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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1374**

Timmothy E. Dimascio,
Relator,

vs.

W. N. Cardozo Furniture Co.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed July 15, 2008
Affirmed
Lansing, Judge**

Department of Employment and Economic Development
File No. 5642 07

Timmothy E. Dimascio, 8448 Little Road, Bloomington, MN 55437-1302 (pro se relator)

W. N. Cardozo Furniture Co., 845 East Hennepin Avenue, Minneapolis, MN 55414-1201
(respondent)

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Development, 1st National Bank Building, 332 Minnesota Street, Suite E200, St.Paul,
MN 55101-1351 (for respondent Department of Employment and Economic
Development)

Considered and decided by Lansing, Presiding Judge; Stoneburner, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

LANSING, Judge

Timmothy Dimascio appeals, by writ of certiorari, an unemployment law judge's determination that he is disqualified from receiving unemployment benefits. The determination was based on findings that Dimascio engaged in employment misconduct when, within a thirty-three-day period, and, despite a final warning, he was absent from work on three separate days without providing proper notice. Because the findings are supported by substantial evidence and the decision is not affected by error of law, we affirm.

FACTS

W. N. Cardozo Furniture Company employed Timmothy Dimascio in its shipping and receiving department from June 2005 to February 2007. Dimascio was a salaried employee who worked a forty-hour week. Cardozo terminated Dimascio's employment on February 16, 2007, which was the third time in a thirty-three-day period that he had been absent from work without properly notifying his supervisor.

Dimascio applied for unemployment benefits with the Department of Employment and Economic Development (DEED), and DEED concluded that Dimascio was disqualified from benefits because he was discharged for employment misconduct. Dimascio appealed, and a hearing was scheduled.

At the hearing, Dimascio's supervisor testified that in the calendar year 2006, Dimascio was absent from work about one day each month. Sometimes Dimascio called to inform his supervisor that he would be absent and sometimes he did not. Dimascio

told his supervisor that his absences were necessary to care for his sick child, and the company worked with him on these absences and did not issue him warnings.

On January 15, 2007, Dimascio missed work for reasons unrelated to his child, and he did not notify his supervisor. The next day, Dimascio told his supervisor that he had been absent because his car would not start and that he did not call his supervisor because he could not find his cell phone. Dimascio's supervisor told Dimascio that he could not continue to miss work without calling.

Dimascio was absent from work again on February 8, 2007, and he again failed to notify his supervisor. When Dimascio returned to work the next day, he told his supervisor that he had been absent because of "car trouble" and that he could not call because his cell phone was not working. Dimascio's supervisor told Dimascio that he was giving him his "last warning" that he could not miss work without advance notice.

Then, on February 16, Dimascio's supervisor received a voicemail message from Dimascio at about 8:30 in the morning. Dimascio said that his landlord had locked the door to the garage and that Dimascio was unable to gain access to his car. Based on Dimascio's voicemail message, his supervisor understood that Dimascio would be in contact with his landlord and that he would "probably see [Dimascio] within an hour." When Dimascio did not arrive at work by noon, his supervisor called Dimascio's cell phone and left a message. At 2:00 p.m., Dimascio's supervisor left Dimascio a second message telling him not to come to work because his employment had been terminated.

Following the hearing, the unemployment law judge (ULJ) determined that Dimascio was disqualified from the payment of unemployment benefits because he was

discharged for employment misconduct. Dimascio filed a request for reconsideration, and the ULJ affirmed the disqualification. Dimascio now appeals by writ of certiorari.

D E C I S I O N

A discharge for employment misconduct results in disqualification from unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2006). “Employment misconduct” is intentional, negligent, or indifferent conduct that clearly displays either “a serious violation of the standards of behavior the employer has the right to reasonably expect” or “a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (2006).

We review an unemployment law judge’s (ULJ) decision to determine whether substantial rights were prejudiced because the findings, inferences, conclusion, or decision are affected by error of law or unsupported by substantial evidence in view of the entire record. *See* Minn. Stat. § 268.105, subd. 7(d) (2006) (providing bases on which this court may reverse or modify ULJ’s decision). In determining whether an employee committed a certain act, we defer to the ULJ’s finding if it is supported by substantial evidence. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We review independently, however, the legal determination of whether an employee’s act constitutes employment misconduct. *Id.*

Absence “because of illness or injury *with proper notice* to the employer” is not employment misconduct. Minn. Stat. § 268.095, subd. 6 (2006) (emphasis added). But an employee’s failure to give proper notice of work absences constitutes employment misconduct. *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986). This is particularly true when an employee repeatedly violates an employer’s notice-of-

absence provision or has received a warning for failure to provide proper notice. *Edwards v. Yellow Freight Sys.*, 342 N.W.2d 357, 359 (Minn. App. 1984) (stating that employee's "failure to notify the employer of inability to report to work" despite warnings constitutes disqualifying misconduct); *Flahave v. Lang Meat Packing*, 343 N.W.2d 683, 686-87 (Minn. App. 1984) (holding that employee who, despite warnings, failed to properly notify his employer of his intended absence from work four times in one year was discharged for misconduct).

The ULJ found that Dimascio was discharged because he missed substantial amounts of work during the year preceding his discharge, because he was absent from work without notice to Cardozo on both January 15, 2007, and February 8, 2007, and because he failed to properly notify his employer that he would be absent from work on February 16, 2007.

The testimony of Dimascio's supervisor substantially supports the ULJ's determination that Dimascio repeatedly missed work without providing proper notice. His employer testified that prior to January 2007 Dimascio was absent from work about one day each month; that Dimascio missed work without notifying his supervisor on both January 15, 2007, and February 8, 2007; and that Dimascio was absent from work on February 16, 2007, after indicating that he would arrive at work before noon. Although Dimascio testified at the hearing that he did not remember being absent without notice in January and that he notified his supervisor he would be absent on February 8, the ULJ noted that Dimascio's testimony on important points was less than certain and that the

testimony of Dimascio's supervisor was more credible and reliable. We defer to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344.

Dimascio argues that he should not be disqualified from receiving unemployment benefits because he had good reasons for missing work. But the ULJ's decision was not based on whether Dimascio had good reasons for missing work. The ULJ's employment-misconduct determination was based on his findings that Dimascio did not properly notify his employer of his absences, even after he had received a final warning. Failing to comply with an employer's reasonable notice-of-absence policy results in disqualification whether or not the employee has a good reason for his absence. *See Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985) (concluding that patterns of violations related to absences may constitute unemployment misconduct regardless of reason for employee's absence on last day of work).

We therefore conclude that the ULJ's findings are supported by substantial evidence and his decision is not affected by error of law. Thus, the ULJ properly concluded that Dimascio was discharged for employment misconduct, and he is disqualified from receiving unemployment benefits.

Affirmed.