

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEANA CRUIKSHANK
Claimant

APPEAL NO. 12A-UI-11782-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

AEROTEK INC
Employer

**OC: 08/26/12
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Aerotek, Inc. filed a timely appeal from a representative's decision dated September 19, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on October 29, 2012. The claimant participated personally. Participating as witnesses for the employer were Ms. Alexandra Cannistra and Ms. Ellen Carlson.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Deana Cruikshank was employed by Aerotek, Inc. from February 13, 2012 until July 30, 2012 when she was discharged from employment for being excessively absent. Ms. Cruikshank was assigned to work at the Wells Fargo Company as a full-time Operations Clerk III and was paid by the hour. Her contact person at Aerotek, Inc. was Ms. Ellen Carlson.

During the course of her employment with Aerotek, Inc., Ms. Cruikshank was assigned at the Wells Fargo client location. Ms. Cruikshank was discharged after the client, Wells Fargo, requested that Ms. Cruikshank no longer be assigned to the client location because the claimant had been absent too often. During the course of her assignment at the Wells Fargo facility, Ms. Cruikshank had been absent on numerous occasions due to serious medical problems affecting her mother and requiring Ms. Cruikshank to miss work. The claimant's normal practice was to report any impending absences both to the client employer, Wells Fargo, and to her contact person at Aerotek, Inc., Ellen Carlson. On some occasions, however, Ms. Cruikshank failed to notify Ms. Carlson when the claimant was going to be absent from the Wells Fargo location. The claimant, however, was never warned or counseled about her lack of notification.

The final incident that caused the claimant's discharge took place on July 30 when Ms. Cruikshank's mother was seriously ill and hospitalized. After spending the night with her mother, the claimant contacted Wells Fargo to report her impending absence but fell asleep before she was able to contact Ms. Carlson. At that point the claimant's attendance infractions were well in excess of those allowed at the Wells Fargo location and the claimant was discharged from her employment.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Conduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate,

intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

The Supreme Court in the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive, unexcused absenteeism is a form of job misconduct. The Court held that the absences must both be excessive and unexcused. The Court further held, however, that absence due to illness and other excusable reasons are deemed excused if the employee properly notifies the employer.

Although the evidence in the record establishes that the employer acted with much forbearance before discharging Ms. Cruikshank, the evidence in the record does not establish sufficient evidence of intentional misconduct at the time of job separation to justify the denial of unemployment insurance benefits. The last absence was occasioned by the claimant being unable to report for work due to the serious illness and hospitalization of her mother and the evidence in the record establishes that Ms. Cruikshank attempted to the best of her ability to provide notification of her impending absence for July 30, 2012. Unfortunately, Ms. Cruikshank fell asleep before she could provide notice to Ms. Carlson as she had to the client employer. Because this matter had not been a subject of disciplinary concern in the past, it is not sufficient to be used to disqualify the claimant during the final incident.

While the employer's decision to terminate the claimant may have been a sound management decision, the reason for the claimant's discharge on July 30, 2012 was not disqualifying.

DECISION:

The representative's decision dated September 19, 2012, reference 01, is affirmed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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