

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

TRACY L WILLIAMS
Claimant

APPEAL NO. 10A-UI-16503-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

ANK HOSPITALITY LLC
Employer

OC: 05-23-10
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 23, 2010, reference 05, decision that allowed benefits. After due notice was issued, a hearing was held on January 19, 2011. The claimant did participate. The employer did participate through Lalit Patel, General Manager.

ISSUE:

Was the claimant discharged due to job-related misconduct?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a front desk associate full time beginning May 29, 2010 through October 16, 2010 when she was discharged. On October 7 the claimant fell down a set of stairs at home and was off work for medical treatment. One of her relatives notified Mr. Patel that she could not work due to the injury. When the claimant returned to work on October 12 to provide her doctor's note and to check the schedule she noticed she was not on the schedule for the upcoming week. The claimant told Mr. Patel that she had been released to work but he told her she should stay off work and rest. The claimant did not want to rest, she was cleared by her doctor and wanted to work. Mr. Patel told the claimant that he was going to make her an on-call employee. The claimant was never put on the schedule again and believed her employment had ended because the employer simply stopped scheduling her. The claimant was rightfully upset when she visited with the employer on October 12 and learned she was not going to be scheduled and that her status would go to on call, which in essence meant she would have no work. The claimant was discharged because the employer was no longer offering her any work and had changed her to an on-call status.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. In the case of an illness, it would seem reasonable that employer would not want an employee to report to work if they are at risk of infecting other employees or customers. Certainly, an employee who is ill or injured is not able to perform their job at peak levels. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. The employer effectively discharged the claimant by failing to put her back on the schedule after she recovered from her injury. The administrative law judge is persuaded that the claimant was discharged due to absence for properly reported illness. Because the final absence for which she was discharged was related to properly reported illness or injury, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

DECISION:

The November 23, 2010 (reference 05) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css