

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**CRYSTAL G KOSAK**  
Claimant

**LOWE'S HOME CENTERS LLC**  
Employer

**APPEAL 19A-UI-06680-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/28/19  
Claimant: Respondent (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct  
Iowa Code § 96.3-7 – Overpayment

**STATEMENT OF THE CASE:**

Lowe's Home Centers (employer) appealed a representative's August 14, 2019, decision (reference 01) that concluded Crystal Kosak (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for September 17, 2019. The claimant participated personally. The employer participated by Amanda Sernulka-George. The administrative law judge took official notice of the administrative file.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 14, 2015, and at the end of her employment she was working as a full-time customer service associate four. The claimant signed for receipt of the employer's electronic handbook and code of conduct when she was hired. The Code of Conduct states, "Do not misstate facts or omit important information." The policy also states, "Working "off-the-clock" by overtime eligible staff is strictly forbidden and could result in termination of employment for those at fault." Clocking out for lunch breaks is not a written policy but employees are aware of a verbal policy.

On June 22, 2019, the employer issued the claimant an electronic warning for attendance issues. The claimant was absent for eight days and left early twenty-three days between March 21 and June 13, 2019. All of the absences were properly reported and due to medical issues. The claimant was diagnosed with depression and fibromyalgia. The employer notified the claimant that further infractions could result in termination from employment.

On July 25, 2019, the employer discovered the claimant had not clocked out for her lunch break on July 6, 7, 9, and 15, 2019. The claimant took longer than a one-hour break on July 6 and July 7, 2019. On July 26, 2019, the employer met with the claimant to discuss the issue. The

claimant was upset and emotional at the meeting. Her medical diagnoses made it difficult for her to sleep. The lack of sleep made it difficult for her to think clearly. Sometimes, she did not clock out because she knew she might be called away from lunch to work on the floor. The employer handed her a paper and told her to write something.

The claimant wrote, "I have not punched out for lunch for about 2 months. I have no good reason and there are no excuses other than I have recently realized and expected that I am dealing with some internal issues that are affecting my judgment. I am doing things I never normally would do. I am seeking help and get help through medication and therapy. Maybe this was a cry for help. I know there are better ways and I am not proud of my behavior." The claimant was crying too hard to work after the meeting and the employer allowed her to go home. On another day, she returned to work. On July 30, 2019, the employer terminated the claimant for inaccurately reporting her hours of work.

The claimant filed for unemployment insurance benefits with an effective date of July 28, 2019. She received \$3,070.00 in benefits after the separation from employment. The employer provided the name and number of Alex Starks as the person who would participate in the fact-finding interview on August 13, 2019. The fact finder called Alex Starks but that person was not available. The fact finder left a voice message with the fact finder's name, number, and the employer's appeal rights. The employer did not respond to the message. The employer provided some documents for the fact finding interview. The employer did not identify or submit the specific rule or policy that the claimant violated which caused the separation.

#### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of

recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

An employer may discharge an employee for any number of reasons or no reason at all, 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. The only issue the employer had with the claimant prior to the separation was absenteeism.

The employer issued the claimant a warning a little over a month before her separation for properly reported absences due to medical issues. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The claimant's absences cannot be considered misconduct because they were properly reported and due to medical issues. The claimant had no history of misconduct in the four years she worked for the employer.

In July 2019, the employer discovered the claimant was not clocking out for her lunch breaks. They knew the claimant was a long term employee with a medical condition and no history of misconduct. They met with her on July 25, 2019, and she told the employer she was not thinking clearly due to her medical condition. She thought she should not clock out because she might be called to the floor. The employer had a written rule about working "off the clock". The employer had not previously warned claimant about any of the issues leading to the separation. Rather than warning her about the issue, it terminated her. The employer has not met the burden of proof to establish that claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed, provided the claimant is otherwise eligible.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or

disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible. The employer's testimony was internally inconsistent and it did not provide sufficient documentation of policies and absences.

**DECISION:**

The representative's August 14, 2019, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs