

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MARILYN D HAWKINS
Claimant

APPEAL NO. 08A-UI-05268-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MOSIAC
Employer

**OC: 05/04/08 R: 01
Claimant: Respondent (2)**

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

STATEMENT OF THE CASE:

Mosaic (employer) appealed a representative's May 30, 2008 decision (reference 01) that concluded Marilyn D. Hawkins (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 June 17, 2008. The claimant received the hearing notice and responded by calling the Appeals Section on June 13, 2008. She indicated that she would be available at the scheduled time for the hearing at a specified telephone number. When the administrative law judge called that number at the scheduled time for the hearing, the claimant did answer. Contrary to the recommendation on the hearing notice instructions, the claimant's phone was a cell phone. Shortly after the hearing was convened, the claimant's connection was lost or disconnected. The administrative law judge attempted to recontact the claimant, but she did not answer her phone and did not recontact the Appeals Section; therefore, the claimant did not participate in the hearing. Craig Cree of TALX Employer Services appeared on the employer's behalf and presented testimony from two witnesses, Chris Wilhelm and Rhonda Willcox. 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?

FINDINGS OF FACT:

The claimant started working for the employer on May 29, 2007. She worked full time as a direct support associate and certified medications aide (CMA) in the employer's residential facility for mentally disabled persons. Her last day of work was May 9, 2008. The employer discharged her on that date. The reason asserted for the discharge was excessive and improperly reported absenteeism.

Prior to May 8 the claimant had 18 absences, most of them reportedly due to illness, but at least three of which were not properly reported. An absence is to be reported at least two hours prior

to the start of the shift. The claimant received written warnings for the three occurrences for which she did not call in at least two hours early; at least one of those absences was not called in until even after the start of her shift. The final warning was given to her on October 1, 2007, indicating that if this occurred again the claimant would face further discipline, potentially discharge.

On May 8, the claimant was scheduled to work from 6:00 a.m. to 2:00 p.m. She was a no-call/no-show for the start of her shift. At 6:37 a.m. she called and reported she would be absent due to illness. She indicated that she had called late as she had just awoken. However, the employer challenges the claimant's assertion that she was too sick to call in as the claimant was sufficiently well that she was able to go shopping in the employer's second-hand store later that day.

The claimant established a claim for unemployment insurance benefits effective May 4, 2008. The claimant has received unemployment insurance benefits after the separation from employment in the amount of \$1,173.00.

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 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). Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional. Cosper, supra. However, the alleged illness-related absence in this matter was not properly reported, nor was an acceptable reason provided to excuse the failure to properly report the absence. The presumption is that oversleeping is generally within an employee's control. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant's final absence was not excused and was not due to properly reported bona fide illness or other reasonable grounds. The claimant had previously been warned that future absences could result in termination.

Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's May 30, 2008 decision (reference 01) is reversed. The employer discharged the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of May 9, 2008. 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 claimant is overpaid benefits in the amount of \$1,173.00.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css