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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1285**

Robert Dietz,
Relator,

vs.

Wal-Mart Associates, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed March 12, 2018
Affirmed
Smith, Tracy M., Judge**

Department of Employment and Economic Development
File No. 35581293-3

Robert Dietz, St. Cloud, Minnesota (pro se relator)

Wal-Mart Associates, Inc., St. Louis, Missouri (respondent employer)

Lee B. Nelson, Ryann M. Sparrow, 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UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Relator Robert Dietz appeals an unemployment law judge's (ULJ) determination that he is ineligible for unemployment benefits because he was discharged due to employment misconduct. Because the record supports the ULJ's finding that Dietz was discharged for repeated unapproved absences, and because Dietz's absenteeism constituted employment misconduct, we affirm.

FACTS

Dietz worked as a grocery support manager at a Walmart retail store in St. Cloud from September 9, 2015, until his discharge on April 15, 2017.

Walmart maintained an employee-attendance policy during Dietz's employment. Under the policy, employees received one "occurrence" point per unapproved absence, three points per no-call, and one-half point per late-in or early-out. A no-call, no-show absence thus resulted in four total points. An employee who accumulated more than nine points or recorded three no-call, no-show absences during a continuous six-month period was subject to termination. Employees could access their work schedules through an in-store computer or remotely with any internet-capable device. Walmart posted its employees' work schedules three weeks in advance.

Dietz regularly worked a schedule of shifts on four consecutive days, Saturday through Tuesday, followed by three consecutive days off. In early April 2017, the store manager met with Dietz and the other support managers and announced that she would personally oversee all scheduling changes.

On April 8, 2017, Dietz worked his normal Saturday shift. The next day, Dietz arrived at Walmart and could not clock in. Dietz left the store without communicating with anyone. On the following two days, Dietz again arrived for work, could not clock in, and left without talking to anyone or verifying his work schedule. Dietz testified that he was unable to view his schedule because he could not access the in-store timekeeping system and because he lacked the technology to view his schedule remotely.

Dietz was scheduled to work on April 12, 13, and 14, but he did not show up for work and did not call in to report his absences for any of the three shifts. Dietz claimed that he did not know that he was scheduled to work. According to Walmart, Dietz's regular work schedule had been changed and posted three weeks in advance. On April 15, following Dietz's three consecutive no-show, no-call absences, Walmart discharged Dietz for excessive absences. Walmart reported that, at the time of Dietz's discharge, he had accrued 18.5 occurrence points during the previous six-month period, in violation of the attendance policy.

Dietz applied for unemployment benefits. Respondent Minnesota Department of Employment and Economic Development (DEED) determined that Dietz was ineligible due to being discharged for employment misconduct. Dietz appealed the determination for a de novo hearing before a ULJ pursuant to Minn. Stat. § 268.105, subd. 1(a) (2016).¹

¹ Portions of Chapter 268 were amended between the time Dietz applied for unemployment benefits and the time of this appeal. Because those amendments are immaterial to the resolution of this case, we cite the 2016 version of that chapter in this opinion.

During the unemployment hearing, Dietz accused Walmart managers of a number of “unethical practices,” which he claimed resulted in his discharge. Dietz alleged that managers made “unethical changes to scheduling” and that they added occurrence points to his attendance record. Dietz testified that he reported ethical violations by the managers on four occasions to a global Walmart hotline.

Following the hearing, the ULJ determined that Dietz had been discharged for employment misconduct and was therefore ineligible to receive unemployment benefits. The ULJ found that, in addition to three previous absences, Dietz was absent and did not call in for three consecutive shifts on April 12, 13, and 14, 2017, resulting in his discharge. The ULJ found that Dietz had reason to know his work schedule was changed when he was unable to clock in on three consecutive days preceding the April absences, and that his failure to verify his work schedule was unreasonable. The ULJ determined that Dietz’s actions seriously violated Walmart’s reasonable expectation that its employees know when they are scheduled to work and work when scheduled.

Dietz appeals.

D E C I S I O N

Dietz challenges the ULJ’s determination that he was discharged due to employment misconduct, arguing that the ULJ (1) made erroneous findings concerning his attendance, (2) erred in determining that he committed employment misconduct, and (3) deprived him of a fair unemployment hearing.

I. Dietz was discharged for employment misconduct.

An employee generally is ineligible for unemployment benefits if he “was discharged because of employment misconduct.” Minn. Stat. § 268.095, subd. 4(1) (2016). We may reverse or modify a ULJ’s decision if the relator’s substantial rights have been prejudiced because the ULJ’s “findings, inferences, conclusions, or decision” are unsupported by the record, arbitrary or capricious, or affected by other error of law. Minn. Stat. § 268.105, subd. 7(d) (2016). “Whether an employee engaged in employment misconduct presents a mixed question of fact and law.” *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011). The determination of whether an employee committed a particular act is a question of fact. *Id.* We review the ULJ’s findings of fact in the “light most favorable to the decision” and will not disturb the findings if “there is evidence in the record that reasonably tends to sustain them.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Whether the factual findings establish employment misconduct is a question of law, which we review de novo. *Cunningham*, 809 N.W.2d at 235.

A. Substantial evidence supports the ULJ’s findings concerning Dietz’s attendance.

Dietz contends the ULJ erroneously found that he accrued 18.5 “absences” during the relevant six-month period leading up to his discharge and that Dietz was absent on the day after his discharge. Dietz also contends that Walmart managers either falsified his attendance record or intentionally changed his work schedule to cause his absences in April.

Here, contrary to Dietz's claim, the ULJ made no finding concerning Dietz's cumulative attendance record or that he was absent on the day after his discharge. The ULJ found that Dietz admitted to absences on October 31, 2016, December 10, 2016, and February 28, 2017, and that Dietz did not dispute Walmart's testimony that he was absent and did not call in on April 12, 13, and 14, 2017. In response to Dietz's request for reconsideration, the ULJ stated that, "regardless of [Walmart's] attendance reports, [Walmart] testified to six absences and Dietz did not dispute them."

With regard to Dietz's claim that managers falsified his attendance record or changed his work schedule to cause his absences, Dietz provided no testimony or evidence contesting any of the specific absences for which the ULJ found he was discharged, and he did not allege that any specific absence in his attendance record had been falsified. Further, Dietz did not dispute that Walmart posted his April schedule three weeks in advance. Dietz said that he witnessed a manager remove another employee's absence from that employee's record to allow the employee to continue to work, but he could not adequately explain the relevance of the event to his claim. We conclude that the record evidence supports the ULJ's findings that Dietz was absent on six occasions, including three consecutive no-show, no-call absences on April 12, 13, and 14, 2017, resulting in his discharge.

B. Dietz's conduct constitutes employment misconduct.

Dietz argues that the ULJ erred in determining that Dietz's actions constitute employment misconduct because they comprised a "single incident" and were reasonable.

Employment misconduct is defined, in part, as "any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly . . . a serious violation of

the standards of behavior the employer has the right to reasonably expect of the employee.” Minn. Stat. § 268.095, subd. 6(a)(1) (2016). Employment misconduct is not “simple unsatisfactory conduct” or “conduct an average reasonable employee would have engaged in under the circumstances.” *Id.*, subd. 6(b)(3), (4) (2016). Even a single incident may constitute employment misconduct if the employee sufficiently disregards his or her employer’s expectations. *Nieszner v. Minn. Dep’t of Jobs & Training*, 499 N.W.2d 832, 838 (Minn. App. 1993) (citing *Ress v. Abbott Nw. Hosp., Inc.*, 448 N.W.2d 519, 524 (Minn. 1989)). “As a general rule, refusing to abide by an employer’s reasonable policies and requests amounts to disqualifying misconduct.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). However, as Dietz points out, “[i]f the conduct for which the applicant was discharged involved only a single incident, that is an important fact that must be considered in deciding whether the conduct rises to the level of employment misconduct” Minn. Stat. § 268.095, subd. 6(d) (2016).

“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*, 796 N.W.2d at 316. We focus our inquiry on the conduct of the employee, rather than on the conduct of the employer. *Id.* In *Stagg*, the Minnesota Supreme Court upheld the ULJ’s determination that the employee seriously violated the employer’s standards of behavior when the evidence showed that the employee was aware of the expectation to follow the employer’s attendance policy and the employee failed to follow it on five occasions. *Id.* at 317.

Here, rather than a “single incident,” as Dietz claims, the ULJ made the determination of employee misconduct on the basis of six incidents of unauthorized absenteeism, including three consecutive no-show, no-call absences on April 12, 13, and 14, 2017. Dietz contends that he acted reasonably in not verifying his April work schedule because “[his] shift started at . . . noon . . . [and] any reasonable person would assume that [the] [s]tore [m]anager . . . was at lunch, or on a conference call, or working the evening shift, or taking personal time off, or not in the building or was in a meeting and not available.” Dietz’s explanation defies common sense. The evidence shows that Dietz was provided Walmart’s attendance policy when he was hired. The evidence also shows that Dietz arrived for work on three consecutive days, April 9, 10, and 11, 2017, when he thought he was scheduled to work. On each day, he was unable to clock in and therefore had reason to know that his work schedule had been changed. Dietz admitted that he was unable to verify his work schedule on his own and that he did not check with anyone about his work schedule. We conclude that the ULJ’s findings that Dietz was absent on six occasions and that he unreasonably failed to verify his April work schedule, which have support in the record, establish disqualifying employment misconduct.

II. Dietz was not deprived of a fair unemployment hearing.

Dietz argues that he did not receive a fair unemployment hearing because the ULJ did not ensure that all relevant facts were fully developed. Specifically, Dietz contends that he intended to offer as evidence his reports to a global Walmart hotline concerning his allegations of unethical attendance and scheduling practices by Walmart managers.

The ULJ must conduct the unemployment hearing as “an evidence-gathering inquiry” and “must assist all parties in the presentation of evidence.” Minn. R. 3310.2921 (2015); see Minn. Stat. § 268.105, subd. 1(b) (2016) (establishing DEED’s authority to adopt procedural rules for unemployment hearings). “Unemployment-law judges have a duty to reasonably assist pro se parties with the presentation of the evidence and the proper development of the record.” *White v. Univ. of Minn. Physicians Corp.*, 875 N.W.2d 351, 355-56 (Minn. App. 2016) (quotation omitted) (citing Minn. R. 3310.2921 (2013)). However, the ULJ remains neutral and does not act as either party’s advocate, even when assisting unrepresented parties in the presentation of their evidence. *Stassen v. Lone Mountain Truck Leasing, LLC*, 814 N.W.2d 25, 32 (Minn. App. 2012).

The ULJ stated at the outset of the hearing that both parties “have the right to request that the hearing be rescheduled if there is specific relevant evidence like documents or witnesses that are outside of your control that need to be obtained by subpoena.” Dietz asked the ULJ if he could submit evidence after the hearing. The ULJ told Dietz that it would be better to have the evidence beforehand, but that they could discuss it further if something came up. Dietz indicated his desire to obtain and submit evidence of his reports to the Walmart hotline, but then added, “But we’ll address that when it comes [up].” The ULJ then began the hearing.

Dietz extensively testified on the content of his reports and on his allegations against Walmart managers during the hearing. The ULJ asked Dietz several follow-up questions to develop the record on his allegations. Throughout the hearing, the ULJ sought to elicit testimony from Dietz concerning the specific dates that Walmart testified that he was

absent. Dietz provided few specifics. Before closing the hearing, the ULJ asked Dietz twice whether he had any more evidence to offer or whether he had any requests or questions for anyone. At no point did Dietz offer the reports, ask the ULJ to subpoena the reports, or ask Walmart to produce the reports. Further, in his request for reconsideration, Dietz made no mention of the reports and made no request that the ULJ subpoena the reports. Dietz provides no authority to claim that a ULJ is required to sua sponte subpoena such evidence. We conclude that Dietz was not deprived of a fair unemployment hearing.

Affirmed.