

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JASMINE POWELL
Claimant

APPEAL NO: 13A-UI-03434-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SKYLINE CENTER INC
Employer

OC: 02/17/13
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Skyline Center, Inc. (employer) appealed a representative's March 13, 2013 decision (reference 01) that concluded Jasmine Powell (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 24, 2013. The claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Lisa Hammond appeared on the employer's behalf. Based on the evidence, the arguments of the employer, 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:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on May 7, 2012. She worked part time (15-25 hours per week) as a direct care manager in one of the employer's community living homes for persons with disabilities. Her last day of work was February 10, 2013. The employer discharged her on February 12, 2013. The reason asserted for the discharge was excessive absenteeism.

The employer's attendance policy provides for discharge if an employee has six attendance incident reports within a year. The claimant had a first incident report on June 5, but no details regarding the incident were available. She had a second incident report on June 19, but no details regarding the incident were available. She had a third incident report on June 30, but no details regarding the incident were available.

On July 25 the claimant had a fourth incident report, a written warning; this was for an absence on July 24 due to car problems. She had a fifth incident report, a suspension, on September 10; this was for an absence on September 7 due to being sick.

The sixth and final incident report was on February 11, 2013; this was for being a no-call/no-show for a group/staff meeting on that date. When she was questioned about this on February 12 when she was discharged, the claimant acknowledged that she had forgotten about the meeting.

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 which is both excessive and unexcused can constitute misconduct. 871 IAC 24.32(7). 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). It is the employer's burden to establish by a preponderance of the evidence that an employee discharged for absenteeism both was excessively absent and that the absenteeism was for unexcused reasons. Here, the employer is only able to establish that two (the July 24, 2012 absence for transportation and the February 11, 2013 absence for forgetting the meeting) of the six incidents at issue were for unexcused reasons; one of the remaining four (the September 7 absence for illness) is excused for purposes of determining misconduct, and as the burden is upon the employer to establish the absences were unexcused, with no information to the contrary, the remaining three must also be treated as

excused. Even though the final incident is treated as unexcused, the employer has not established there was excessive unexcused absenteeism, and 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 March 13, 2013 decision (reference 01) is affirmed. 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

ld/pjs