

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CARMEN J BARNES**  
Claimant

**APPEAL NO. 16A-UI-11856-TN-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CEMEN TECH INC**  
Employer

**OC: 10/09/16**  
**Claimant: Appellant (2)**

Section 96.5-2-a - Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated October 31, 2016, reference 01, which denied unemployment insurance benefits finding the claimant was discharged from work on October 10, 2016 for violation of a known company rule. After due notice was provided, a telephone hearing was held on November 16, 2016. Claimant participated. Although the employer listed a number for a witness, the witness was not available at the telephone number provided. Two messages were left for the witness. Claimant's Exhibits One and Two were admitted into the hearing record.

**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 the evidence in the record, the administrative law judge finds: Carmen Barnes was employed by Cemen Tech, Inc. from April 4, 2016 until October 10, 2016 when she was discharged from employment. Ms. Barnes last worked as a shipping/receiving associate on a full-time basis and was paid by the hour.

Ms. Barnes had initially been assigned to work in the company's paint department, but had been transferred to the shipping and receiving department after she complained that a supervisor was sexually harassing her. While assigned to work in the shipping and receiving department, the claimant had not been required to operate a forklift in the performance of any of her job duties. Ms. Barnes had been given time off work in early September 2016 for medical testing and was off work on September 12, 2016 for a biopsy.

Although Ms. Barnes returned to work after the biopsy procedure with a light-duty limitation, she was allowed to resume her work with the company. On September 14, 2016, Ms. Barnes became light-headed at work and was sent home by the employer and was informed at that time that she needed to have a full release to return back to her work.

On October 3, 2016, the claimant received a doctor's release authorizing her to return to the duties that she normally performed at Cemen Tech, Inc. as a shipping and receiving associate. The release did not allow the claimant to operate any equipment or forklifts, however, these were not part of the claimant's regular job duties since, being assigned to the shipping/receiving department after complaining that she had been sexually harassed. Although the claimant's absences were due to illness and she provided notice to the employer of each impending absence, the employer considered the claimant's time away from work to be excessive and discharged Ms. Barnes effective October 10, 2016 although she had been medically released to perform the actual duties she was performing in her job. Any continuing absences were due to the employer's decision not to allow the claimant to return to work. Although Ms. Barnes requested an accommodation that would allow the claimant to return, the employer chose not to accommodate Ms. Barnes and discharged her from employment.

### **REASONING AND CONCLUSIONS OF LAW:**

The question before the administrative law judge is whether the evidence in the record establishes intentional, disqualifying misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does not.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(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 findings of fact in this matter are derived from the claimant's testimony as the employer did not participate in the hearing.

The Supreme Court of 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 and that the concept includes tardiness, leaving early, etc. The Court further held, however, that absence due to illness or other excusable reasons are deemed excused, if the employee properly notifies the employer.

In the case at hand, the claimant had been transferred from the paint department at Cemen Tech, Inc. that she was hired to work at to the shipping and receiving department because she had filed a complaint about sexual harassment against a supervisor. After being assigned to the shipping/receiving department, the claimant was placed in a job position in the department that operated no forklifts or heavy equipment while in that department.

Ms. Barnes was allowed time off work for medical testing and allowed to return to work by the employer with light-duty restrictions. A limitation on the claimant operating heavy equipment or forklifts was not applicable because Ms. Barnes did not perform those duties for the employer. Later, the employer sent Ms. Barnes home and thereafter did not allow the claimant to return to work because of the same or similar lifting limitations that the company had previously accepted. It appears that although the claimant was not allowed to return to work by the employer, the days that the claimant was absent from work were considered counted against the claimant and she was discharged although the claimant kept in contact and the employer's decision was why she was not reporting for work. It is the claimant's belief that the employer would no longer accommodate her light-duty requirement that prevented her from performing duties that were not assigned to her because she had filed a sexual harassment complaint against a supervisor in a different department. The administrative law judge makes no finding on that assertion.

The question before the administrative law judge is not whether the employer has a right to discharge an employee for this reason or no reason whatsoever but whether the discharge is disqualifying under the provisions of the Iowa Employment Security Law.

While the decision to terminate Ms. Barnes may have been a sound decision from a management viewpoint, the administrative law judge concludes that the claimant's absences were excused and properly reported and, therefore, did not constitute misconduct that would disqualify the claimant for unemployment insurance benefits. Accordingly, the claimant is held to be eligible to receive unemployment insurance benefits, provided that she meets all other eligibility requirements of Iowa law.

**DECISION:**

The representative's decision dated October 31, 2016, reference 01, is reversed. The claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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