

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARY C MUK**  
Claimant

**APPEAL NO: 12A-UI-01709-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABM LTD / SERVICEMASTER GREEN**  
Employer

**OC: 01/15/12**

**Claimant: Respondent (2/R)**

Section 96.5-2-a – Discharge  
Section 96.3-7 – Recovery of Overpayment of Benefits

**STATEMENT OF THE CASE:**

ABM Ltd. / ServiceMaster Green (employer) appealed a representative's February 16, 2012 decision (reference 01) that concluded Mary Muk (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 9, 2012. The claimant participated in the hearing. Gregg Stears appeared on the employer's behalf and presented testimony from two other witnesses, Coco Lopez and Kara Patton. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The claimant started working for the employer on April 18, 2011. She worked full-time as a general cleaner at the employer's business client, working a schedule of 6:00 p.m. to 2:30 a.m., Monday through Friday. Her last day of work was December 6, 2011. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

Between April 18 and October 31, 2011, the claimant had the following absences:

Date	Occurrence/reason if any
06/17/11	Absent, called in, sick.
08/26/11	Absent, no-call, no-show.
10/28/11	Absent, no-call, no show.
10/31/11	Absent, no-call, no show.

The October 28 and October 31 absences were due to the claimant taking time off to see her daughter; the claimant had previously arranged to take time off in November to visit with her

daughter and the employer had approved that time off, but the claimant decided to change the dates she was going to take off, and failed to get that change approved by the employer.

As a result of these four occurrences, on November 8, 2011, the claimant's area manager, Lopez, gave the claimant a warning and told her that if there were any more occurrences without a doctor's note within the next 90 days, she would be discharged.

On December 2, 2011, the claimant was a no-call, no-show for work; her immediate supervisor, Patton, called her after the start of the shift. The claimant did not answer, but she later returned the call; she explained to Patton that she was not feeling well and was sleeping. The claimant came in later that evening just to pick up her paycheck. Patton reminded the claimant that she needed to call in if she was going to be absent; the claimant did not respond by asserting that she had called in.

The employer reviewed the claimant's attendance record on December 5 and December 6. As a result of that review, after the final occurrence on December 2, the employer determined to discharge the claimant, which it did when she reported for work on December 6.

The claimant established a claim for unemployment insurance benefits effective January 15, 2012. The claimant has received unemployment insurance benefits after the separation.

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

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. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982); Iowa Code § 96.5-2-a.

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

Excessive and unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). Absences due to properly reported illness cannot constitute work-connected misconduct, since they are not volitional. *Cosper*, supra. However, the claimed illness-related final absence in this matter, as well as two prior absences, were not properly reported, nor were acceptable reasons provided to excuse the failure to properly report the absences. The claimant's final absence was not excused and was not due to illness or other reasonable grounds. The claimant had

previously been warned that future absences could result in termination. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). The employer discharged the claimant for reasons amounting to work-connected misconduct.

The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits whether or not the overpayment is recovered. Iowa Code § 96.3-7. In this case, the claimant has received benefits but was ineligible for those benefits. The matter of determining the amount of the overpayment and whether the claimant is eligible for a waiver of overpayment under Iowa Code § 96.3-7-b is remanded to the Claims Section.

**DECISION:**

The representative's February 16, 2012 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of December 6, 2011. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged. The matter is remanded to the Claims Section for investigation and determination of the overpayment issue.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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