

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BRANDI HATHAWAY GIL**  
Claimant

**APPEAL NO. 11A-UI-06358-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**WEST LIBERTY FOODS LLC**  
Employer

**OC: 04/10/11**  
**Claimant: Respondent (1/R)**

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

**STATEMENT OF THE CASE:**

West Liberty Foods, LLC (employer) appealed an unemployment insurance decision dated May 6, 2011, reference 02, which held that Brandi Hathaway Gil (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 8, 2011. The claimant did not comply with the hearing notice instructions and did not call in to provide a telephone number at which she could be contacted and, therefore, did not participate. The employer participated through Monica Dyar, human resources supervisor. Human Resources Specialist Alejandra Rojas was present with the employer but did not participate. Based on the evidence, the arguments of the party, 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 full-time package inspector from February 21, 2011 through April 11, 2011. She was discharged from employment due to excessive absenteeism with a final incident on April 8, 2011, when she was absent due to illness that was properly reported. The claimant was last warned on April 1, 2011, that she faced termination from employment upon another incident of unexcused absenteeism. Prior absences occurred on March 3, March 31, April 1, and April 7, 2011. The claimant also left early on March 22, 2011.

The claimant informed the employer that she was going to have to take time off work due to a non-work-related surgery. The employer told her that she could reapply once she was completely released to return to work. The claimant has not reapplied even though the employer has work available, and the employer questions whether she is medically able to work.

## 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 April 11, 2011 for excessive unexcused absenteeism.

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's final absence was due to properly reported illness and is therefore not considered misconduct under the unemployment insurance laws. Inasmuch as the employer has not established a current or final act of misconduct, benefits are allowed.

This case is remanded for an investigation and determination on the claimant's ability to work.

**DECISION:**

The unemployment insurance decision dated May 6, 2011, reference 02, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible. This case is remanded for a further determination.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

sda/kjw