

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TRACI R FISHER**  
Claimant

**APPEAL NO: 13A-UI-01329-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OZARK AUTOMOTIVE DISTRIBUTORS INC**  
Employer

**OC: 01/06/13**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Traci R. Fisher (claimant) appealed a representative's January 29, 2013 decision (reference 01) that concluded she was not 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 March 6, 2013. The claimant participated in the hearing. Whitney Smith-McIntosh appeared on the employer's behalf. Based on the evidence, the arguments of the parties, 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:**

Reversed. Benefits allowed.

**FINDINGS OF FACT:**

The claimant started working for the employer on April 18, 2012. She worked full time as an outbound material handler/shipping auditor in the employer's Des Moines, Iowa distribution center. Her last day of work was October 10, 2012. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

Prior to October 10 the claimant had the following attendance occurrences:

Date	Occurrence/reason if any	Action taken, if any
07/30/12	Went home early, sick.	
08/01/12	Called in absence, sick.	
08/02/12	Went home early, sick.	Verbal warning.
08/09/12	Went home early, sick.	First written warning.
08/24/12	Went home early, sick.	
09/14/12	Went home early, sick.	Suspension.

The final incident occurred on October 10, 2012. The claimant's scheduled start time was 9:30 a.m. On October 10 the claimant was three minutes late. The reason she was late was that she had delayed leaving home because she had been feeling nauseated and waited for the nausea to pass before leaving for work. Because of this further incident after the prior occurrences and warnings, the employer discharged the claimant.

#### **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).

Excessive unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. 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). In this case, the employer asserts that the reason for the final tardy was not properly reported. However, it is clear that the claimant's failure to report she would be tardy before the start of her shift was not volitional, as she had been ill and was attempting to get to work as soon as she was able. Further, even if the final occurrence was treated as unexcused, it is the only unexcused occurrence; the employer has not established that the claimant had excessive unexcused occurrences. Therefore, the employer 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 January 29, 2013 decision (reference 01) is reversed. 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.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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