STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2073

Wayne E. Hartman,
Relator,

vs.

Thermo-Tech Windows Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed October 20, 2009
Affirmed
Johnson, Judge

Department of Employment and Economic Development
File No. 21162676-3

Wayne E. Hartman, 52 Glen Street, #11, Foley, MN 56329-4702 (pro se relator)

Thermo-Tech Windows Inc., 1105 39th Avenue Northeast, Sauk Rapids, MN 56379-9671 (respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and Larkin, Judge.

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

JOHNSON, Judge

Thermo-Tech Windows Inc. terminated the employment of Wayne E. Hartman because he was absent from work after his supervisor denied his request for a vacation. Hartman sought unemployment benefits but was deemed ineligible on the ground that he was terminated for employment misconduct. We affirm.

FACTS

Hartman was employed by Thermo-Tech from October 3, 2005, to August 18, 2008. He worked as a fabricator, making windows.

During the week of August 11, 2008, Hartman asked his supervisor for permission to take one day of vacation on Friday, August 15. Hartman's supervisor denied the request because other employees were planning on taking vacation on that day and because the company's workload required Hartman to be present. But Hartman's supervisor said that he could have the day off on Monday, August 18. Hartman nonetheless called in sick on Thursday, August 14, and called in absent on Friday, August 15. When he returned to work on Monday, August 18, he was terminated.

Hartman sought unemployment benefits, and the Department of Employment and Economic Development (DEED) determined that he was ineligible. Hartman appealed from the initial determination, and a telephonic hearing was held in September 2008 before an unemployment law judge (ULJ). At the hearing, Hartman testified that he took two days off work because he wanted to help his cousin move and believed that he would not be terminated. The ULJ concluded that Hartman was discharged for employment

misconduct and, thus, was ineligible for unemployment benefits. The ULJ reasoned that Hartman's absences on August 14 and 15, 2008, were "not for compelling or necessitous reasons." The ULJ found that Hartman's absences "displayed a serious violation of the standards of behavior Thermo-Tech had a right to reasonably expect of him and a substantial lack of concern for the employment." After Hartman sought reconsideration of the decision, the ULJ affirmed his previous decision. Hartman appeals by way of a writ of certiorari.

D E C I S I O N

Hartman argues that the ULJ erred because his absenteeism did not constitute employment misconduct. This court reviews a ULJ's decision denying benefits to determine whether the findings, inferences, conclusions, or decision are affected by an error of law or are unsupported by substantial evidence in view of the entire record. *See* Minn. Stat. § 268.105, subd. 7(d) (2008). The ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination whether an employee is ineligible for unemployment benefits is a question of law, to which we apply a *de novo* standard of review. *Id.*

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2007). "Employment misconduct" is defined as 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) (2008). But employment misconduct does not include "absence because of illness or injury with proper notice to the employer." *Id.*

This case is very similar to *Little v. Larson Bus Serv.*, 352 N.W.2d 813 (Minn. App. 1984), *superseded by statute on other grounds*, Minn. Stat. § 268.095, subd. 6(e) (2008). In that case, the employee requested time off, a supervisor denied the request, but the employee nonetheless failed to report to work. The employee was terminated. *Id.* at 814. This court held that the employee committed employment misconduct by failing to report to work after being denied a requested leave. *Id*. at 815. Similarly, Hartman requested time off, but his request was denied. Hartman nonetheless was intentionally absent on both August 14 and 15, without permission, and was terminated. As a general rule, refusing to follow an employer's reasonable policies and requests is misconduct because it shows a substantial lack of concern for the employer's interest. *See Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). More specifically, "[a]n employer has the right to establish and enforce reasonable rules governing absences from work." *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007).

Hartman contends that he did not engage in misconduct because he reasonably did not expect that his absences would lead to his termination. His contention is based on Thermo-Tech's attendance policy, which assigns an employee half a point for being late for work or leaving early from one's shift; assigns one point for an unexcused absence, regardless whether the employees calls in; and makes an employee subject to termination upon the accumulation of six points. A series of unexcused absences, on successive days,

counts for only one point. In light of this policy, Hartman calculated that by being absent on Thursday and Friday, he would not be subject to termination because he would have only five and one-half points. Hartman notes that, before his absences, he asked his supervisor what would happen if he took time off without permission and that his supervisor merely said that it would be considered an unexcused absence, which would result only in an additional point.

This argument might have some support in the caselaw if it had a nexus with his termination. *See Hoemberg v. Watco Publishers, Inc.*, 343 N.W.2d 676 (Minn. App. 1984) (holding that employee did not engage in misconduct because employer failed to follow disciplinary policy and because employee could not have known action would lead to termination), *review denied* (Minn. May 15, 1984). But the argument fails because Hartman was terminated for a reason other than the accumulation of six points. Thermo-Tech's attendance policy also states that if an employee violates the policy within 60 days of being disciplined for the same type of violation, or if the employee had previously been disciplined twice for the same type of violation, the next violation will result in termination. Approximately one month before his termination, Hartman had received a "Final Written Warning" for an unexcused absence. That written warning stated that additional violations of the attendance policy "can result in discipline, up to and including termination." The notice of termination that Hartman received on August 18 states that he was terminated because he had committed an offense within 60 days of his prior offense. Thus, Hartman's reliance on the six-point rule is unwarranted.

The relevant issue is whether Hartman's intentional unexcused absences on August 14 and 15, 2008, which occurred within 60 days of his prior unexcused absence, constitute misconduct. Hartman has no additional arguments why his conduct does not clearly display 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." Minn. Stat. § 268.095, subd. 6(a). By unilaterally taking two days off work in blatant disregard for his supervisor's statements that he was not permitted to take a vacation day and that his presence was needed, Hartman engaged in exactly the type of conduct described in the statute. *See Little*, 352 N.W.2d at 814-15 (noting that employers may expect employees to work when scheduled); *see also Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985) (noting that chronic absenteeism may "demonstrate a lack of concern" for one's employment). Furthermore, Hartman's absences are not within the statutory exception for "absence because of illness or injury with proper notice to the employer." Minn. Stat. § 268.095, subd. 6(a).

In sum, the ULJ did not err by concluding that Hartman was terminated for employment misconduct.

Affirmed.