

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOSHUA J MARKS
Claimant

APPEAL NO. 11A-UI-05208-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

O'REILLY AUTOMOTIVE INC
Employer

**OC: 03/20/11
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

O'Reilly Automotive (employer) appealed a representative's April 15, 2011 decision (reference 01) that concluded Joshua Marks (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 May 13, 2011. The claimant did not provide a telephone number for the hearing and, therefore, did not participate. The employer participated by Matt Hill, District 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 considered all of the evidence in the record, finds that: The claimant was hired on December 16, 2008, as a full-time retail service specialist. The claimant signed for receipt of the employer's handbook on December 15, 2008. The employer issued the claimant written warnings on January 22, 31, February 10 and 25, 2011, for properly reported absences due to illness. On March 23, 2011, the claimant properly reported his absence due to illness. This was the claimant's eighth absence for illness in 2011. The employer terminated the claimant on March 23, 2011, 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 § 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 which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on March 23, 2011. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's April 15, 2011 decision (reference 01) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs