

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DESMOND D ROGERS
Claimant

APPEAL NO. 17A-UI-09841-S1-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

SIMPLY ESSENTIALS LLC
Employer

OC: 08/27/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Desmond Rogers (claimant) appealed a representative's September 18, 2017, decision (reference 01) that concluded he was not eligible to receive unemployment insurance benefits after his separation from employment with Simply Essentials (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 12, 2017. The claimant participated personally. The employer did not provide a telephone number where it could be reached and therefore, did not participate in the hearing. Exhibit D-1 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 12, 2016, as a full-time floor lead. He received the employer's handbook. The employer had a policy that terminated employees who accumulated more than seven attendance points.

The claimant requested and was granted a week's vacation. He did not know he would be assessed attendance points for his vacation. He was absent two other times during his employment. The claimant always reported his absences by text to his supervisor. The employer never told him this was improper. The employer did not issue the claimant any warnings during his employment.

On August 28, 2017, the claimant reported his absence due to illness to the employer. On August 29, 2017, the employer terminated the claimant for having too many attendance points.

The claimant filed for unemployment insurance benefits with an effective date of August 27, 2017. He went into the hospital on August 30, 2017. He was still in the hospital on September 11, 2017, when he reported his claim for the week ending September 9, 2017. For

the week ending September 9, 2017, the claimant reported that he was not able and available for work.

The agency held a fact finding interview on September 20, 2017. The first time the claimant heard about the interview was when the claimant received a voice mail from the fact finder on September 20, 2017. The claimant returned the fact finder's call. The fact finder called the claimant again on September 20, 2017, but the claimant did not receive the call until after 3:00 p.m., the time the fact finder gave the claimant to return the call.

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, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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 August 28, 2017. 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 September 18, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/scn