

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JOHN F HOLDER
Claimant

APPEAL NO: 12A-UI-03749-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

K MART CORPORATION
Employer

OC: 03/11/12

Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

K Mart Corporation (employer) appealed a representative's April 6, 2012 decision (reference 01) that concluded John F. Holder (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 April 26, 2012. The claimant participated in the hearing. Katie Cook appeared on the employer's behalf and presented testimony from one other witness, Linnell Hesse. 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:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on March 6, 2006. He worked part time (25 to 30 hours per week) as a replenishment or stocking staff person at the employer's Charles City, Iowa store. He worked a 7:00 a.m.-to-3:00 p.m. shift three to five days per week. His last day of work was March 12, 2012. The employer discharged him on that date. The reason asserted for the discharge was excessive absenteeism.

The employer's attendance policy provides for discharge if an employee has six attendance incidents within six months. The claimant had the following incidents in the six months prior to February 29:

Date	Occurrence/reason if any	Action taken, if any
09/08/11	Absent, sick, called in.	1.0 incident
10/11/11	Absent, left because of problem clocking in.	1.0 incident (2.0 cum.)
11/17/11	Late, left home too late.	.5 incident (2.5 cum.)
12/14/11	Late, left home too late.	.5 incident (3.0 cum.)
01/14/12	Absent, sick, called in.	1.0 incident (4.0 cum.)
01/21/12	Absent, weather, car problems, called in.	1.0 incident (5.0 cum.)

After the January 21 incident, the employer initially believed the claimant might be at six incidents and informed him he might be discharged. The employer subsequently determined that because an August 2011 incident had “fallen off,” the claimant was at five points, not six points, as of January 21.

On February 29 the claimant came into the employer’s store as scheduled at 7:00 a.m. He had a 103 degree temperature, and when he arrived he spoke to the acting manager on duty to indicate that he was sick and would be going to the doctor. The acting manager informed the claimant that it did not matter if he worked for part of the day and then left, or if he did not punch in at all, so the claimant did not punch in and left. He went to his doctor at about 9:00 a.m. and was diagnosed with a bacterial lung infection; his doctor gave him a note excusing him from work on that day and March 1. The claimant then went home but arranged for the doctor’s note to be dropped off with the employer.

On March 5 the employer advised the claimant that because of the additional attendance incident on February 29, he was again being reviewed for discharge. On March 12 he was informed that the employer had determined to discharge him for the occurrences.

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 that 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 that 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 and 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). Even if all of the claimant's prior occurrences had been unexcused (which they were not), because the final absence was clearly related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred that establishes work-connected misconduct and no disqualification is imposed. 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 April 6, 2012 decision (reference 01) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if he is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw