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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2068**

Angela Brown,
Relator,

vs.

Phyxius, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 8, 2011
Affirmed
Halbrooks, Judge**

Department of Employment and Economic Development
File No. 25566231-3

Angela Brown, Foley, Minnesota (pro se relator)

Phyxius, Inc., Sartell, Minnesota (respondent)

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

Considered and decided by Hudson, Presiding Judge; Halbrooks, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Pro se relator Angela Brown brings this certiorari appeal to challenge the unemployment-law judge's (ULJ) determination that she is ineligible for unemployment compensation. Because we conclude that the ULJ's findings are supported by substantial evidence in the record and because the findings support the ULJ's determination that relator was terminated for employment misconduct, we affirm.

FACTS

Due to her mother's unexpected heart attack during surgery, Brown requested a leave of absence from her employer, respondent Phyxius, Inc. Brown's leave was scheduled to end on February 17, 2010. But her mother's condition deteriorated, and Brown did not return to work that day. Instead, on February 17, she left a voicemail on the office phone at Phyxius stating that she needed "a few more days off." Brown arranged for coworkers to cover her shifts on February 17 and 18. Brown was also scheduled as the on-call person for Friday, February 19, but she did not cover that shift and a coworker called in sick.

That evening, John Westphal, a co-owner of Phyxius, called Brown and told her that she needed to come in Monday morning. Westphal was trying to reach Brown to ask her about a report that he had received from some clients on February 16 that Brown had previously slept on the job and used a chair to block a fire escape. After Brown failed to return four phone calls from Westphal and failed to show up on Monday morning as

requested, Westphal called Brown on Tuesday, February 23 and terminated her employment.

Brown applied for unemployment benefits and was initially deemed to be eligible by respondent Minnesota Department of Employment and Economic Development. Phyxius appealed. After a telephone hearing, the ULJ concluded that Phyxius had the right to expect Brown to contact Westphal so that he could investigate the charges against her and that her refusal to do so was a violation of standards of behavior that Phyxius had the right to expect and displayed a substantial lack of concern for her employment. Therefore, the ULJ concluded, Brown was terminated for employment misconduct and is not eligible for unemployment compensation. Brown requested reconsideration; the ULJ affirmed on reconsideration. This appeal follows.

D E C I S I O N

A discharge for employment misconduct results in ineligibility for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). To qualify as employment misconduct, the conduct must be “intentional, negligent, or indifferent conduct” that clearly conveys either “a serious violation of the standards of behavior the employer has the right to reasonably expect” or “a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a)(1), (2) (2010).

Whether an employee committed employment misconduct is a mixed question of law and fact. *Skarhus v. Davanni’s Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). Whether the employee performed or failed to perform a specific act is a question of fact.

Id. This court views a ULJ's findings of fact in the light most favorable to the decision and will sustain them if they are supported by substantial evidence. *Id.*

We first turn to whether the ULJ's finding that Brown avoided Westphal's phone calls is supported by substantial evidence. At the hearing, Brown and the witnesses called by Phyxius testified to two different accounts of the facts. But the ULJ found that "Paul [the Phyxius office manager] and Westphal describe a more likely chain of events than Brown. Westphal's testimony is more consistent with the documents in the record than Brown's testimony. Westphal and Paul are more persuasive witnesses than Brown." We defer to the ULJ's credibility determinations and resolutions of conflicts in testimony. *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007) (conflicts in testimony); *Skarhus*, 721 N.W.2d at 344 (credibility determinations). In light of the deference owed to the ULJ's credibility determinations, the ULJ's finding that Brown failed to return Westphal's numerous phone calls is supported by substantial evidence.

We next address whether Brown's failure to return Westphal's phone calls, given the circumstances, was employment misconduct. Whether an employee's conduct constitutes misconduct is a question of law that this court reviews *de novo*. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Generally, refusing to comply with "reasonable policies and requests" qualifies as employment misconduct. *Id.* Phyxius has a right to expect that its employees will cooperate with an investigation about a report of inappropriate on-the-job behavior. *See Drellack v. Inter-Cnty. Cmty. Council, Inc.*, 366

N.W.2d 671, 674 (Minn. App. 1985) (finding misconduct when the employee, in part, failed to respond to a letter inquiring about alleged inappropriate behavior).

Although Brown does not frame her argument in terms of the statute, it provides that “conduct an average reasonable employee would have engaged in under the circumstances” is excluded from the statutory definition of misconduct. *See* Minn. Stat. § 268.095, subd. 6(b)(4) (2010). The record here reflects that Brown responded to Westphal’s phone calls by text messages. The ULJ found that “[i]t is true that Brown did send Westphal text messages between February 17, 2010, and February 23, 2010. Text messages are not a means of communication that allow the recipient to ask the sender questions. Brown was clearly trying to avoid Westphal’s questions during this period.”

We conclude that avoiding direct questions about allegations of inappropriate behavior is not conduct that an average, reasonable employee would have engaged in under the circumstances. Rather, it is a violation of Phyxius’s right to expect cooperation in an investigation of alleged wrongdoing and shows a substantial lack of concern for employment. Brown is therefore ineligible for unemployment benefits.

Affirmed.