

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

LINDA A HOMGREN
1111 MILLER AVE
RED OAK IA 51566

PROFESSIONAL RESOURCES INC
512 N 4TH ST
RED OAK IA 51566

Appeal Number: 05A-UI-08012-S2T
OC: 05/01/05 R: 01
Claimant: Respondent (1)

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:

Professional Resources (employer) appealed a representative's August 1, 2005 decision (reference 05) that concluded Linda Holmgren (claimant) was discharged for excessive absences but the absences were for illness. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 22, 2005. The claimant participated personally. The employer participated by Monica Bartlett, Staffing Manager. The employer offered one exhibit which was marked for identification as Exhibit One. Exhibit One was received into evidence.

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 May 24, 2005, as a temporary full-time receptionist. She worked 8:00 a.m. to 5:00 p.m., Monday through Friday. The employer's attendance policy states that an employee who receives three or more points will be terminated. The claimant did not receive a copy of the employer's handbook which contained the policy. The policy indicates a person would accrue 0.5 points for each incident of pre-approved absence. Unapproved absences would earn the employee 0.5 to 2.0 points depending on the time the absence was reported. The employer thought the claimant had received it even though the claimant did not sign for the handbook. During the claimant's employment she had been tardy but received no attendance points or warnings for her absences. The handbook indicates an employee should receive 0.5 to 1.0 for each incident of tardiness. The claimant knew of the handbook but did not think the handbook applied to her.

The claimant requested leave for July 5, 6, 7 and 8, 2005. The employer granted the claimant's leave. On July 6, 2005, the claimant notified the employer she did not need to take leave on July 7 and 8, 2005, and would be at work.

On July 7, 2005, the claimant woke up late because she had a migraine and had not slept well. At 9:00 a.m. the claimant notified the employer she was ill and could not work. The claimant was still sick on July 8, 2005. She overslept due to her illness and contacted the employer at 12:15 p.m.

On July 11, 2005, the employer met with the claimant and gave her four written warnings for her absences on July 5, 6, 7 and 8, 2005. The employer did not plan to terminate the claimant for her absenteeism. The employer told the claimant her position had ended and offered her a position elsewhere. The claimant did not wish to take a position a number of miles away. After the claimant left work the employer realized it could terminate the claimant because she had accrued three attendance points. The claimant received 0.5 points each for July 5 and 6, 2005. She accrued 1.0 point for July 7, 2005, and 2.0 points for July 8, 2005. The employer terminated the claimant for accruing three attendance points.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes she was not.

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, (8) provide:

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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

(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. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Let us first address the issue of the prior tardiness. The employer gave the claimant no warnings and assessed no points regarding the claimant's prior tardiness. The claimant's prior tardiness is not material to the claimant's separation. In fact, the claimant reasonably believed the handbook did not apply to her.

Next let us address the issue of the excused absences on July 5 and 6, 2005. Excessive absences are not misconduct unless unexcused. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer had never applied the handbook to the claimant's absences so the claimant was unaware she would be assessed points for taking employer approved time off. The employer has failed to provide any proof of misconduct with regard to employer approved days off.

Lastly let us look at the absences for illness. 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 incidents of absence were a reported illness which occurred on July 7 and 8, 2005. The employer does not have any work rules in their handbook that indicates what proper reporting would or would not be. While an employee would accrue more points for calling in later, the handbook does not indicate that no points would be awarded for reporting by a certain time. The claimant's

absence does not amount to job misconduct because it was 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.

DECISION:

The representative's August 1, 2005 decision (reference 05) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

bas/tjc