

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LISA M GATZEMEYER
Claimant

APPEAL NO. 10A-UI-09961-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**KPTOO INC
MCDONALD'S**
Employer

**OC: 06/13/10
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Lisa Gatzemeyer (claimant) appealed a representative's July 12, 2010 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with McDonald's (employer) for excessive unexcused absenteeism. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 30, 2010. The claimant was represented by Al Sturgeon, Attorney at Law, and participated personally. Legal Assistant, Gina Jelken, observed the hearing. The employer participated by Kathy Petrie, Office Manager, and Michele Hansen, General 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 July 1, 2004, as a full-time maintenance person. The claimant signed for receipt of the employer's handbook on July 1, 2004. The handbook has a progressive disciplinary system with regard to absenteeism. The employer must issue the worker three warnings prior to termination for absenteeism.

On March 10, 2010, the claimant suffered a work-related back injury. Due to her injury and illness, she worked less than half of her scheduled hours in March, April, and May 2010. The claimant properly reported all her absences. On May 3, 2010, the employer remembers giving the claimant a written warning for tardiness due to the claimant's back injury. The warning was unsigned and the claimant does not remember receiving it.

The claimant left work early on June 9, and 10, 2010, because she was having problems breathing. The claimant called in sick on June 11, and 14, 2010, due to back pain. On June 15, 2010, the claimant reported she could not work due to problems breathing. The claimant properly reported all her absences. The employer terminated the claimant on June 15, 2010, due to 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 incident of absence was a properly reported illness that occurred in June 2010. 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 that would be a final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

DECISION:

The representative's July 12, 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