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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-211**

Michael Jibben,
Relator,

vs.

T C P LLC,
Respondent

Department of Employment and Economic Development,
Respondent.

**Filed December 28, 2010
Affirmed
Ross, Judge**

Department of Employment and Economic Development
File No. 23358367-4

Michael Jibben, Montrose, Minnesota (pro se relator)

T C P LLC, Rockford, Minnesota (respondent employer)

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

Considered and decided by Toussaint, Presiding Judge; Ross, Judge; and Huspeni,
Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

Michael Jibben contests an unemployment law judge's decision that his employer discharged him for employment misconduct, rendering him ineligible to receive unemployment benefits. But the record supports the finding that Jibben was repeatedly tardy for work despite warnings and that he was absent without properly notifying his employer. We therefore affirm.

FACTS

Michael Jibben worked as a roofer for T C P LLC from December 2007 through May 2009. In August 2008, T C P reprimanded and warned Jibben in writing about his poor attendance. Jibben was then absent nine times and tardy five times, so T C P gave him another written warning. He was tardy again. T C P gave Jibben a written notice warning him that his next attendance infraction could result in his discharge.

Jibben did not arrive to work on May 1, 2009; he was in jail for drunk driving. T C P still allowed Jibben to remain employed but warned that it would discharge him if he was tardy or missed work again during the next 60 days. Jibben left a telephone message for T C P days later, claiming that he could not report to work because he was ill. The T C P employees who listened to the message discerned from Jibben's delivery that he was intoxicated, not ill, and T C P terminated his employment.

Jibben applied to the Minnesota Department of Employment and Economic Development (DEED) for unemployment benefits. After a hearing, the unemployment law judge (ULJ) found that Jibben had been late to work six times, that he had been

absent due to illness nine times, that he then failed to give his employer proper notice that he would be absent from work, and that on the day of his discharge, he had been intoxicated when he called T C P. The ULJ concluded that Jibben's attendance infractions constituted employment misconduct. This certiorari appeal follows.

D E C I S I O N

Jibben challenges the ULJ's determination that T C P discharged him for employment misconduct based on his poor attendance. This court may reverse or modify a ULJ's decision if her findings, conclusion, or decision are affected by an error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4), (5) (2008). We will review the ULJ's factual findings in the light most favorable to the decision and defer to her credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). We rely on the findings if they are supported by substantial evidence. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moore Assocs., LLC v. Comm'r of Econ. Sec.*, 545 N.W.2d 389, 392 (Minn. App. 1996) (quotation omitted). The ULJ may consider all relevant and reliable evidence. Minn. R. 3310.2922 (2009). Whether the employee's conduct constitutes employment misconduct is a question of law subject to de novo review. *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).

Jibben challenges the ULJ’s finding that he was late for work on six occasions between October 2008 and April 2009. The ULJ heard specific and sometimes conflicting testimony on this issue. Jibben was admittedly late on three of these days. The ULJ found that Jibben had been late for personal reasons on the other days. She did not credit Jibben’s various excuses, including that the foreman had been late picking him up, that the time clock was not functioning, and that he forgot to clock in. We defer to the ULJ’s weighing of credibility and conflicting testimony. *Skarhus*, 721 N.W.2d at 344. Substantial evidence supports the ULJ’s findings that Jibben was late to work on these six occasions.

Jibben also challenges other findings. He disputes the ULJ’s finding that he failed to notify T C P that he would be absent on the day he had been jailed for impaired driving. And he challenges the finding that he was intoxicated when he called in sick. Although some evidence conflicted with these findings, other evidence supported them. Deferring to the ULJ’s credibility determinations on the conflicting evidence, we conclude that substantial evidence in the record supports the findings. The ULJ also found that even if Jibben had not been intoxicated when he called in, his tardiness and a different absence independently constituted employment misconduct.

Jibben raises another challenge regarding the nine days that he was out sick. He contends that on each of these days, he had properly notified his employer and documented that he obtained medical care for his illnesses. Absences for illness with

proper notice to the employer are not misconduct. Minn. Stat. § 268.095, subd. 6(b)(7). But the ULJ found in Jibben's favor, crediting his testimony over that of T C P's witnesses, and she did not consider his sick days in making her misconduct determination.

On the factually supported findings, the ULJ correctly determined that Jibben engaged in employment misconduct. "An employer has the right to establish and enforce reasonable rules governing absences from work," and, generally, an employee's failure to follow those rules constitutes misconduct. *Wichmann v. Travalia & U.S. Directives, Inc*, 729 N.W. 2d 23, 28 (Minn. App. 2007). T C P had the right to require Jibben to work as scheduled. Jibben's failure to follow the schedule in the face of T C P's repeated warnings constitutes employment misconduct and renders Jibben ineligible to receive unemployment benefits.

Affirmed.