

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

ELIANA M HERNANDEZ
2127 CAPITOL AVE
DES MOINES IA 50317

SEARS ROEBUCK & COMPANY
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-00769-CT
OC: 12/14/03 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Eliana Hernandez filed an appeal from a representative's decision dated January 14, 2004, reference 01, which denied benefits based on her separation from Sears Roebuck & Company (Sears). After due notice was issued, a hearing was held by telephone on February 17, 2004. Ms. Hernandez participated personally. The employer participated by Melissa Forret, Recruiter, and Travis Noblitt, Team Manager. Exhibits One through Six were admitted on the employer's behalf.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all the evidence in the record, the administrative law judge finds: Ms. Hernandez was employed by Sears from April 17, 2001 until December 12, 2003 as a full-time customer service representative. She was discharged because of her attendance.

Ms. Hernandez was late reporting to work on a number of occasions, the last of which was November 14, 2003. She was 27 minutes late on this occasion because of a flat tire. The final series of absences which precipitated the discharge began on November 29, 2003. Ms. Hernandez suffered a miscarriage on November 29 and properly reported her intent to be absent that day and again on December 1. She was not scheduled to work on December 2. She reported to work on December 3 but began experiencing cramping. She was granted permission to leave work early. When she returned on December 4, she provided a doctor's statement covering December 1, 2, and 3. Ms. Hernandez continued to perform her normal job until notified of her discharge on December 12. She had received written warnings advising that her continued employment was in jeopardy because of her attendance. Attendance was the sole reason for the discharge.

REASONING AND CONCLUSIONS OF LAW:

At issue in this matter is whether Ms. Hernandez was separated from employment for any disqualifying reason. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct in connection with the employment. The employer had the burden of proving disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). An individual who was discharged because of attendance is disqualified from receiving job insurance benefits if she was excessively absent on an unexcused basis. Absences which are for reasonable cause and which are properly reported to the employer are considered excused absences. Moreover, there must be a current unexcused absence to support a disqualification from benefits.

The last unexcused absence on Ms. Hernandez' record was the tardiness of November 14. All of the time missed from work thereafter was for reasonable cause and was properly reported to the employer. Therefore, the absences commencing November 29 are considered excused. Excused absences may not form the basis of a misconduct disqualification, regardless of how excessive and regardless of prior warnings. The unexcused absence of November 14 was not a current act of misconduct in relation to the December 12 discharge date. It is concluded, therefore, that the employer has failed to establish a current act of misconduct. Accordingly, no disqualification may be imposed. While the employer may have had good cause to discharge, conduct which might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983).

DECISION:

The representative's decision dated January 14, 2004, reference 01, is hereby reversed. Ms. Hernandez was discharged by Sears but misconduct has not been established. Benefits are allowed, provided she satisfies all other conditions of eligibility.

cfc/kjf