

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MIROSLAVA HART
Claimant

APPEAL NO: 11A-UI-00841-B

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CINCLEAN INC
CINDY'S CLEANING SERVICE**
Employer

**OC: 12/19/10
Claimant: Respondent (1)**

Iowa Code § 96.5-2-a - Discharge for Misconduct
871 IAC 24.32(7) - Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Cindy's Cleaning Service (employer) appealed an unemployment insurance decision dated January 14, 2011, reference 01, which held that Miroslava Hart (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held in Mason City, Iowa, on March 11, 2011. The claimant participated in the hearing. The employer participated through owner Cindy Weber and Attorney Richard Piscopo, Jr. Employer's Exhibits One through Six were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was employed as a part-time cleaning assistant from approximately November 6, 2009 through July 14, 2010, when she walked off the job. Prior to her separation, she had received a final written warning on July 6, 2010 for excessive absenteeism. The employer rehired the claimant on September 1, 2010 on a 90-day probation period on the condition that she had good attendance, punctuality, and attitude.

The claimant missed work due to properly reported illness on September 18, September 22, October 13, and November 3, 2010. Any absences due to illness for which she had a doctor's note were excused, but the employer testified that the claimant did not provide medical excuses for these four dates. A final written warning was issued to her on November 5, 2010 and she was advised any further infractions would result in termination.

The employer subsequently discharged the claimant on December 16, 2010 for excessive unexcused absenteeism with a final incident on that same day. The employer said the absence was properly reported but the claimant did not provide a reason for the absence. The claimant

testified she missed work due to illness and she told the employer she had to go to the doctor that day, where she was diagnosed with strep throat.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

Iowa Code § 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 propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The claimant was discharged on December 16, 2010 for excessive unexcused absenteeism.

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.

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 claimant was discharged for five absences, but the employer admits the claimant missed four of those days due to properly reported illness. The parties dispute whether the final absence was due to illness. The claimant contends she reported it as an absence due to illness did, but the employer testified she did not. Even if the employer's testimony is relied upon and the final absence was not excused, it would not prevent the claimant from qualifying for unemployment insurance benefits. A single unexcused absence does not constitute excessive unexcused absenteeism. Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989). Consequently, work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated January 14, 2011, reference 01, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/kjw