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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2068**

Farah M. Muse,
Relator,

vs.

New Flyer of America, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 27, 2018
Reversed
Stauber, Judge***

Department of Employment and Economic Development
File No. 35876874-3

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Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Stauber,
Judge.

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

UNPUBLISHED OPINION

STAUBER, Judge

Relator argues that the unemployment-law judge (ULJ) erroneously determined that relator is ineligible for unemployment benefits by using a per se rule that absence from work due to incarceration constitutes employee misconduct as a matter of law. He also argues that the ULJ's determination was not supported by substantial evidence. We reverse.

FACTS

Relator Farah M. Muse worked as an assembly technician for respondent New Flyer of America Inc. (New Flyer) from February 2014 to August 2017. New Flyer has an attendance policy that requires its employees to personally call their supervisor within two hours of the scheduled start time for their shift if they will not be at work. An employee who is a no call/no show for two consecutive days is considered to have voluntarily terminated his or her employment with New Flyer.

On August 22, 2017, Muse was arrested. Muse could not go to work on the day of his arrest and the following day, and could not call New Flyer about his incarceration as he did not have access to a phone in jail. However, a few hours after the starting time of his shift on August 23, 2017, his attorney informed New Flyer that Muse had been in jail. On August 24, 2017, New Flyer formally terminated his employment.

Muse requested unemployment benefits, but respondent Minnesota Department of Employment and Economic Development (DEED) determined that he was ineligible. Muse appealed and a ULJ held a hearing during which Muse testified that on the day he was arrested, his wife hit him, injuring his eye. He also told the ULJ that after his wife hit

him, he called the police and when the police arrived, she framed him as a child abuser in order to cover up her actions. As a result, he and his wife were both charged for the incident. Both charges were pending at the time of the hearing.

After the hearing, the ULJ determined that Muse is ineligible for unemployment benefits because he was discharged for employment misconduct. Muse requested reconsideration and the ULJ affirmed her decision. This certiorari appeal follows.

D E C I S I O N

“Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law.” *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011) (quotation omitted). Whether an employee committed a particular act is a question of fact. *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011). Whether an employee’s act constitutes employment misconduct is a question of law that appellate courts review de novo. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). We may reverse the ULJ’s decision if it is unsupported by substantial evidence or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d)(4), (5) (2016).

An employee discharged from employment because of employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2016). Section 268.095, subd. 6(a) defines “employment misconduct” as “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.”

I. The ULJ erroneously applied a per se rule.

Muse first argues, and DEED agrees, that the ULJ erred by determining that relator's absence constitutes employment misconduct solely based on the fact that relator was incarcerated. We agree.

An employer has a right to expect its employees to come to work when scheduled. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. App. 1984). And an employee's refusal to abide by an employer's attendance policy generally amounts to employee misconduct. *Schmidgall*, 644 N.W.2d at 804; *see also* § 268.095, subd. 6(a)(1). However, the ULJ must not apply a per se rule that absenteeism due to incarceration is employment misconduct as a matter of law. *Jenkins v. Am. Express Fin. Corp.*, 721 N.W.2d 286, 287 (Minn. 2006). Rather, the ULJ must base its determination on the "facts in each particular case." *Id.*

Here, the ULJ made the blanket conclusion that "[a]bsence from work due to incarceration is misconduct sufficient to disqualify an employee from receiving unemployment compensation benefits" without incorporating or analyzing any of the factual findings. The ULJ employed the per se rule that the *Jenkins* court specifically prohibited, and therefore erred.

II. Substantial evidence does not support the ULJ's determination.

Muse next argues that the ULJ erroneously presumed, without any evidence, that he engaged in conduct that constituted employee misconduct. We also agree.

Unemployment benefits purport to assist workers "who are unemployed through no fault of their own." Minn. Stat. § 268.03, subd. 1 (2016); *see also Jenkins*, 721 N.W.2d

at 289. Although this court has held in some cases that an employee's absence due to incarceration amounted to employee misconduct, *see, e.g., Brown v. PDR Admin. Servs., Inc.*, A16-1831, 2017 WL 2414913 (Minn. App. June 5, 2017), the employee's absence in each case was "under circumstances *within the control* of the employee, including incarceration *following a conviction for a crime.*" *Jenkins*, 721 N.W.2d at 290 (Minn. 2006) (emphasis added).

Here, Muse was not yet convicted when the ULJ held the hearing, issued a decision, and affirmed it after reconsideration.¹ The record before us does not include any evidence, such as a police report, that shows that Muse was arrested for his own act. At the hearing, Muse alleged that his wife assaulted him then framed him. However, the ULJ did not make findings on his allegation or whether Muse's incarceration was a circumstance within his control.

Under the particular circumstances of the present case, we believe that the ULJ's decision was not supported by substantial evidence that shows Muse's failure to report to work while incarcerated was employment misconduct, and therefore we reverse. *See* Minn. Stat. § 268.105, subd. 7(d) (4)-(5).

Reversed.

¹ DEED urges us to take judicial notice of the outcome of appellant's criminal case based on its submission of an unauthenticated, unverified document. We decline to do so because we will not take judicial notice of a matter that occurred subsequent to the proceedings below. *Distrib. Servs., Inc. v. Comm'r of Jobs & Training*, 435 N.W.2d 101, 103 (Minn. App. 1989) (citing *Laff v. Laff*, 161 Minn. 122, 123, 200 N.W.936, 937 (1924)).