

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LYNETTE A CONARD
Claimant

APPEAL NO. 10A-UI-03995-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE HON COMPANY
Employer

OC: 01/24/10
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, The Hon Company (Hon), filed an appeal from a decision dated March 4, 2010, reference 01. The decision allowed benefits to the claimant, Lynette Conard. After due notice was issued, a hearing was held by telephone conference call on April 28, 2010. The claimant participated on her own behalf and was represented by Jeff Tronvold. The employer participated by MCR Manager Chad Schmidt, Group Leader Scott Stecher, MCR Generalist Sue McDonald and was represented by Employers Edge in the person of Debra Campbell. Exhibits One, Two, Three, Four, and A were admitted into the record.

ISSUE:

Whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Lynette Conard was employed by Hon from November 5, 1982 until September 30, 2009, as a full-time machine operator/welder working 4:10 a.m. until 2:30 p.m. She received the employer's attendance and progressive disciplinary policies.

In 2009 she was certified for intermittent FMLA. The number of absences was certified based on the doctor's determination as to how many absences would be reasonable for her condition. If there were more absences than had been determined to be reasonable she would have to provide additional medical documentation about the reason for the absence.

Ms. Conard received a warning June 8, 2009, for six unexcused absences in the past six months. It should have been given in April but she was on voluntary layoff at that time and did not return to work until June 7, 2009. The warning included two absences she felt were to be excused under the FMLA. But when she had reported the absence to her group leader Scott Stecher, he had notified her it was not included under the FMLA and she would have to bring in additional documentation. But she did not do this.

On September 22, 2009, MCR Manager Chad Schmidt had a face to face meeting with Ms. Conard and notified her of her attendance situation. She was presented with a memo the next day which documented the meeting but she refused to sign it although she did read it. The memo did confirm she had been warned that any further absences would result in discharge. On September 30, 2009, she overslept and was late to work. Mr. Stecher told her to punch out and come back later to talk with Mr. Schmidt. At that meeting the employer notified her she was discharged.

Lynette Conard has received unemployment benefits since filing a claim with an effective date of January 24, 2010.

REASONING AND CONCLUSIONS OF LAW:

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.

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 claimant had been advised her job was in jeopardy as a result of her absenteeism. The employer worked with her throughout her FMLA period to excuse any absences due to her medical condition and notifying her when additional documentation was needed. Whether she provided the needed documentation was her responsibility and when she did not, the absence was then properly counted against her.

The final absence was a tardy due to oversleeping. Matters of purely personal consideration, such as oversleeping, are not considered an excused absence. *Harlan v. IDJS*, 350 N.W.2d 192 (Iowa 1984). The final incident of absenteeism was unexcused, a current, final act of misconduct as required by 871 IAC 24.32(8). Under the provisions of the above Administrative Code section, this is misconduct and the claimant is disqualified.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which she is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of March 4, 2010, reference 01, is reversed. Lynette Conard is disqualified and benefits are withheld until she has requalified by earning ten times her weekly benefit amount, provided she is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/css