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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0732**

Mark Scott,
Relator,

vs.

Artistic Finishes, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed February 25, 2019
Affirmed
Cochran, Judge**

Department of Employment and Economic Development
File No. 36161710-3

Mark Scott, Coon Rapids, Minnesota (pro se relator)

Artistic Finishes, Inc., Roseville, Minnesota (respondent employer)

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

Considered and decided by Hooten, Presiding Judge; Rodenberg, Judge; and
Cochran, Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

Relator Mark Scott challenges the unemployment law judge's (ULJ) determination that he is ineligible for unemployment benefits because he was discharged for employment misconduct. We affirm.

FACTS

Scott was employed full-time with Artistic Finishes, Inc. (Artistic Finishes) as a special-finishes operator for several years. Artistic Finishes has an attendance policy that states employees are expected to report to work as scheduled and are required to call the employer prior to their shift if they are going to be late or miss a day of work. During the course of his employment, Scott had a number of unplanned absences, including arriving late, leaving early, and not coming to work. In December 2017, Artistic Finishes discharged Scott due to attendance issues. Scott applied for unemployment benefits and was determined ineligible because he was discharged for employment misconduct. He appealed this determination, and a hearing was held before a ULJ.

At the hearing, the ULJ heard testimony from Scott and employees of Artistic Finishes, including the director of human resources, a human-resources specialist, and a production manager. The director of human resources testified that Scott had numerous unplanned, unexplained absences during the period from May 2017 through December 2017. The human-resources specialist testified that Scott had been approved for leave under the Family and Medical Leave Act (FMLA) from July 2016 through July 2017 to provide assistance to his mother-in-law who had been diagnosed with cancer. A production

manager testified that when an employee calls to let the employer know that the employee will be late or will not be at work on a given day, the absence is recorded. The manager also testified that if the employee gives a reason for the absence, then the reason is documented as well. The ULJ received into evidence documentation maintained by Artistic Finishes recording Scott's absences and the reason, if any, he gave for each absence. The ULJ also received into evidence documentation regarding a verbal warning that Scott received from his manager in June 2017 about attendance issues and a note Scott signed in October 2017 indicating that a manager had warned him that any more unplanned absences would result in termination. The human-resources director testified that, although Scott was terminated for excessive unplanned absences, Artistic Finishes did not consider any absences due to illness or FMLA leave in its decision.

At the hearing, Scott acknowledged that he was absent on a number of days—arriving late, leaving early, or missing work entirely—but testified that he always provided a reason to his employer when he was absent. He stated that many of his absences were due to his own health issues, his daughter's illness, or assisting his ill mother-in-law. In response to questioning from the ULJ, Scott agreed that he was late on several dates but did not attribute those absences to illness or FMLA leave.

The ULJ found that Scott had excessive unplanned absences for reasons unknown, these absences constituted employment misconduct, and therefore Scott was ineligible for unemployment benefits. In doing so, the ULJ resolved all factual disputes regarding the reasons for Scott's absences in favor of the employer. She based this decision on the employer's witnesses' testimony and the employer's written documentation. The ULJ

found that the employer's witnesses were more credible than Scott because the employer's witnesses were "more direct, straightforward, and consistent." In contrast, the ULJ did not credit Scott's testimony because it was "self-serving, less plausible, and, at times, conflicting and uncertain." Scott sought reconsideration and the ULJ affirmed her previous decision.

D E C I S I O N

Scott argues that the ULJ erred in finding him ineligible for unemployment benefits based on employment misconduct. When reviewing a ULJ's decision, this court may affirm the decision of the ULJ, remand the case for further proceedings, or reverse and modify the decision if the substantial rights of the relator have been prejudiced because, among other things, the decision is affected by an error in law or is unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d) (2018).

An employee who is discharged for employment misconduct is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2018). Employment misconduct is defined 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." Minn. Stat. § 268.095, subd. 6(a) (2018). But absence because of illness or an immediate family member's illness *with proper notice* to the employer is not misconduct. Minn. Stat. § 268.095, subd. 6(b)(7), (8) (2018) (emphasis added).

Whether an employee committed employment misconduct is a mixed question of fact and law. *Stagg v. Vintage Place Inc.*, 796 N.W.2d 312, 315 (Minn. 2011). Factual findings regarding an employee's conduct are viewed in the light most favorable to the ULJ's decision and will not be disturbed as long as they are substantially supported by the record. *Peterson v. Nw. Airlines, Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). Whether the act committed by the employee constitutes misconduct is a question of law that we review de novo. *Id.*

Scott argues that the ULJ erred in finding that he had excessive unplanned absences constituting employment misconduct. He maintains that his attendance issues were primarily due to his own health problems and taking FMLA leave to care for his mother-in-law while she was sick. He also asserts that Artistic Finishes was aware that he needed to take time off for these reasons. In essence, Scott is challenging the ULJ's finding that he was absent from work for unknown reasons on a number of occasions.

We first consider whether the record supports the ULJ's findings that many of Scott's absences between May 2017 and December 2017 were for unknown reasons. We then consider whether Scott's absences constitute employment misconduct as defined by Minn. Stat. § 268.095 (2018), making him ineligible for unemployment benefits.

The ULJ's findings regarding Scott's absences are substantially supported by the record. The employer presented documentation of Scott's absences and any proffered reason for those absences. According to the production manager's testimony, if Scott had given the employer a reason for his absence, such as illness or FMLA leave, it would have been included in those documents. The documents reflect that, although Scott was absent

on several days due to FMLA leave or illness, there were other numerous occasions between May 2017 and December 2017 when he was late, left early, or missed work entirely and did not provide a reason for his absence. Scott conceded that he was late seven times for unknown reasons. The employer's witnesses also testified that Scott was absent for unknown reasons on many occasions. To the extent that there is conflicting testimony in the record between the employer's witnesses and Scott regarding whether Scott provided a reason for certain absences, the ULJ found the employer's witnesses to be more credible. Because this court defers to credibility determinations made by the ULJ, we conclude that the ULJ did not err in finding that Scott was absent for unknown reasons on the dates in question. *Peterson*, 753 N.W.2d at 774. Accordingly, the record substantially supports the ULJ's findings that Scott was late, left early, or did not come to work numerous times for unknown reasons between May 2017 and December 2017.

Having concluded that the ULJ's findings are substantially supported by the record, we must now determine whether these findings constitute employment misconduct. An employer has the right to expect employees to work when scheduled. *Stagg*, 796 N.W.2d at 316. If, under the circumstances, an employee's absenteeism amounts to a serious violation of the standards of behavior an employer has the right to expect, the employee has committed employment misconduct. *See id.* But if the absence is due to the employee's or an immediate family member's illness or injury, *and* the employee gives proper notice to the employer, he does not commit employment misconduct. Minn. Stat. § 268.095, subd. 6(b)(7), (8).

Here, there is a serious violation of the employer's standards of behavior. In this case, Scott had ongoing attendance problems. He was late to work for unknown reasons on seven occasions between May 1, 2017 and October 12, 2017. He also left work early for unknown reasons on May 24, July 14, October 5, and November 28. Scott missed work entirely for unknown reasons on May 3 and May 30, and did not come to work on October 3 and December 28 due to car trouble. Despite warnings in June and October, Scott's attendance issues persisted until he was discharged on December 28, 2017. Because the record shows a serious violation of the employer's expectation that Scott report to work as scheduled, we conclude that Scott's actions constitute employment misconduct.¹ *See Stagg*, 796 N.W.2d at 317 (concluding there was misconduct when the employee violated the attendance policy on five occasions).² In sum, the ULJ properly determined that Scott is ineligible for unemployment benefits because he was discharged due to employment misconduct.

Affirmed.

¹ In reaching this conclusion, we consider only instances when Scott was absent or late for unknown reasons. We do not consider Scott's additional absences due to illness and FMLA leave that the ULJ found were properly reported to his employer. Minn. Stat. § 268.095, subd. 6(b)(7), (8).

² Scott also argues that Artistic Finishes was retaliating against him for being a whistleblower. This issue was not raised before the ULJ. Accordingly, we decline to address this argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that a party generally may not raise a new issue on appeal).