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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1673**

Cathy Brathol,  
Relator,

vs.

East Suburban Resources Inc.,  
Respondent,

Department of Employment and Economic Development,  
Respondent.

**Filed May 11, 2010  
Affirmed  
Bjorkman, Judge**

Department of Employment and Economic Development  
File No. 21963135-3

Cathy Brathol, River Falls, Wisconsin (pro se relator)

East Suburban Resources Inc., c/o Talx UCM Services Inc., St. Louis, Missouri  
(respondent)

Lee B. Nelson, Britt K. Lindsay-Waterman, Minnesota Department of Employment and  
Economic Development, St. Paul, Minnesota (for respondent Department of Employment  
and Economic Development)

Considered and decided by Toussaint, Chief Judge; Bjorkman, Judge; and Collins,  
Judge.\*

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

## UNPUBLISHED OPINION

**BJORKMAN**, Judge

Relator challenges the decision by the unemployment-law judge (ULJ) that she is ineligible to receive unemployment benefits because she was discharged for employment misconduct, arguing that she had received approval for her absence and that the reason for her discharge was pretextual. We affirm.

### FACTS

Relator Cathy Brathol worked from January 2003 to February 2009 as a full-time training facilitator for respondent East Suburban Resources, Inc. (ESR). By December 2008, Brathol had been disciplined for numerous violations of company policy, including leaving work without informing her supervisor, failing to speak directly with her supervisor at least two hours before being absent from work, and using vulgar language with a client. In December, Brathol again failed to speak directly with her supervisor before an absence, and received a written warning stating that her next failure to do so would be “viewed as job abandonment which is grounds for immediate termination.”

On January 9, 2009, after five of Brathol’s coworkers signed a written statement alleging that she had mistreated a client, Brathol’s supervisor Kris Olson gave her an “action plan,” which highlighted attendance, punctuality, and upholding ESR’s professional standards as areas in which Brathol needed to show improvement. On January 29, Brathol had a performance review with Olson and ESR’s director of operations. The review included implementation of a performance improvement plan that required “immediate and continuous improvement” in areas of behavior including

reporting for work on time unless an absence has been approved. The plan stated that failure to show immediate improvement in these areas would result in discipline and possibly termination.

That evening, Brathol twice called Olson at home to discuss her performance review. Olson replied that they could discuss the review the next day at work. Brathol persisted until Olson told her that she was respectfully ending the conversation and hung up. Brathol called Olson again the next morning, less than two hours before she was scheduled to work, advising that she was taking the day off to discuss her performance review with her husband. Olson told Brathol that she did not approve this absence, that Brathol needed to work that day, and that she would report this unexcused absence to ESR's executive director. Brathol did not appear for work, and was terminated by ESR's executive director for insubordination and for her unexcused absence.

Brathol was denied unemployment benefits and appealed to a ULJ, who affirmed the denial of unemployment benefits on the ground that Brathol was ineligible because she was terminated for employment misconduct. Brathol requested reconsideration, and the ULJ affirmed the decision. This certiorari appeal follows.

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

An employee discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2008). This court views a ULJ's findings of fact "in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ. In doing so, we will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Skarhus v. Davanni's*

*Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (citations omitted). This court may reverse or modify the ULJ's findings or inferences if they are "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5) (2008).

Employment misconduct includes any intentional conduct that clearly displays either a serious violation of the standards of behavior an employer can reasonably expect, or a lack of concern for the employment. Minn. Stat. § 268.095, subd. 6(a) (2008). Whether an employee committed a particular act is a fact question, but whether that act constitutes employment misconduct is a question of law that we review de novo. *Skarhus*, 721 N.W.2d at 344.

Brathol does not dispute that her unexcused absence on January 30, 2009, would constitute employment misconduct. Rather, she challenges the ULJ's factual determination that her absence was unexcused. Brathol testified that she used her speaker phone when she called Olson that morning, and that both she and her husband heard Olson approve her request for a day off. Olson testified that she did not excuse Brathol's absence. When, as here, the credibility of a party or witness has a significant effect on the outcome of a decision, the ULJ is required to "set out the reason for crediting or discrediting that testimony." Minn. Stat. § 268.105, subd. 1(c) (2008). The ULJ did so, explicitly finding "Olson's testimony . . . to be more credible than the testimony of the Brathols, because it is more likely, more believable, and corroborated by detailed contemporaneous written statements of Olson."

Brathol disputes this express credibility finding, asserting that a credit card receipt that Brathol presented to the ULJ proves that Olson's testimony was not truthful. During the evidentiary hearing, Olson answered "no" when asked if she had picked relator up in Forest Lake for a mandatory meeting held "half a block away." Brathol argues that the gas receipt shows that Brathol drove to Forest Lake that day, contrary to Olson's sworn testimony. But the record shows that the point of disagreement was not whether Olson picked Brathol up in Forest Lake; rather, it was whether Olson picked Brathol up more than one-half block away from the meeting location. The ULJ noted Brathol's reference to the receipt but expressly found that Olson was credible on the critical issue of whether Brathol's January 30 absence was unexcused. Deferring to the ULJ's credibility findings, as we must, and based on our close review of the record, we conclude that substantial evidence supports the ULJ's finding that Brathol's absence was unexcused and contrary to Olson's directive and the conclusion that this action constituted employment misconduct.

Brathol also argues that the allegations of her misconduct were fabricated and offered as a pretext for the real reason for her dismissal, Olson's personal vendetta against her. Brathol testified about several instances of Olson's misconduct, and ESR's director of operations testified that Brathol complained to him about Olson. He also testified that an internal investigation failed to substantiate the complaint. Our review of the record does not support Brathol's contention that the reasons for her termination were pretextual.

**Affirmed.**