STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0936

Michael Eskierka,
Relator,

vs.

Graco Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed June 3, 2008
Affirmed
Willis, Judge

Department of Employment and Economic Development
File No. 2785 07

Michael Eskierka, 13103 Zion Street Northwest, Coon Rapids, MN 55448-1235 (pro se relator)

Graco Inc., c/o Talx Employer Services, LLC, P.O. Box 1160, Columbus, Ohio 43216-1160 (respondent)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic Development, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351(for respondent DEED)

Considered and decided by Toussaint, Chief Judge; Willis, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

By writ of certiorari, pro se relator challenges the decision of an unemployment-law judge (ULJ) that relator was discharged for employment misconduct and is, therefore, disqualified from receiving unemployment benefits. Because the ULJ's decision is supported by substantial evidence, we affirm.

FACTS

Relator Michael Eskierka worked full time for Graco, Inc. as an assembler from June 1999 until December 20, 2006, when Graco discharged him for repeatedly violating its attendance policy.

In July 2006, Eskierka did not report for an overtime shift that he had signed up to work, and Graco gave him a written warning. The warning stated that additional violations of work rules could result in "further disciplinary action, up to and including the termination of your employment." In August 2006, Eskierka called his supervisor before his regularly scheduled shift was about to begin to report that he would be three hours late to work. Later that morning, Eskierka called the supervisor again and said that he needed to take the entire day off because he was meeting with his attorney. Graco, which requires its employees to give advance notice to miss an entire day of work, issued Eskierka another written warning for failing to provide proper notice of his absence.

On December 14, 2006, Eskierka came to work two hours late. He did not call his supervisor in advance to report that he would be late. Instead, Eskierka called his mother, who also works at Graco, and asked her to write his name in Graco's "attendance book."

The attendance book allows employees to request time off in advance. Eskierka's mother then wrote "Mike E. 2 hr. personal" in the attendance book on the page for the day on which the entry was made. When confronted by his supervisors, Eskierka said that he, not his mother, had written his name in the attendance book. Graco issued another warning, and, on December 20, 2006, discharged Eskierka for violating its attendance policy.

Eskierka applied for unemployment benefits, and an adjudicator initially determined that Eskierka was discharged for reasons other than misconduct and granted Eskierka's application for benefits. Graco appealed the decision to an ULJ, who concluded that Eskierka's "repeated failure to come to work without proper notice displays clearly a serious violation of the standards of behavior the employer has the right to expect" and disqualified Eskierka from receiving unemployment benefits because he had been discharged for employment misconduct. Eskierka filed for reconsideration, the ULJ affirmed, and this certiorari appeal follows.

D E C I S I O N

This court may affirm the ULJ's decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights "may have been prejudiced because the findings, inferences, conclusion or decision are . . . unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d) (2006).

Whether an employee committed employment misconduct 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 question of fact. *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Findings of fact are reviewed in the light most favorable to the ULJ's decision, and deference is given to the ULJ's determinations of credibility. *Id*. But whether an act by the employee constitutes disqualifying misconduct is a question of law, which this court reviews de novo. *Schmidgall*, 644 N.W.2d at 804.

A person who is discharged because of employment misconduct is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4 (2006). "Employment misconduct" is defined as

> any intentional, negligent, or indifferent conduct, on the job or off the job (1) that displays clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee, or (2) that displays clearly a substantial lack of concern for the employment.
>
> Inefficiency, inadvertence, simple unsatisfactory conduct, a single incident that does not have a significant adverse impact on the employer, conduct an average reasonable employee would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer, are not employment misconduct.

Minn. Stat. § 268.095, subd. 6(a) (2006). Excessive tardiness and repeated absences may constitute employment misconduct. *See McLean v. Plastics, Inc.*, 378 N.W.2d 104, 107 (Minn. App. 1985) (concluding that an employee's excessive tardiness constituted misconduct); *Flahave v. Lang Meat Packing*, 343 N.W.2d 683, 686-87 (Minn. App. 1984) (concluding that an employee's failure to notify employer of absences on four

occasions in one year constituted misconduct). And even a single absence without prior notification may constitute misconduct. *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986). Additionally, an employee "can commit misconduct by refusing to comply with an employer's reasonable requests and policies." *Bray v. Dogs & Cats Ltd.*, 679 N.W.2d 182, 184 (Minn. App. 2004); *see also Edwards v. Yellow Freight Sys.*, 342 N.W.2d 357, 359 (Minn. App. 1984) (concluding that, when employee had received several warnings, employee's persistent absenteeism and repeated failure to comply with employer's regulation to provide advance notice when unable to report to work constituted misconduct, even though there was evidence that the employee was ill).

Eskierka contends that the ULJ's decision is not supported by substantial evidence. We disagree. Substantial record evidence supports the ULJ's finding that Eskierka committed employment misconduct because of his "repeated failure to come to work without proper notice." At the hearing, Graco representatives testified that Eskierka violated company policy by failing to provide notice of his absence or tardiness on three occasions. Testimony established that Eskierka failed to properly notify Graco of absences or tardiness in July, August, and December 2006. And Eskierka does not deny that he (1) missed a shift in July and failed to properly report it; (2) failed to comply with Graco's policy on reporting absences when he missed a shift in August; and (3) did not call his supervisor to provide notice of his tardiness on December 14. Additionally, the record contains three written warnings, all signed by Eskierka, that document Eskierka's failure to comply with company policies. These warnings show that Eskierka was aware

that Graco required its employees to notify their supervisor "before shift start for absenteeism or one hour after shift start for tardiness."

Eskierka also contends that Graco selectively enforced its rules because, in the past, he had "come in during third shift and wrote [his] name in the book for that day" to take time off, and he was not penalized. But selective enforcement of an employer's rules does not excuse an employee's violation of those rules. *See Sivertson v. Sims Sec., Inc.*, 390 N.W.2d 868, 871 (Minn. App. 1986) (stating that claims of selective enforcement are "not relevant" to whether an employee's violation of an employer's rules is employment misconduct), *review denied* (Minn. Aug. 20, 1986). Similarly, Eskierka's claim that other employees "find it acceptable and appropriate to inform their supervisors" in a manner that violates company policy does not absolve him from complying with those rules. *See Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986) ("Violation of an employer's rules by other employees is not a valid defense to a claim of misconduct.").

Because the ULJ's findings are supported by substantial evidence and failure to provide adequate notice of absences and tardiness as required by company policy is employment misconduct as it is defined in Minn. Stat. § 268.095, subd. 6(a), the ULJ properly disqualified Eskierka from receiving unemployment benefits.

Affirmed.