

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHELLE A LATCHAM
Claimant

APPEAL NO. 14A-UI-06977-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESLEYLIFE
Employer

OC: 06/01/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Wesleylife (employer) appealed a representative's June 25, 2014, decision (reference 01) that concluded Michelle Latcham (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for July 29, 2014. The claimant participated personally. The employer was represented by Caroline Semer, Hearings Representative, and participated by Esa Muttillainen, Food and Beverage Director, and Nancy Webb, Director of People and Culture. The employer offered and Exhibit One was received into evidence.

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 November 5, 2012, and at the end of her employment she was working as a full-time lead server. The claimant signed for receipt of the employer's handbook on November 19, 2012. The handbook indicates the claimant is supposed to notify a leader at least two hours prior to the start of her shift of her absence. On February 8, August 28, 2013, and March 23, 2014, the employer issued the claimant written warnings regarding absenteeism. The employer notified the claimant that further infractions could result in termination from employment.

Four weeks prior to May 29, 2014, the claimant requested the day off from the director. The claimant had never been denied a requested day off and she assumed her request had been approved. At the end of May 2014, the food and beverage director position was going to change hands. The old director told the claimant that Tyler, a peer, was a lead and a person to report absences to because he was preparing the schedule. On May 26, 2014, the claimant called the director's office and heard a recording. She did not leave a message. The claimant then called Tyler and left a message saying she could not work on May 27, 2014, due to a foot injury. Tyler responded to the claimant regarding the absence by texting her. The claimant thought she had properly reported the absence based on the director's instructions. On May 29,

2014, the employer called the claimant about her absenteeism. After discussion, the employer excused her for May 29, 2014, but not for May 27, 2014. The employer terminated the claimant on May 29, 2014

The claimant filed for unemployment insurance benefits with an effective date of June 1, 2014. The employer participated personally at the fact finding interview on June 20, 2014, by Nancy Webb.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(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 May 27, 2014. 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.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible because she was an eye witness to what the director told her about proper reporting.

DECISION:

The representative's June 25, 2014, 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/css