

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EDGAR ROJAS
Claimant

APPEAL NO. 13A-UI-04941-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CURLYS FOODS
Employer

**OC: 03/31/13
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Edgar Rojas (claimant) appealed a representative's April 22, 2013 decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits because he was discharged from work with Curlys Foods (employer) for violation of a company rule. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 3, 2013. The claimant participated personally. The employer provided a telephone number but could not be reached at the time of the hearing. The administrative law left two messages for the employer.

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 10, 2006, as a full-time line leader working the 2:00 p.m. to 11:30 p.m. shift. The claimant signed for receipt of the employer's handbook on April 4, 2013. The handbook indicates that an employee does not need to report every day's absence if he has a doctor's note excusing him for multiple days in a row. The claimant had a lot of attendance points and suffered from a work-related back injury that has not been resolved.

On April 3, 2013, the claimant was sick and barely able to drive himself to the hospital. He did not report his absence from work because he was not able to form the thought to call work. The physician diagnosed him with viral influenza, gave him morphine, and prohibited him from working until April 5, 2013. The claimant was released from the hospital and felt well enough to telephone the employer. He reported to the employer what the doctor said and that he would provide the doctor's excuse indicating he could return to work on April 5, 2013.

The claimant returned home. The morphine had the effect of not allowing him to sleep. When it wore off at 5:00 a.m. on April 3, 2013, he slept until 10:00 p.m. on April 3, 2013. On April 4, 2013, the claimant took the doctor's note to the employer. The employer terminated the

claimant. The claimant went back to the hospital on April 4, 2013, because he was still sick with viral influenza. His physician excused him from work through April 6, 2013.

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:

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(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). Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. Roberts v. Iowa Department of Job Service, 356 N.W.2d 218 (Iowa 1984). 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 an improperly reported illness. The claimant's absence does not amount to job misconduct because the claimant could not properly report his absence due to his illness. He did the best under the circumstances and then provided a doctors' note to show the employer he could not work . 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 April 22, 2013 decision (reference 01) is reversed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css