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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-605**

Joseph Hosch,
Relator,

vs.

St. Paul Harley-Davidson Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed December 15, 2009
Affirmed
Connolly, Judge**

Department of Employment and Economic Development
File No. 21897936-3

Joseph E. Hosch, 2581 Fifth Avenue East, North St. Paul, MN 55109-3026 (pro se relator)

St. Paul Harley-Davidson Inc., 2899 Hudson Road, St. Paul, MN 55128-7100 (respondent)

Lee B. Nelson, Amy R. Lawler, Minnesota Department of Employment and Economic Development, E200 First National Bank Building, 332 Minnesota Street, St. Paul, MN 55101 (respondent-department)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator challenges the decision by the unemployment-law judge (ULJ) that he was ineligible to receive unemployment benefits because he was discharged for misconduct based on his overall pattern of behavior. Because there is substantial evidence in the record to support the decision, we affirm.

FACTS

Relator Joseph Hosch began working for respondent St. Paul Harley-Davidson Inc. (SPHD) as a motorcycle sales agent on February 11, 2008. Relator was discharged on January 27, 2009. SPHD has well-established attendance and conduct policies in place that employees are required to review and agree to prior to beginning employment with SPHD. Sales agents of SPHD are required to attend weekly meetings at 8:45 a.m. on Saturdays, which is approximately one hour and fifteen minutes earlier than the starting time of other days of the week. All SPHD sales agents are informed that meeting attendance is mandatory.

Relator was late to or missed Saturday meetings on four separate occasions from 2008-2009, and received several reminders regarding SPHD's attendance policy. On October 25, 2008, relator missed a second consecutive Saturday meeting and was warned by Jeff Astrup, SPHD sales manager, that it was unacceptable to miss meetings without preapproval. After relator missed a third meeting on November 8, 2008, relator was suspended for a day without pay and informed that the next incident would result in a

one-week suspension without pay. On January 3, 2009, relator missed a fourth meeting without preapproval, and received a five-day suspension.

Relator was also warned about inappropriate conduct on more than one occasion. On November 24, 2008, relator sent an e-mail to a large group of Harley-Davidson employees, including Lunette Blomgren, human resources manager of SPHD, and Bill Sigel, a sales manager of another Harley-Davidson store. The e-mail included approximately 30 attachments. At least two of the attachments featured scantily clad women, with one woman appearing topless. Both Sigel and Blomgren reprimanded relator for sending the e-mail. In December 2008, relator also received a warning regarding improper treatment of a prospective customer.

Relator underwent back surgery on January 9, 2009, spending four days in the hospital and another four in a care center. On January 19, 2009, two days after returning home from the care center, relator visited Blomgren in her office. While speaking with Blomgren, relator noted that his nurses had all been “nines and tens.” Three days later, relator received a telephone call at home from Blomgren. Relator indicated to Blomgren that he was getting ready for an appointment, and that he would call Blomgren back because he had to put his “wiener” away. Relator later testified that he had been caught off guard by receiving a telephone call at home, that the word “wiener” is not sexually suggestive, and that he was under the influence of morphine and other pain medication at the time.

Relator had chronic back pain, which ultimately required surgery. Prior to surgery, relator was in a great deal of pain and took a number of prescription pain

medications. SPHD employees noted that relator's energy level was different while taking the medication. Relator, however, did not ask for a specific accommodation, and did not request an adjusted work schedule from SPHD to accommodate limitations associated with his condition. Relator also did not provide a doctor's note to SPHD indicating that his medical condition might cause him to miss work.

D E C I S I O N

I. The ULJ's decision that relator was terminated for misconduct is substantially supported by the record.

Relator argues that he did not commit employment misconduct because his medical condition caused his absence and SPHD failed to provide him with an adequate accommodation. Relator relies heavily on his back condition and use of prescription pain medication to explain or otherwise justify his conduct. The ULJ determined that relator was discharged for employment misconduct and therefore was ineligible for unemployment benefits. We agree.

When reviewing the decision of a ULJ, this court may affirm the decision, remand it for further proceedings, or reverse or modify it if the substantial rights of the petitioner may have been prejudiced because the findings, inferences, conclusion, or decision are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2008).

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 an employee committed a particular act is a question of fact. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). This court views the ULJ's factual findings in the light most favorable to the decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court also defers to the ULJ's credibility determinations. *Id.* As a result, this court will not disturb the ULJ's factual findings when the evidence substantially sustains them. Minn. Stat. § 268.105, subd. 7(d). But whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo. *Scheunemann*, 562 N.W.2d at 34.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct means “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.” *Id.*, subd. 6(a) (2008).

Relator argues that his tardiness and absence issues were few and were due to his back injury. By statute, neither “a single incident that does not have a significant adverse impact on the employer,” nor absence from work “because of illness or injury with proper notice to the employer” constitutes employment misconduct. *Id.* Continued tardiness, however, combined with several warnings, amounts to misconduct sufficient to

disqualify an employee from receiving unemployment benefits. *Evenson v. Omnetic's*, 344 N.W.2d 881, 883 (Minn. App. 1984).

Relator did not attend mandatory Saturday meetings on four separate occasions. Relator attempts to excuse his absences by relying on his back condition, indicating that he was unable to wake up early enough on Saturdays to arrive at work an hour and fifteen minutes earlier than the other days of the week. Relator did not have attendance issues on any other day of the week, and provided no evidence that his back pain was worse on Saturdays. Relator provided no evidence that he was unable, due to his back condition, to give notice to his employer when he was going to be late or absent. Even after repeated warnings that absences were not acceptable, relator did not seek preapproval for absences or provide a doctor's note indicating that such an accommodation would be necessary.

Relator also argues that his conduct was acceptable, or that SPHD policy required that he be warned to stop making inappropriate comments to coworkers. Relator received a copy of SPHD's employee code of conduct that outlined rules regarding appropriate computer use and harassment. Despite acknowledging the employee code, relator sent an inappropriate e-mail to coworkers and made at least two sexually charged comments to a female human-resources manager.

The record is replete with instances in which relator was warned of inappropriate conduct. A reprimand immediately followed relator's e-mail. Relator was reminded of the attendance policy after every absence. Relator was also notified after a prospective

customer voiced a complaint. The record indicates that SPHD sufficiently communicated its dissatisfaction with relator's conduct.

Relator attempts to excuse his conduct, and argues that the prescription pain medication for his back condition affected his conduct. Specifically, relator testified that he was on four different pain medications, which caused lightheadedness "similar to maybe being drunk." The ULJ, however, did not find relator's testimony credible. We give deference to the ULJ's credibility determinations. *Skarhus*, 721 N.W.2d at 344. Relator also provided two statements from doctors in support of his contention that the prescription medications had the ability to affect his conduct. These statements, however, were dated well after the hearing and are being presented for the first time on appeal. This court will not consider matters outside the record on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Thus, we must rely on the ULJ's credibility determinations.

Relator also argues that his actions were condoned, at least with respect to the e-mail, and that he should not be held to a higher standard than his superiors. Relator submits several e-mail messages for the first time on appeal in support of the contention that forwarding e-mails containing objectionable content was permitted by his superiors at SPHD. As previously stated, this court will not consider matters outside the record on appeal. *Id.* Furthermore, the violation of an employer's rules by other employees is not a valid defense to employment misconduct. *Dean v. Allied Aviation Fueling Co.*, 381 N.W.2d 80, 83 (Minn. App. 1986). The e-mail evidence submitted by relator for the first

time on appeal, regardless of whether it tends to condone relator's conduct, will not be considered by this court and is not persuasive.

II. SPHD did not fail to provide an appropriate accommodation, because an accommodation was not requested.

Relator relies heavily throughout his argument on his allegation that SPHD did not provide a proper accommodation for his back condition. We disagree. Minn. Stat. § 268.095, subd. 6(a) establishes that an employee who is discharged for "absence because of illness or injury with proper notice to the employer" has not committed misconduct. An employee also retains his eligibility if he is ill, asks his employer for a reasonable accommodation for his illness, the employer refuses, and the employee quits. Minn. Stat. § 268.095, subd. 1(7) (2008). Relator did not request an accommodation to arrive late to meetings. Rather, relator did not think that it would be an issue, and simply informed his supervisor that he could not get up every morning. Relator testified that he did not ask for a specific accommodation. At no time during his employment did relator provide a doctor's statement providing notice to SPHD that an accommodation for late arrival was required. Further, relator did not quit because SPHD was unwilling to provide an accommodation. Relator was terminated for misconduct.

Relator's continued absenteeism from mandatory meetings and inappropriate conduct in the workplace constitute serious violations of the conduct an employer has the right to reasonably expect from its employees pursuant to Minn. Stat. § 268.095, subd. 6(a). The ULJ did not err by finding him ineligible to receive employment benefits.

Affirmed.