

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

CYNTHIA L LINDSEY
Claimant

APPEAL NO. 18A-UI-06745-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

AT&T MOBILITY SERVICES LLC
Employer

OC: 05/27/18
Claimant: Appellant (2R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Cynthia Lindsey (claimant) appealed a representative's June 13, 2018, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with AT&T Mobility Services (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 9, 2018. The claimant participated personally. The employer was represented by Susen Zevin, Hearings Representative, and participated by Jamie Durkop, Attendance Manager.

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 June 13, 2011, as a full-time customer service representative. The employer had a new attendance policy effective in January or February 2018, but the claimant did not receive a copy. Copies were not available to employees.

The new attendance policy stated that an employee may be reviewed for termination after she accumulated eight attendance points. The employer did not accept doctor's notes. The employer was supposed to issue a verbal warning after the employee accumulated four points, a written warning after the employee accumulated five points, and a final written warning after the employee accumulated seven points. Some employees were terminated at eight points and others were not.

The claimant properly reported her absence due to a medical condition on February 12, March 14, 15, 16, April 23, and 24, 2018. She had accumulated 4.5 points but the employer did not issue her a verbal warning. The claimant properly reported her absence due to a medical condition on April 30, 2018. The employer called the claimant in for a meeting and talked to her about her absences. It indicated it issued her a verbal warning. The claimant did not sign any

documents and did not receive a copy of the warning. The claimant was not warned that she could be terminated for further absences.

The claimant properly reported her absence due to a medical condition on May 4, 7, 8, 9, 10, 11, 14, 15, 17, 18, and 21, 2018. Prior to 2018, the claimant had no issues with attendance. On May 23, 2018, the employer terminated the claimant for excessive absenteeism. At the time of her termination, she had accumulated 12.5 attendance points.

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).

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. 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 employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on May 21, 2018. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

The issue of whether the claimant is able and available for work is remanded for determination.

DECISION:

The representative's June 13, 2018, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

The issue of whether the claimant is able and available for work is remanded for determination.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs