findings of fact in the light most favorable to the decision and will not disturb the findings if they are substantially supported by the evidence. *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011). We review de novo the judge’s determination whether those facts are employment misconduct. *Id.* We may affirm, remand, reverse, or modify the judge’s decision if Moravec’s substantial rights have been prejudiced because we find the decision is based on insufficient evidence or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2010).

An applicant for unemployment benefits who was discharged because of employment misconduct is ineligible for benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct includes “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.” *Id.*, subd. 6(a) (2010).

The judge found, and Moravec does not dispute, that he refused to take a drug and alcohol test in violation of Faribault Foods’ policy. Moravec instead argues that he was “harassed” because of the time period between the first request and the second, and that his discharge was motivated by retaliation for his worker’s compensation claim against the company. The judge credited the employer’s testimony on these issues, finding that “David and Erickson provided a logical account of events leading to Moravec’s discharge, and had no reason to fabricate their testimony.” Thus, the judge found that Moravec’s discharge was motivated by his test refusal, rather than the extraneous issues raised by Moravec.

Giving deference to these factual findings, and viewing them in the light most favorable to the decision, we conclude that Moravec’s contentions regarding the true reason for his discharge are without merit. *See Skarhus v. Davanni’s, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006); *Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 205 (Minn. App. 2004) (“When parties have presented conflicting evidence on the record, appellate courts must defer to the commissioner’s ability to weigh the evidence; they may not weigh that evidence on review.”), *review denied* (Minn. Mar. 30, 2004). Substantial evidence supports the judge’s findings regarding the facts that led to Moravec’s discharge, and we will not disturb those findings here.

In addition, the judge’s conclusion that Moravec’s conduct in refusing to take the drug and alcohol test seriously violated the employer’s reasonable standards, and was

therefore employment misconduct, is not erroneous. Employment misconduct can occur where an employee refuses to follow the employer's "reasonable requests and policies." *Bray v. Dogs & Cats Ltd.*, 679 N.W.2d 182, 184 (Minn. App. 2004); *see also Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774–75 (Minn. App. 2008) (holding that an employee commits employment misconduct where he consumes alcohol in violation of the employer's policy prohibiting such consumption); *Vargas*, 673 N.W.2d at 206 ("An employer has a right to expect that its employees will abide by reasonable instructions and directions.").

Faribault Foods had a defined and reasonable substance abuse policy and testing program, Moravec was aware of that policy, and had signed his acknowledgment of receipt of the policy. The company followed that policy closely and did what it could to ensure that Moravec was not wrongly accused by conducting a second behavioral observation. At the time of his refusal, David informed Moravec that refusal could impact negatively on his employment, and could even lead to discharge. The employer acted reasonably in the situation, and Moravec chose to refuse the test and walk out of the job.

Because the judge's factual findings are supported by substantial evidence, and because she did not err in concluding that Moravec was discharged for employment misconduct, we affirm the determination that Moravec is ineligible for unemployment benefits.

Affirmed.