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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0422**

Patrick J. Silk,
Relator,

vs.

New Flyer of America, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent

**Filed December 3, 2012
Affirmed
Stoneburner, Judge**

Minnesota Department of Employment and Economic Development
File No. 28967712-4

Patrick J. Silk, Waubun, Minnesota (pro se relator)

New Flyer of America, Inc., Crookston, Minnesota (respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Stoneburner, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

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

DECISION

This court reviews a ULJ's decision to determine 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 an error of law. Minn. Stat. § 268.105, subd. 7(d) (2010). Whether an employee engaged in employment misconduct presents a mixed question of fact and law. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether an employee committed a particular act is a question of fact. *Id.* The ULJ's factual findings are reviewed in the light most favorable to the decision and will not be disturbed when the evidence substantially sustains them. *Id.* But whether a particular act constitutes employment misconduct is a question of law, which is reviewed de novo. *Id.*

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). Employment misconduct is defined as "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). "An employer has the right to

establish and enforce reasonable rules governing absences from work [and r]efusing to abide by an employer's reasonable policies generally constitutes disqualifying employment misconduct." *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007) (citation omitted).

The ULJ determined that relator Patrick J. Silk was discharged from his employment with respondent New Flyer of America, Inc. for poor attendance and for being a no-call/no-show on November 16, 17, and 18, 2011. Silk, who had left work to go to the emergency room on November 9, admits that he failed to call in his absences after November 15, but he argues that he was discharged for being ill, which is not misconduct.¹

Substantial evidence supports the ULJ's conclusion regarding the reason for Silk's discharge. New Flyer's representative testified at the hearing that New Flyer was trying to work with Silk regarding his absences, but when Silk failed to report or call in for three consecutive days, New Flyer considered his employment to be over. A personnel notification form admitted into evidence at the hearing states that Silk was separated from employment for violating a written rule, which provides that an employee who is a "No Call/No Show" for three consecutive days is deemed to have voluntarily terminated his or

¹ Silk also asserts that respondent Minnesota Department of Employment and Economic Development sent a "false" itemized list to Silk, but Silk makes no argument related to this claim. Issues not briefed on appeal are waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

her employment.² The form states that Silk was a “No Call/No Show” on November 16, 17, and 18, 2011. And Silk conceded that he failed to call in or report to work after November 15, 2011.

Although Silk may have thought his employment was already terminated at that time due to other provisions in the attendance policy, “an employee’s expectation that the employer will follow its disciplinary procedures has no bearing on whether the employee’s conduct violated the standards the employer has a reasonable right to expect or whether any such violation is serious.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 316 (Minn. 2011). Silk’s failure to call to report his absences constitutes a serious violation of the standards of behavior the employer has a right to reasonably expect. *See id.* at 317; *Wichmann*, 729 N.W.2d at 28.

Silk contends that he notified New Flyer of his illness and complied with the attendance policy because he submitted a doctor’s note to New Flyer, apparently referring to a doctor’s note that he gave to New Flyer on November 7, 2011, following absences on November 3 and 4, 2011. A document Silk submitted with his motion for reconsideration shows that New Flyer received this doctor’s note and excused his absences for November 3 and 4.³

On reconsideration, the ULJ credited Silk regarding the doctor’s note, stating that “[i]t was undisputed that Silk submitted a doctor’s note for a previous absence several

² Silk’s argument that the ULJ did not receive the attendance policy into evidence or consider the policy in making his decision is clearly refuted by the hearing transcript.

³ Silk argues that New Flyer’s representative falsely testified that the first note was not given to New Flyer, but the record reflects that the representative was merely uncertain about whether this doctor’s note was given to New Flyer.

weeks prior to the termination.” As the ULJ points out, however, the issue is whether Silk submitted a doctor’s note to excuse his absences after November 15, 2011. It was these absences that led to his termination. Silk does not challenge the ULJ’s determination that he failed to submit a doctor’s note related to his later absences because the determination is based on Silk’s admission that he failed to submit a note related to the absences that led to his termination from employment. The ULJ’s finding that Silk was terminated for being a no-call/no-show for three consecutive days is supported by the record. And because this act violated New Flyer’s reasonable attendance policy, Silk committed employment misconduct and is ineligible for benefits.

Affirmed.