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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0887**

Hussein Elseweissy,
Relator,

vs.

Gasthof Zur Gemutlichkeit,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 5, 2018
Affirmed
Rodenberg, Judge**

Department of Employment and Economic Development
File No. 35034791

Hussein Elseweissy, Blaine, Minnesota (pro se relator)

Gasthof Zur Gemutlichkeit, Minneapolis, Minnesota (respondent employer)

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

Considered and decided by Bjorkman, Presiding Judge; Rodenberg, Judge; and
Smith, Tracy M., Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Relator Hussein Elseweissy appeals from an unemployment law judge's finding that relator was terminated from his job as a full-time restaurant manager for employment misconduct, rendering him ineligible for unemployment benefits. We affirm.

FACTS

Relator worked at the Gasthof Zur Gemutlichkeit restaurant from August 25, 2015 to January 4, 2017, most recently as a full-time manager. On January 4, 2017, the restaurant terminated relator's employment after three incidents of claimed employment misconduct.

First, on November 3, 2016, relator closed the restaurant early without permission. The restaurant owner initially gave relator a verbal warning about this incident. On December 18, the general manager completed a written disciplinary action form about the November 3 incident. This written warning was given to relator on December 23. Upon receiving the written warning, relator left work without approval or permission. Relator admitted that when he was given the written warning, he got "really, really mad" and left before his shift had ended. Additionally, relator was approved to have the night of December 31 off of work on the condition that he come in to help with closing the restaurant. Relator came to work after 11:00 p.m. on December 31 with some friends and "was in no shape to work that night." Finally, on January 1, 2017, Relator was scheduled to be the closing manager but did not show up for work. Relator admitted that he was "no

call/no show.” After these incidents, the restaurant terminated relator’s employment on January 4, 2017.

Relator applied for unemployment benefits, and respondent Minnesota Department of Employment and Economic Development initially found relator eligible for benefits. The restaurant appealed the eligibility determination, stating that it believed that relator “was trying to get fired to claim unemployment.” A telephone hearing was held with an unemployment law judge (ULJ) after which the ULJ found that relator had been discharged because of employment misconduct and was therefore ineligible for unemployment benefits. Relator requested reconsideration and the ULJ affirmed the initial decision.

This appeal followed.

D E C I S I O N

We may only “reverse or modify the [ULJ’s] decision if the substantial rights of the [relator] may have been prejudiced because the findings, inferences, conclusion, or decision” violate constitutional provisions, exceed the department’s statutory authority, were made after an unlawful procedure, are based on an error of law, are unsupported by the record evidence, or are arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (Supp. 2017). An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (Supp. 2017). “The question of whether an employee engaged in conduct that disqualifies him or her from unemployment benefits is a mixed question of fact and law.” *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016). 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). We review factual findings “in the light most favorable to the decision and will not disturb those findings as long as there is evidence in the record that reasonably tends to sustain them.” *Wilson*, 888 N.W.2d at 460 (quotations omitted). “Whether a particular act constitutes disqualifying conduct is a question of law we review de novo.” *Id.* “Credibility determinations are the exclusive province of the ULJ and will not be disturbed on appeal.” *Skarhus*, 721 N.W.2d at 345.

The ULJ found that, on November 3, 2016, relator closed the business early; that on December 23, 2016, relator left his shift early without permission after receiving a warning for the November 3 incident; that on December 31, 2016, relator arrived to work “intoxicated and . . . unable to help closing duties” after previously agreeing to help with closing; and that on January 1, 2017, relator did not show up for his scheduled shift at the restaurant. The ULJ went on to conclude that relator was discharged based on a “pattern of conduct over a short period of time [that] displayed clearly a serious violation of the standards of behavior the employer has the right to reasonably expect of the employee,” constituting employment misconduct. Therefore, the ULJ concluded that relator is ineligible for unemployment benefits.

During the hearing, relator admitted that he closed the restaurant early on November 3, 2016, received a warning for this on December 23, 2016, left work early on December 23, and was “no call/no show” for his shift on January 1, 2017. Regarding the December 31 incident, relator testified that he came to work late that night but left because the restaurant was slow and his help was not needed. The restaurant’s general manager testified that relator came in around 11:00 p.m. on December 31, but “was in no shape to

work that night,” “wasn’t going to be much of assistance with the demeanor he was in,” and “was just there to hang out with his friends.” The ULJ found the general manager’s testimony regarding December 31 to be more credible than relator’s testimony, “as it referenced time records and . . . provided a detailed recollection of the night from a sober perspective.”

The ULJ’s factual findings regarding relator’s conduct are reasonably supported by the record. In fact, relator admitted to most of what the ULJ found. While there was some dispute over what happened on December 31, we defer to the ULJ’s credibility determinations. *Skarhus*, 721 N.W.2d at 344. The record evidence supports the ULJ’s factual findings.

We next review whether relator’s conduct constitutes employment misconduct. 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.” Minn. Stat. § 268.095, subd. 6(a) (Supp. 2017). “[W]hether the act committed by the employee constitutes employment misconduct is a question of law, which we review de novo.” *Skarhus*, 721 N.W.2d at 344.

An employer has the right to establish reasonable work attendance rules for its employees. *Jones v. Rosemount, Inc.*, 361 N.W.2d 118, 120 (Minn. App. 1985). “Whether an employee’s absenteeism and tardiness amounts to a serious violation of the standards of behavior an employer has a right to expect depends on the circumstances of each case.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 316 (Minn. 2011). Employers have the right

to expect their employees to work when scheduled. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. App. 1984). We have held “that except in certain limited circumstances, an employee engages in misconduct if he is absent even once without notifying his employer.” *Del Dee Foods, Inc. v. Miller*, 390 N.W.2d 415, 418 (Minn. App. 1986). Moreover, the supreme court has held that “an employee’s expectation that the employer will follow its disciplinary procedures has no bearing on whether the employee’s conduct violated the standards the employer has a reasonable right to expect or whether any such violation is serious.” *Stagg*, 796 N.W.2d at 316.

Relator argues that the ULJ erred in finding that his termination was because of employment misconduct for three reasons. First, he argues that he did not come to work drunk on December 31, but rather had the day off and there were two other managers on duty that night. Second, relator argues that he had permission to close the restaurant early on November 3 because the owner had said that they could close early on days when business is slow and that it was common to close early. Third, relator argues that it was improper to give him a written warning two months after the November 3 incident, especially since the person issuing the warning was not the general manager at the time of the incident. Relator’s arguments do not persuade us that his conduct did not amount to employment misconduct. Relator admitted to being “no call/no show” for his shift on January 1, 2017, even after he had been told that he was not approved to have that day off. Under *Del Dee*, that absence alone constitutes employment misconduct. 390 N.W.2d at 418. The ULJ found as a fact that relator closed the restaurant early on November 3 without permission, left work early on December 23 without permission, and showed up “in no

shape to work” on December 31. These repeated incidents are such as to evidence a disregard of the employer’s reasonable expectations. The fact that the written warning for the November 3 incident was delayed by almost two months does not affect our analysis of whether relator committed employment misconduct. *Stagg*, 796 N.W.2d at 316. The ULJ did not err in concluding that relator committed employment misconduct and is therefore ineligible for unemployment benefits.

Affirmed.