

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KARMA K COOK
Claimant

APPEAL NO. 10A-EUCU-01150-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SDH EDUCATION WEST LLC
Employer

OC: 12/27/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated November 29, 2010, reference 03, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 11, 2011. Employer participated by Caroline Rassmussen, manager, and Stephen Finn, general manager. Claimant failed to respond to the hearing notice and did not participate. The record consists of the testimony of Caroline Rassmussen and Employer's Exhibits 1-16.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer provides food services at St. Ambrose University in Davenport, Iowa. The claimant was hired on August 16, 2007. She cleaned tables; bussed dishes; and checked student identifications. She was a full-time employee. Her last day of actual work was September 24, 2010. She was terminated on September 24, 2010, for excessive absenteeism.

The employer has a written attendance policy, of which the claimant was aware, that called for termination if an employee reached five points. An absence for medical reasons was considered excused if a doctor's slip was provided. If, however, an individual was considered excessively absent, even if those absences were excused, a point could be assessed. The claimant's final absence was on September 22, 2010. This absence was considered excused by the employer because the claimant was having a diagnostic test. (Exhibit 14) The absences on September 20, 2010, and September 21, 2010, were considered unexcused. The claimant asked for those days off because of her medical test. The claimant's physician did not require the claimant to be off work prior to the test.

REASONING AND CONCLUSIONS OF LAW:

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984) Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

In this case, the employer had the burden of proof to show excessive unexcused absenteeism. The employer also had to show that the final incident leading to discharge was an unexcused absence. The term unexcused has a particular meaning in unemployment insurance law and may or may not be the same as the employer's definition of unexcused. The claimant in this case was excessively absent and she was terminated in accordance with her employer's attendance policy. However, the claimant's final absence was excused as she was gone for a diagnostic medical test. In addition, the majority of her absences were due to personal illness, which is considered an excused absence so long as the employer's notification policy is followed.

The employer may have had good business reasons to terminate the claimant's employment. The evidence does not show that the claimant had excessive unexcused absenteeism as that term is defined in unemployment insurance law. Since the employer has not met its burden of proof, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated November 29, 2010, reference 03, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs