

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LETICIA AGUERO
Claimant

APPEAL NO. 17A-UI-10684-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

STAPLES CONTRACT AND COMMERCIAL
Employer

OC: 09/24/17
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Staples Contract and Commercial (employer) appealed a representative's October 9, 2017, decision (reference 01) that concluded Leticia Aguero (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 6, 2017. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Helen Larsen. Exhibit D-1 was received into evidence. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 June 19, 2012, as a full-time reclaim operator. She received the employer's handbook at the time she was hired. The handbook contains an attendance policy. The attendance policy states the employer may terminate an employee who has six unscheduled absences in a rolling twelve month period. The claimant was injured at work in 2014, and again on January 17, 2017. At the end of her employment she was working on restricted duty.

The employer issued the claimant written attendance warnings on December 6, and 20, 2016, April 11, and August 23, 2017. The claimant's final absences occurred on October 21, 2016, April 10, August 22, September 15, and September 19, 2017. They were properly reported and the claimant accrued one point for each absence. The absences on August 22 and September 19, 2017, were due to medical issues. On November 16, 2016, the claimant left early and accrued one-half point. On December 6, 2016, the claimant was tardy and accrued one-half point.

On September 22, 2017, the employer issued the claimant a final written warning for the absence on September 15, 2017, and accumulating five attendance points. It also issued the claimant a termination document for her properly reported absence on September 19, 2017, due to leg pain.

The claimant filed for unemployment insurance benefits with an effective date of September 24, 2017. The employer provided the number of the person who would participate in the fact-finding interview on October 6, 2017. The fact finder called the number but was put on hold for five minutes. There was no answer in the human resources department. The employer did not provide documents for the fact finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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(8) provides:

(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. 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 employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on September 19, 2017. The claimant's absence does not amount to job misconduct because it was properly 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 October 9, 2017, decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/rvs