

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUSAN M HARLOW
Claimant

APPEAL NO. 10A-UI-12988-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CALERIS INC
Employer

OC: 08/22/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Caleris (employer) appealed a representative's September 16, 2010 decision (reference 01) that concluded Susan Harlow (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 1, 2010. The claimant participated personally. The employer participated by Heidi Brodersen, Human Resources Supervisor, and Angie Nichol, Manager.

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 having considered all of the evidence in the record, finds that: The claimant was hired on February 22, 2010, as a full-time technical service representative. The claimant signed for receipt of the employer's handbook on February 22, 2010. The employer issued the claimant warnings for performance issues on July 23, August 5, and August 20, 2010. The employer issued the claimant warnings for exceeding break time on June 30, and July 8, 2010. The employer issued the claimant warnings for attendance on June 1, June 23, and July 15, 2010. The employer notified the claimant that further infractions could result in termination from employment.

The claimant was absent 14 days during her employment. The employer excused two days for the claimant due to a family member's death. Nine of the absences were properly reported and for illness. The last three absences occurred on August 21, 22, and 23, 2010. The claimant left early on August 21, 2010, because she was ill. She told the employer that she was not feeling well and was going to see her physician. The physician diagnosed her with vertigo, a condition from which the claimant suffered, and gave her an injection. The claimant called the employer later on August 21, 2010, stating she could not return to work. On August 22, 2010, the claimant was still groggy from the injection when she notified the employer she would not be at work. The claimant did not give a reason for her absence because she was not thinking clearly. On August 23, 2010, the claimant was still sick and left another message for the employer that

she would not be working. August 24, 2010, was the claimant's day off. On August 25, 2010, the claimant worked about an hour before the employer terminated her for excessive absenteeism.

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). The employer must establish not only misconduct, but that there was a final incident of misconduct that precipitated the discharge. The last incidents of

absenteeism were properly reported absences on August 21, 22, and 23, 2010. These absences were due to illness. The claimant's absences do not amount to job misconduct, because they were properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

DECISION:

The representative's September 16, 2010 decision (reference 01) is reversed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw