

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2**

Mark Schwartz,
Relator,

vs.

Edina Couriers LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed September 7, 2010
Affirmed
Wright, Judge**

Minnesota Department of Employment and Economic Development
File No. 23350408-3

Mark Schwartz, St. Paul, Minnesota (pro se relator)

Edina Couriers, Eden Prairie, Minnesota (respondent)

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

Considered and decided by Lansing, Presiding Judge; Wright, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

In this certiorari appeal from the denial of unemployment benefits, relator argues that the unemployment law judge (ULJ) erred by concluding that relator was discharged for employment misconduct and, therefore, is ineligible to receive unemployment benefits. We affirm.

FACTS

Relator Mark Schwartz worked full time in the warehouse for Edina Couriers LLC (Edina Couriers) from April 1, 2008, to September 2, 2009. Schwartz's work schedule was 7:00 a.m. to 4:00 p.m., Tuesdays through Fridays, and 1:00 p.m. to 5:00 p.m. on Saturdays. Beginning in May 2009, Schwartz was tardy for work on several occasions and repeatedly left work before the end of his scheduled shift. Schwartz also began to make errors in filling customer orders and to sleep at his desk. Between May 7 and September 2, 2009, Schwartz's supervisor, Tom McBurney, documented 22 incidents of Schwartz's performance problems. During this period, McBurney also gave Schwartz "a number of verbal warnings" regarding the need to fill orders accurately and to improve his attendance. On August 21, 2009, McBurney gave Schwartz a written warning directing Schwartz to work his scheduled shift, refrain from being late more than twice each month, and refrain from taking any unscheduled days off, barring unforeseen circumstances. The document, which Schwartz signed, also warned that "[t]he next occurrence will result up to and including employment termination."

On the afternoon of August 25, Schwartz's brother called him and asked if Schwartz could pick up his two-year-old niece from their mother's house. McBurney already had left work for the day when Schwartz approached Frank Zastrow, Edina Couriers's transportation operations manager, at approximately 3:00 p.m. and asked Zastrow to sign Schwartz's timecard because he was leaving. Zastrow was not aware of the written warning pertaining to Schwartz because Zastrow was not involved with personnel issues or management of the warehouse. When making his request, Schwartz misrepresented to Zastrow that "everything was done in the warehouse and that there was nothing left to do." Zastrow directed Schwartz to change the time he had written on his timecard from 4:00 p.m. to 3:00 p.m. to accurately reflect Schwartz's departure time. After Schwartz complied with this request, Zastrow signed the timecard. On September 2, McBurney terminated Schwartz's employment for (1) leaving early after receiving a written warning and (2) making a series of errors in filling orders.

Schwartz applied for unemployment benefits and established an unemployment benefits account with the Minnesota Department of Employment and Economic Development (DEED). A DEED adjudicator determined that Schwartz was ineligible to receive unemployment benefits because he was discharged for employment misconduct. Schwartz appealed. After a hearing, the ULJ concluded that Schwartz is ineligible to receive unemployment benefits because he committed employment misconduct by committing a serious violation of the standards of behavior Edina Couriers has the right to expect of an employee. Following Schwartz's request for reconsideration, the ULJ affirmed his decision. This certiorari appeal followed.

DECISION

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator 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 engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed a particular act is a question of fact. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). A ULJ’s factual findings are reviewed in the light most favorable to the decision and will not be disturbed on appeal if there is evidence that reasonably tends to sustain those findings. *Schmidgall*, 644 N.W.2d at 804. But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Id.* Because credibility determinations are the exclusive province of the ULJ, we accord such determinations deference on appeal. *Skarhus*, 721 N.W.2d at 344.

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). Employment misconduct is “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has

the right to reasonably expect of the employee; or (2) a substantial lack of concern for the employment.” *Id.*, subd. 6(a) (Supp. 2009).

An employer may establish and enforce reasonable rules governing employee absences. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). An employer also “has a right to expect an employee to work when scheduled.” *Little v. Larson Bus Serv.*, 352 N.W.2d 813, 815 (Minn. App. 1984), *superseded by statute on other grounds*, Minn. Stat. § 268.095, subd. 6(e) (Supp. 2007). An employee’s refusal to abide by the employer’s reasonable policies ordinarily constitutes employment misconduct. *Schmidgall*, 644 N.W.2d at 804.

Schwartz first challenges the ULJ’s finding that he knew that he was not to leave before 4:00 p.m. Schwartz argues that he did not have a set work schedule until after the warehouse moved to a new location, at which point Edina Couriers “wanted to get a handle on overtime.” But Schwartz acknowledges that Edina Couriers established set hours after it settled into the new facility. The August 21 written warning clearly states that Schwartz’s schedule as of August 24, 2009, would be Tuesday through Friday, 7:00 a.m. to 4:00 p.m., and Saturday, 1:00 p.m. to 5:00 p.m. And McBurney’s testimony corroborated Schwartz’s work schedule and established that the schedule was to be followed without deviation unless Schwartz obtained McBurney’s approval. When viewed in the light most favorable to the ULJ’s decision, the evidence amply supports the ULJ’s finding that Schwartz knew that he was scheduled to work from 7:00 a.m. to 4:00 p.m. and that he was not permitted to leave before 4:00 p.m. on August 25 without McBurney’s permission.

Schwartz also challenges the ULJ's finding that he left work early without permission for reasons other than an emergency. Schwartz contends that he had permission to leave early because he had a supervisor, Zastrow, sign his timesheet. But the written warning that Schwartz signed required him to work his full shift "unless arranged in advance or altered by Tom McBurney." That Schwartz did not arrange in advance to leave early is undisputed. And the ULJ's finding that Schwartz did not leave early because of an emergency also is supported by the undisputed evidence that Schwartz left work to perform a favor for his brother, not in response to a personal emergency. Finally, the evidence establishes that Schwartz had no reason to believe that obtaining Zastrow's signature on the timesheet satisfied the requirements of his written warning. Zastrow, McBurney, and Edina Couriers owner Nick Olson testified that Zastrow was not Schwartz's supervisor and that Zastrow's role at the company did not involve personnel issues. Even if Zastrow could be considered Schwartz's supervisor in McBurney's absence, there is no evidence in the record that Schwartz asked Zastrow for permission to leave early. Rather, Schwartz told Zastrow that "everything was done in the warehouse" and that Zastrow needed to sign Schwartz's timesheet because he was leaving. Zastrow submitted a written statement to the ULJ that he was not aware of the arrangement between Schwartz and McBurney and that he "initialed the timesheet as a formality." This record provides ample evidentiary support for the ULJ's finding that Schwartz left work early without permission after being warned that doing so could result in termination.

Edina Couriers had the right to expect Schwartz to work his scheduled hours unless he arranged to leave early in advance with his supervisor. *See Little*, 352 N.W.2d at 815 (stating that an “employer has a right to expect an employee to work when scheduled”). This expectation is particularly reasonable given the written warning that Schwartz signed, which made this requirement clear. By failing to work his scheduled hours and refusing to abide by Edina Couriers’s reasonable rules requiring Schwartz to arrange in advance changes to his schedule, Schwartz “display[ed] clearly . . . a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee.”¹ *See* Minn. Stat. § 268.095, subd. 6(a)(1).

Accordingly, the ULJ did not err by concluding that Schwartz is ineligible to receive unemployment benefits because he was discharged for employment misconduct.

Affirmed.

¹ Because the ULJ reached its decision based on Schwartz’s failure to comply with his employer’s attendance requirements, we need not reach Schwartz’s arguments addressing the reasons for his errors in filling orders.