

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

AMRA BEMISDARFER

Claimant

APPEAL NO. 10A-UI-06897-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA WIRELESS SERVICES LLC

I WIRELESS

Employer

OC: 04/04/10

Claimant: Appellant (2)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The claimant, Amra Bemisdarfer, filed an appeal from a decision dated April 29, 2010, reference 01. The decision disqualified her from receiving unemployment benefits. After due notice was issued, a hearing was held by telephone conference call on June 29, 2010. The claimant participated on her own behalf. The employer, I Wireless, participated by Human Resources Generalist Kate Kreis-Claflin.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Amra Bemisdarfer was employed by I-Wireless from April 28, 2008 until March 19, 2010 as a full-time customer service representative. The employer's attendance policy is based on a point system and any employee who accumulated six points in a 30-day period is subject to discharge. The claimant received a final written warning and three-day suspension on January 11, 2010.

Ms. Bemisdarfer accumulated six points in 30-day period when she was absent due to migraine headaches on March 9 and 13, 2010, was late punching back in from break on March 11, 2010, and two minutes late to work on March 19, 2010. She had sufficient paid time off available to cover the absences on March 9 and 13, 2010, but these were counted against her because she had not gotten approval in advance to take the time off. The employer's policy is no-fault so even though Ms. Bemisdarfer had a doctor's note for each of those occasions, the points were not removed from her total.

Her final occurrence was due to lack of transportation when her son took her car the night before and did not return it in time for her to get to work at 7:00 a.m. on March 19, 2010. She was able to secure a ride from her mother. When she arrived two minutes late, the claimant spoke with Manager Erin Bishop because she knew her point total had reached six. Ms. Bishop

said the human resources department was not open yet and she could not advise Ms. Bemisdarfer one way or the other about whether she would be fired and the claimant elected to quit. Human Resources Generalist Kath Kreis-Claflin acknowledged the claimant would have been discharged for absenteeism.

REASONING AND CONCLUSIONS OF LAW:

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The claimant was aware her job was in jeopardy as a result of her attendance. But more than half of the accumulated points in the final 30-day period were due to properly reported illnesses. These cannot be considered unexcused as they were not volitional. See *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). The final occurrence was due to the unauthorized taking of her vehicle and, despite a good-faith effort to obtain other transportation, she was two minutes late to work.

The administrative law judge understands that lack of transportation is not considered an excused absence. *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). But this is not a case of lack of transportation but unauthorized taking of her vehicle by her son, which caused her to lose her job.

The issue is not whether the employer made a correct decision in separating the claimant, 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 misconduct warrants denial of unemployment benefits are two separate decisions. *Pierce v. IDJS*, 426 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." The record does not support a finding the claimant was guilty of excessive, unexcused absenteeism and disqualification may not be imposed.

DECISION:

The representative's decision of April 29, 2010, reference 01, is reversed. Amra Bemisdarfer is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs