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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1834**

Amos Holton,
Relator,

vs.

Greyhound Lines Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 30, 2010
Affirmed
Larkin, Judge**

Department of Employment and Economic Development
File No. 22701725-3

Amos Holton, Eau Claire, Wisconsin (pro se relator)

Greyhound Lines Inc., c/o TALX UCM Services Inc., St. Louis, Missouri (respondent)

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

Considered and decided by Toussaint, Chief Judge; Larkin, Judge; and Randall,
Judge.*

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

UNPUBLISHED OPINION

LARKIN, Judge

Relator Amos Holton challenges the determinations of an unemployment-law judge (ULJ) that relator was discharged for misconduct, was ineligible for unemployment benefits, and had been overpaid benefits. Because the ULJ did not err by determining that relator was ineligible for unemployment benefits because he was discharged for employment misconduct, we affirm.

FACTS

In 1990, relator began working as a bus driver for respondent Greyhound Lines Inc. Relator was aware of respondent's policies that: (1) prohibit drivers' use of drugs, on or off the job; (2) require drivers to submit to random testing; and (3) provide that drivers who test positive will be discharged. In 2005, relator tested positive for marijuana. He completed a three-month outpatient treatment program and attended semi-weekly Narcotics Anonymous (NA) meetings for one year. Thereafter, he attended meetings, in his own words, "occasionally" but not "consistently." In May 2009, relator again tested positive for marijuana. Respondent discharged him, and he applied for unemployment benefits.

Relator was found eligible for benefits because he had been discharged for conduct that resulted from his chemical dependency, he had been previously diagnosed as chemically dependent, and he was making consistent efforts to control his chemical dependency. *See* Minn. Stat. § 268.095, subd. 6(b) (2008) (providing that conduct resulting from previously diagnosed chemical dependency is not misconduct unless the

employee has failed to make consistent efforts to control the chemical dependency). Respondent employer appealed, arguing that relator had been discharged in accord with a provision in its drivers' rule book that active drivers who test positive for an illegal drug will be discharged.

Following a telephonic hearing, at which relator testified that he had been using marijuana before he tested positive and that he attended NA or Alcoholics Anonymous (AA) meetings occasionally but not consistently, the ULJ found that relator had not attended meetings consistently and had been using marijuana. The ULJ concluded that his use of marijuana was misconduct because it violated respondent's reasonable policy that active drivers refrain from using drugs. The ULJ determined that relator was ineligible for benefits and had been overpaid \$3,320.

D E C I S I O N

Our review of a ULJ's eligibility determination is governed by Minn. Stat. § 268.105, subd. 7(d) (2008), which provides:

The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision 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.

Relator was not eligible for benefits under Minn. Stat. § 268.095, subd. 6(b), because he was not consistently controlling his chemical dependency. The remaining question is whether he committed misconduct. 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). The misconduct definitions set out in the act are exclusive and “no other definition applies.” *Id.*, subd. 6(e) (2008). An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. *Id.*, subd. 4(1) (2008).

Whether an employee committed an act alleged to be employment misconduct is a question of fact, but the interpretation of whether that act is employment misconduct is a question of law, which this court reviews de novo. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008).

Peterson addressed the similar issue of an airline pilot’s use of alcohol.

[A]n airline pilot whose alcohol consumption violates his employer’s policy prohibiting such alcohol consumption while on flight reserve status commits employment misconduct. An airline has the right to reasonably expect that its pilots will refrain from violating a policy put in place to ensure the safety of the flying public. A pilot’s transgression of this policy is a serious violation of the standards of behavior that an airline has a right to reasonably expect of its employees because such a violation endangers the flying public by creating the possibility that an intoxicated pilot may be called on to fly a plane.

. . . . A pilot who voluntarily places himself in a position where he cannot perform his most essential job duty because he has consumed alcohol, in direct violation of his employer’s policy, shows a substantial

lack of concern for his employment as well as an utter contempt for those who have placed their trust in him.

Id. at 775.

Relator, like the airline pilot in *Peterson*, violated standards of behavior that respondent had a right to reasonably expect of its drivers and showed a substantial lack of concern for his employment. He committed misconduct within the meaning of Minn. Stat. § 268.095, subd. 6(a).¹ The ULJ did not err by determining that relator was ineligible for unemployment benefits because he was discharged for employment misconduct.

Affirmed.

Dated:

Judge Michelle A. Larkin

¹ In his request for reconsideration and on appeal, relator argues that there was a misunderstanding of his use of the terms “occasionally” and “consistently” and that he attended NA and AA meetings whenever his work schedule permitted. Because this evidence was not before the ULJ at the time he made his decision, it could not be considered on reconsideration and cannot be considered on appeal. *See* Minn. Stat. § 268.105, subd. 2(c) (2008) (providing that, on request for reconsideration, ULJ may not consider any evidence not submitted at the hearing); Minn. R. Civ. App. P. 110.01 (restricting record on appeal to papers filed with previous decision-maker, exhibits, and transcripts).