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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1129**

Alex Sieh,
Relator,

vs.

The Wackenhut Corporation,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 9, 2010
Affirmed
Collins, Judge***

Department of Employment and Economic Development
File No. 21477474-3

Alex K. Sieh, Brooklyn Park, Minnesota (pro se relator)

The Wackenhut Corporation, Peabody, Massachusetts (respondent employer)

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

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Collins,
Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Relator Alex Sieh, a security guard, challenges the finding of the unemployment law judge (ULJ) that relator was sleeping on the job and the ULJ's conclusion that this was employment misconduct. We affirm.

DECISION

“Whether an employee committed employment misconduct is a mixed question of fact and law. Whether the employee committed a particular act is a question of fact. . . . But whether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo.” *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008) (citations omitted), *review denied* (Minn. Oct. 1, 2008). “[T]his court will not disturb the ULJ’s factual findings when the evidence substantially sustains them.” *Id.*; Minn. Stat. § 268.105, subd. 7(d) (2008).

Relator was employed by respondent Wackenhut Corporation, a contract security provider, and assigned to the night shift in an office building. After receiving a report that relator was sleeping during his shift, Wackenhut sent a field supervisor to substantiate the report. The field supervisor found relator sleeping and photographed him. The next day relator was discharged.

Relator applied for benefits and was found eligible because he said he was discharged for unsatisfactory work performance, which is not misconduct. *See* Minn. Stat. § 268.095, subd. 6(a) (2008) (excluding “simple unsatisfactory conduct” from definition of misconduct).

Wackenhut appealed. A telephonic hearing was held, and relator testified that he had not been sleeping but merely relaxing. Wackenhut's senior area supervisor (SAS) was asked for her response to this testimony. She testified:

When you come to work you're on duty. . . . When you're on a break, it's a working break. . . . And so, there is no sleeping. And [the security guards] are taught that in training. It's in their officer's handbook. There was a memo . . . put out by their supervisor, saying, if you're sleeping, it's not okay. Don't do it.

Relator agreed that there was a memo saying "[A]ny officer asleep on the job will be fired." When asked for a description of the photograph of relator sleeping, the SAS testified:

[I]t shows him kind of slumped down in a chair with his head slumped over to one side in his hand. And, [the field supervisor] said he stood there for a couple of minutes and [relator] didn't move. He took the picture and even when he took the picture, [relator] did not respond. So, he was sleeping. He admitted to me he was sleeping.

The ULJ determined that the testimony of the SAS was more credible than that of relator. "Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's, Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006).

Based on the testimony of the SAS, the ULJ found that relator was sleeping. A single incident of sleeping on the job may be misconduct. *See, e.g., Augur v. Gillette Co.*, 303 N.W.2d 255, 257 (Minn. 1981). The ULJ concluded that relator had been discharged for misconduct because sleeping on the job violated both the standard of behavior that respondent had a right to reasonably expect of its employees and respondent's policy.

See Minn. Stat. § 268.095, subd. 6(a) (defining misconduct as conduct that violates the standard of behavior the employer has the right to reasonably expect); *Schmidgall v. Filmtec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002) (“[R]efusing to abide by an employer’s reasonable policies . . . amounts to disqualifying misconduct”).

Because the evidence substantially sustains the finding that relator was sleeping on the job and because the conclusion that this constituted employment misconduct is not an error of law, we affirm.

Affirmed.