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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-2160**

Kimberly Jurek,  
Relator,

vs.

Phygen, Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed July 11, 2011  
Affirmed  
Wright, Judge**

Minnesota Department of Employment and Economic Development  
File No. 25404839-3

Kimberly Jurek, Minneapolis, Minnesota (pro se relator)

Phygen, Inc., Minneapolis, Minnesota (respondent)

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

Considered and decided by Wright, Presiding Judge; Connolly, Judge; and Larkin,  
Judge.

## UNPUBLISHED OPINION

**WRIGHT**, Judge

Relator challenges the determination of the unemployment law judge (ULJ) that relator is ineligible to receive unemployment benefits because she committed employment misconduct. Relator argues that the alleged misconduct did not occur and that her coworker lied. We affirm.

### FACTS

Relator Kimberly Jurek worked as a senior accountant and government contract specialist for Phygen, Inc., a startup medical device company, from April 2008 to April 2010. In late summer 2009, at an annual training meeting of approximately 15 employees, Jurek made continuous interruptions, argued with Alan Roth, the company's chief financial officer, and made bowing gestures toward him. Roth warned Jurek to control herself. But Jurek's disruptive behavior escalated, and Roth escorted her from the meeting and sent her home. Roth subsequently discussed Jurek's inappropriate behavior with Jurek, advised her in writing to refrain from angry outbursts, and warned her that her employment could be terminated if she could not conduct herself professionally.

On April 21, 2010, Jurek called Mimi Gyang, an administrative assistant who is African American, a "slut" and described her as "self-righteous and immoral." And on two occasions, Jurek told Gyang to "watch [her] back." Gyang reported this behavior to Roth, who held a meeting with Jurek and Gyang to discuss this matter. During the meeting, Jurek advised Roth that she "tells it like it is." She also stated that "Jews and Blacks over time have never gotten along," and "[b]lack people need to work and become

qualified to work before coming to this side of the river.” Roth and David Bell, the company president, terminated Jurek’s employment on April 22, 2010 for inappropriate behavior.

Jurek applied for unemployment benefits. The Minnesota Department of Employment and Economic Development determined that Jurek is ineligible to receive unemployment benefits because she was discharged for employment misconduct. Jurek appealed. After a hearing, the ULJ concluded that Jurek is ineligible to receive unemployment benefits because she was discharged for committing employment misconduct. Following Jurek’s request for reconsideration, the ULJ affirmed the decision. This certiorari appeal followed.

## **D E C I S I O N**

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator have been prejudiced because the findings, inferences, conclusion, or decision are “(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.” Minn. Stat. § 268.105, subd. 7(d) (2010).

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). 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.” *Id.*, subd. 6(a) (2010).

Whether an employee engaged in employment misconduct presents a mixed question of law and fact. *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). 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). A ULJ’s factual findings are reviewed in the light most favorable to the decision and will not be disturbed on appeal if there is evidence that reasonably tends to sustain those findings. *Schmidgall*, 644 N.W.2d at 804. But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Id.* Because credibility determinations are the exclusive province of the ULJ, we accord such determinations deference on appeal. *Skarhus*, 721 N.W.2d at 344.

An employee’s refusal to abide by the employer’s reasonable policies ordinarily constitutes employment misconduct. *Schmidgall*, 644 N.W.2d at 804. An employee’s insubordinate behavior also can constitute employment misconduct. *Snodgrass v. Oxford Props., Inc.*, 354 N.W.2d 79, 80 (Minn. App. 1984). The record reflects that Jurek exhibited unprovoked insubordination in the presence of other employees during a meeting in 2009. Jurek’s behavior did not improve after her employer gave her oral and written warnings to conduct herself more professionally and refrain from inappropriate outbursts. Instead, she instigated a confrontation with Gyang on April 21, 2010.

Jurek argues that Gyang lied about the April 21 incident and that she did not threaten Gyang. But we accord the ULJ’s credibility determinations deference. *Skarhus*,

721 N.W.2d at 344. Gyang and Roth both testified that Jurek called Gyang a “slut” and accused her of being “self-righteous and immoral.” Roth and Gyang also testified regarding Jurek’s threats and her racially offensive comments to Roth. The ULJ found Gyang’s and Roth’s testimony credible because it was consistent, detailed, plausible, and corroborated. The ULJ also discredited Jurek’s testimony because it was disjointed, vague, and confusing. Moreover, the ULJ found, and the record reflects, that Jurek admitted making the racially offensive comments about where African Americans should work and explained that the commentary was in favor of greater segregation in Minneapolis.

Because an employer has the right to expect an employee to act professionally and refrain from inappropriate and offensive conduct, Jurek’s insubordination, threats, and vulgar and racist comments constitute a serious violation of the standards of behavior that Phygen has the right to expect of its employees. *See* Minn. Stat. § 268.095, subd. 6(a)(1). In light of repeated warnings from her supervisor that she must conduct herself professionally and that continued inappropriate behavior could lead to the termination of her employment, Jurek also displayed a substantial lack of concern for the employment. *See id.*, subd. 6(a)(2).

The ULJ correctly concluded that Jurek is ineligible to receive unemployment benefits because she was discharged for employment misconduct.

**Affirmed.**