

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RACHEL R ANDERSON
Claimant

APPEAL NO: 11A-UI-13477-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HARVEY'S IOWA MANAGEMENT CO INC
Employer

**OC: 02/27/11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Rachel R. Anderson (claimant) appealed a representative's October 6, 2011 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Harvey's Iowa Management Co, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 3, 2011. The claimant participated in the hearing. Tonya Achenbach appeared on the employer's behalf. 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?

OUTCOME:

Reversed. Benefits allowed.

FINDINGS OF FACT:

After a prior period of employment with the employer, the claimant most recently started working for the employer on March 25, 2011. She worked part time as a dealer on a 10:00 a.m. to 6:00 p.m. schedule. Her last day of work was September 11, 2011. The employer discharged her on September 19, 2011. The reason asserted for the discharge was excessive absenteeism.

The claimant had been absent on September 4, September 5, September 9, and September 10, primarily due to transportation issues. This brought the claimant to 11 points under the employer's 10-point system. As the claimant had not received prior attendance warnings, when she was in for work on September 11, she was given a final written warning.

The employer considered the claimant to be a no-call/no-show for work on September 12. However, when the claimant had been in on September 11, she had looked at the upcoming

week and had seen she was next scheduled to work on September 16; she was not on the schedule for September 12. The employer provided some testimony that the schedule did show the claimant working that day, but given the fact that there were multiple versions of the schedule, it cannot be established that what the employer's witness was reviewing at the time of the hearing was the same schedule which was posted and which the claimant reviewed on September 11, so the administrative law judge finds the claimant's testimony on this point to be more credible.

The claimant was absent on September 16, and called in the absence due to illness. She realized that as a result of that absence, given her warning on September 11, that she would be discharged. When she went in on September 19 to discuss the matter with the employer's assistant manager, she was discharged; it was only at that point that the claimant was advised she was also considered to have been absent on September 12.

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). The question is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate matters. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

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 which 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 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. 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).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. The absence on September 12 cannot be considered unexcused because the claimant was not on the schedule for that day which she reviewed on September 11, so the absence was not intentional. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under

its attendance policy. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Because the final absence which occurred on September 16 was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. *Cosper*, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's October 6, 2011 decision (reference 02) is reversed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

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