

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**WESLEY HAMSTREET**  
Claimant

**APPEAL NO: 10A-EUCU-00130-ET**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**THE BON-TON DEPARTMENT STORES INC**  
Employer

**OC: 01-11-09**  
**Claimant: Respondent (1)**

Section 96.5-2-a - Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the February 15, 2010, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 7, 2010. The claimant participated in the hearing. Maureen Janssen, Human Resources Manager, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time sales associate in the men's department for Younkers Store from December 10, 2008 through March 21, 2009. He was ill March 21, 2009, and called in to report his absence one hour before his shift began instead of two hours prior to the start of his shift. The claimant spoke with the manager who told him to find a replacement or to report to work. He could not find a replacement so went to work for a four-hour shift. After approximately one hour, the claimant's stomach was upset and he was nauseous. He called the assistant manager and said he really needed to go home but the assistant manager told him if he left, he would no longer work there. The claimant called three other employees but could not find a replacement so called the assistant manager again and said he really needed to go home. The assistant manager said she did not know what they were going to do but if the claimant was sick and needed to go, he should go. The claimant used the restroom and stopped at the service counter before leaving to ask them to document that he left. He was sick the next day and called the assistant manager to report his absence. The assistant manager said she was still working on the schedule and directed the claimant to call when he felt better and he would be put back on the schedule. Three days later the claimant stopped by the store to check the schedule; he left a note stating that he felt better and provided the hours he was available. There was no response by the employer and the claimant called in and spoke with a different assistant manager who said maybe they could use the claimant in an on-call position. The claimant said that was fine but never heard from the employer after that.

## REASONING AND CONCLUSIONS OF LAW:

The issue is whether the reasons for the claimant's separation from employment qualify him to receive unemployment insurance benefits. The claimant is not qualified to receive unemployment insurance benefits if he voluntarily quit without good cause attributable to the employer or if the employer discharged him for work-connected misconduct. Iowa Code sections 96.5-1 and 96.5-2-a.

The employer contends the claimant was considered a voluntary quit after leaving in the middle of his shift March 21, 2010, and failing to call or report to work for the next three days. In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980) and Peck v. Employment Appeal Bd., 492 N.W.2d 438 (Iowa Ct. App. 1992). The claimant did not exhibit the intent to quit and did not act to carry it out so the separation must be treated as a discharge for unemployment insurance purposes.

Iowa Code section 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(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.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was discharged for two absences due to illness which he properly reported. Excessive unexcused absenteeism, a concept which

includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). 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 has not met its burden. The claimant's separation was not disqualifying and he qualifies for unemployment insurance benefits, provided he is otherwise eligible.

**DECISION:**

The February 15, 2010, reference 02, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

je/css