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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0298**

Paula Roush,
Relator,

vs.

Southern Minnesota Sugar Cooperative,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed October 28, 2013
Affirmed
Chutich, Judge**

Department of Employment and Economic Development
File No. 30307302-3

Paula Roush, Olivia, Minnesota (pro se relator)

Southern Minnesota Sugar Cooperative, Renville, Minnesota (respondent employer)

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

Considered and decided by Kirk, Presiding Judge; Kalitowski, Judge; and Chutich,
Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Relator Paula Roush challenges the unemployment-law judge's determination that she was ineligible for unemployment benefits because she was terminated for employment misconduct. Because we conclude that Roush's conduct was employment misconduct as defined in Minnesota law, we affirm.

FACTS

Roush was employed at the Southern Minnesota Sugar Cooperative (Cooperative) as a machine operator for approximately eight years. She received approval to miss work on September 19, 2012 to attend the funeral of a family member. Roush later heard from a co-worker that she was entitled to two full days off from work for a funeral, so she called her union representative on the evening of September 19 to confirm whether this was correct. After speaking to her union representative, Roush called the night shift supervisor to report that she would not be at work the next day on September 20.

Roush was not scheduled to work from September 21 through 27, and she returned to work on September 28. Her supervisor issued her a written warning for having an unexcused absence on September 20. Her supervisor told Roush, incorrectly as it turned out, that she was written up because she did not report her absence to her supervisor that day. In reality, Cooperative issued a warning because it considered the second day an unexcused absence when Roush did not initially request two days off.

Upset by this warning, Roush attempted to call her union representative to get a leave of absence. She was unable to contact the representative. Roush did not go to

work on September 29, September 30, or October 1 because she was angry about being written up for an unexcused absence on September 20, and she did not call in to report her absences on those days.

On October 1, 2012, Cooperative terminated Roush's employment for failing to call in or report to work for three consecutive days. A rule in Cooperative's employee handbook stated, "Failure to report to work for three (3) consecutively scheduled workdays without notifying the Cooperative is considered voluntary termination."

Roush applied for unemployment benefits. A Department of Employment and Economic Development clerk determined that Roush was ineligible for benefits, and Roush appealed that decision to an unemployment-law judge. During the hearing with the unemployment-law judge, Roush stated that she did not intend to terminate her employment, but she wanted to "show them what a no call/no show" was. She also mentioned that she was depressed at the time from the recent death of her family member, but she did not present evidence that her absences were because of a medical issue.

The unemployment-law judge held that Roush was terminated for employment misconduct and that she is ineligible for unemployment benefits. Roush requested reconsideration, and the unemployment-law judge affirmed the ruling. This appeal by writ of certiorari followed.

D E C I S I O N

An employee who is discharged for employment misconduct is ineligible to receive unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). In reviewing

an unemployment-law judge's determination that an employee engaged in employment misconduct, we review the judge's findings of fact in the light most favorable to the decision and will not disturb the findings if they are substantially supported by the evidence. *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011). We review de novo the judge's determination whether those facts are employment misconduct. *Id.* We may affirm, remand, reverse, or modify the judge's decision if Roush's substantial rights have been prejudiced because we find the decision is based on insufficient evidence or affected by an error of law. Minn. Stat. § 268.105, subd. 7(d) (2012).

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). Employment misconduct is not conduct an average employee acting reasonably would have engaged in under the circumstances, conduct that was a consequence of the applicant's inability or incapacity, good faith errors in judgment, or absences due to illness with proper notice to the employer. *Id.*, subd. 6(b)(4)–(7).

Applying these standards, we conclude that the unemployment-law judge properly found that Roush committed employment misconduct by consecutively missing three days of work without calling to notify her supervisor of her absences. Roush argues that she is entitled to unemployment benefits because Cooperative incorrectly wrote her up for her absence on September 20, 2012. By focusing on this absence, however, she fails

to address the behavior that led to termination—her unexplained absences on September 29, September 30, and October 1, 2012.

Tellingly, at the hearing, Roush admitted to intentionally missing work on September 29, September 30, and October 1 without notifying her supervisor and doing so because she was mad. Such purposeful conduct amounts to employment misconduct. *See Torgerson v. Goodwill Indus., Inc.*, 391 N.W.2d 35, 37–38 (Minn. App. 1986) (finding misconduct when an employee failed to come to work for three days without calling employer in advance); *Smith v. Am. Indian Chem. Dependency Division Project*, 343 N.W.2d 43, 45 (Minn. App. 1984) (finding misconduct when an employee failed to show up for three scheduled work shifts).

While we sympathize with Roush, who had just experienced a death in the family, the record shows that she could have addressed the dispute over her September 20 absence in other legitimate ways. By simply not showing up for work for three days, she unfortunately demonstrated a lack of concern for her employment. Accordingly, we affirm the unemployment-law judge’s decision that she is ineligible for unemployment benefits.

Affirmed.