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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1211**

Keith Jorgensen,
Relator,

vs.

Harty Mechanical Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 16, 2010
Affirmed
Johnson, Judge**

Department of Employment and Economic Development
File No. 21940314-3

Keith Jorgensen, Stewartville, Minnesota (pro se relator)

Harty Mechanical Inc., Austin, Minnesota (respondent)

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

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

UNPUBLISHED OPINION

JOHNSON, Judge

Harty Mechanical Inc. terminated the employment of Keith Jorgensen because he possessed and smoked marijuana in a company-owned vehicle. Jorgensen sought unemployment benefits but was deemed ineligible on the ground that he was terminated for employment misconduct. We affirm.

FACTS

Jorgensen worked as a sheet metal foreman for Harty Mechanical from March 2006 to January 2009. In mid-December 2008, one of Jorgensen's co-workers informed the employer that Jorgensen kept marijuana in a company-owned vehicle that had been issued to Jorgensen. When the employer investigated the matter, Jorgensen admitted that the marijuana belonged to him and that he had smoked marijuana in the vehicle while returning from a job site. The company also learned that Jorgensen possessed alcoholic beverages at the job site. Jorgensen's conduct violated Harty Mechanical's vehicle-safety policy. The company terminated him on January 26, 2009.

After Jorgensen applied for unemployment benefits, the Department of Employment and Economic Development (DEED) initially determined that he is eligible. Harty Mechanical filed an administrative appeal from that decision. An unemployment law judge (ULJ) held an evidentiary hearing in March 2009 and concluded that Jorgensen is ineligible for unemployment benefits because he engaged in misconduct by smoking marijuana in a company vehicle in violation of company policy. The ULJ reiterated that

determination upon Jorgensen's request for reconsideration. Jorgensen appeals by way of a writ of certiorari.

D E C I S I O N

Jorgensen argues that the ULJ erred by concluding that he is ineligible for unemployment benefits because he engaged in 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. Minn. Stat. § 268.105, subd. 7(d) (2008). The evidentiary hearing is an evidence-gathering inquiry, not an adversarial contest, and is conducted without regard to any particular burden of proof. *Id.*, subd. 1(b) (2008); *Vargas v. Northwest Area Found.*, 673 N.W.2d 200, 205 (Minn. App. 2004), *review denied* (Minn. Mar. 30, 2004). 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 based on employment misconduct is a question of law, which is subject to 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 (2008). Employment misconduct includes "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." Minn. Stat. § 268.095, subd. 6(a) (2008). As a

general rule, refusing to follow an employer's reasonable policies 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).

Notwithstanding the general rule, “[c]onduct that was a direct result of the applicant’s chemical dependency is *not* employment misconduct unless the applicant was previously diagnosed chemically dependent or had treatment for chemical dependency, and since that diagnosis or treatment has failed to make consistent efforts to control the chemical dependency.” Minn. Stat. § 268.095, subd. 6(b) (2008) (emphasis added). Jorgensen contends that the main clause of this statutory exception makes him eligible for benefits. The “unless” clause of the exception does not apply because Jorgensen sought a chemical-dependency assessment and was diagnosed as chemically dependent on the day *after* his termination.

To take advantage of the statutory exception, Jorgensen’s conduct “must be *the direct result* of his chemical dependency.” *Peterson v. Northwest Airlines Inc.*, 753 N.W.2d 771, 776 (Minn. App. 2008) (emphasis added), *review denied* (Minn. Oct. 1, 2008). The ULJ made two findings related to this issue. First, the ULJ found that Jorgensen’s chemical-dependency evaluation “does not indicate that Jorgensen’s dependency was of such a nature that he lacked the ability to refrain from smoking marijuana while in a company vehicle.” The record supports the ULJ’s characterization of the assessment document. The assessment does not explicitly address the degree to which Jorgensen had control over his dependence on marijuana or the question whether Jorgensen smoked marijuana in the company vehicle because of his chemical dependency.

If the assessment has any relevance, it would tend to prove that Jorgensen voluntarily decided to smoke marijuana in the company vehicle. The assessment notes Jorgensen's statement "that the pot 'helped him keep awake,' that he enjoyed the feeling, [that it] helped him relax on the way home and [that it] was considered his time."

Second, the ULJ found that "Jorgensen made the choice as when to [smoke marijuana] and when not to do so, indicating that he had the ability to control his conduct." This finding is supported by Jorgensen's own testimony at the agency hearing that he smoked marijuana in his company vehicle "once or twice a week for a period of a month when I was coming back from Blue Earth" because he believed that the marijuana helped him stay awake on the 90-minute drive from the work site to his home.

Based on this evidence, the ULJ concluded that Jorgensen's conduct "was intentional conduct that displayed clearly a serious violation of standards of behavior that Harty Mechanical had the right to reasonably expect of him as an employee, and amounts to employment misconduct as that term is defined." The ULJ's conclusion is proper because the ULJ's factual findings compel the conclusion that Jorgensen's misconduct was not the "direct result of [his] chemical dependency." *See* Minn. Stat. § 268.095, subd. 6(b); *see also Peterson*, 753 N.W.2d at 776. Thus, the ULJ did not err by concluding that Jorgensen is ineligible for unemployment benefits.

Affirmed.