

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1611**

John W. Cook,
Relator,

vs.

Pelican Biothermal, LLC,
Respondent,

Department of Employment and Economic Development,
Respondent

**Filed June 26, 2017
Affirmed
Peterson, Judge**

Department of Employment and Economic Development
File No. 34649015-3

John W. Cook, Osseo, Minnesota (pro se relator)

Pelican Biothermal, LLC, Plymouth, Minnesota (respondent employer)

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

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this certiorari appeal, relator challenges the determination of an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Relator John W. Cook's employment with respondent-employer Pelican Biothermal, LLC, was terminated on April 25, 2016. During January 2016, relator was tardy reporting to work five times. In March 2016, relator received a poor performance review, which stated that he had been tardy 58 times during 2015. Relator disputed this, arguing that the employer erred in recording the number of times that he was tardy because his start time was incorrectly entered in the employer's computer. Relator was so upset about the performance review that he took two days off work on March 28 and 29, 2016, to write a response to the performance review. Under the employer's leave policy, if relator wanted to take time off, he was required to give two weeks' notice, except for an emergency or illness. When relator returned to work on April 1, the employer notified him that if he was late again by as little as one minute, he would be discharged.

On April 25, 2016, relator was 11 minutes late to work because he had a low front tire that needed air and traffic was congested on his route to work. At the end of the day, the employer terminated his employment.

Relator filed for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development (DEED) determined that he was ineligible for

benefits. Relator appealed this decision, and a telephone hearing was held. The employer did not participate in the hearing. The ULJ confirmed the ineligibility determination and, after relator requested reconsideration, issued an order of affirmation. Relator appealed by petition for a writ of certiorari.

D E C I S I O N

We may affirm, remand, reverse, or modify a ULJ's decision if, among other things, the decision is unsupported by substantial record evidence or made upon unlawful procedure. Minn. Stat. § 268.105, subd. 7(d) (2016). Relator argues that there is insufficient evidence to support the finding of misconduct and that the ULJ was biased.

An applicant who was discharged from employment for misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016). "Employment misconduct" is defined as "any intentional, negligent, or indifferent conduct on the job . . . that displays clearly . . . a serious violation of the standards of behavior the employer has a reasonable right to expect of the employee; or . . . a substantial lack of concern for the employment." *Id.*, subd. 6(a)(1), (2) (2016).

A ULJ's misconduct determination is a mixed question of fact and law. *Wilson v. Mortgage Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). We review the ULJ's factual findings about an employee's conduct in the light most favorable to the decision. *Id.* "Whether a particular act constitutes disqualifying conduct is a question of law," subject to de novo review. *Id.*

The ULJ found the following facts: (1) relator was tardy five times in January 2016; (2) he was given an unfavorable performance review in March 2016 based at least in part

on these five instances of tardiness; (3) upset by the review, relator took two days off without complying with the employer's two-week notice requirement for non-emergency days off; (4) when he returned to work, he was warned that if he was tardy again by as little as one minute, he would be discharged; and (5) he was late by 11 minutes on April 25, 2016, and was discharged. Relator admitted to these facts in his testimony. Although relator contested the employer's assertion during his performance review in March 2016 that he had been tardy 58 times during 2015, the ULJ did not find that relator was late 58 times during 2015 and, instead, stated, "[Relator] was not late 58 times. The actual number of tardies is not known." The ULJ's factual findings are supported by the record, and the ULJ's determination that relator is ineligible for benefits is not based on a finding that relator was late 58 times during 2015.

An employer is permitted to establish reasonable rules governing absence from work. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). An employee who disregards an employer's tardiness or absence policies violates the standards of behavior an employer can reasonably expect from an employee, and, therefore, commits employment misconduct. *Stagg v. Vintage Place, Inc.*, 796 N.W.2d 312, 317 (Minn. 2011). Failure to follow such reasonable rules is employment misconduct that disqualifies an applicant from receiving unemployment benefits. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002).

The testimony during the hearing demonstrates that relator was aware of the employer's tardiness and absence policies, received a warning after previous violations,

and was late after being warned that being tardy again would result in discharge. The ULJ's determination of ineligibility is supported by the findings and is not contrary to law.

Relator argues that the ULJ was biased. Relator bases this claim on the employer's absence from the telephone hearing and argues that the ULJ reached his decision despite having no employer testimony and, instead, used his "biased imagination to render [his] biased judgment[].".

An employer does not have the burden of production or persuasion under the unemployment-insurance statutes. *Wilson*, 888 N.W.2d at 461, n.12; Minn. Stat. § 268.069, subd. 2 (2016) (stating that "commissioner has the responsibility for the proper payment of unemployment benefits," and the determination of eligibility is made "without regard to the burden of proof"). An employer is not required to participate in a hearing: "an issue of eligibility is determined based on that information *required* of an applicant, any information that *may* be obtained from an applicant or employer, and information from any other source." Minn. Stat. § 268.101, subd. 2 (c) (2016) (emphasis added).

The ULJ makes findings based on a preponderance of the evidence. Minn. Stat. § 268.031, subd. 1 (2016). Relator admitted to facts that support the ULJ's findings. The record evidence does not demonstrate that the ULJ was biased.

Affirmed.