

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY B CROSON
Claimant

APPEAL NO: 07A-UI-02782-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

TEAM STAFFING SOLUTIONS INC
Employer

OC: 02/11/07 R: 04
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Ashley B. Croson (claimant) appealed a representative's March 12, 2007 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Team Staffing Solutions, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 13, 2007. The claimant participated in the hearing. Sarah Feidler 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?

FINDINGS OF FACT:

The employer is a temporary employment firm. The claimant began taking assignments with the employer in 2003. Her final assignment began on November 5, 2006. She worked full time on a third shift position as a case picker at the business client's West Branch, Iowa warehouse. Her last day on the assignment was December 13, 2006.

The claimant was injured at the assignment on December 13. She was sent to the employer's workers' compensation doctor on December 14 and then was placed on an in house assignment for light duty while she recovered, as the business client did not have any light duty work available for employees through the temporary employment firm. She was released from light duty as of January 1, 2007 and was told to be prepared to return to work at the West Branch assignment on January 2. However, before she actually reported back to the assignment the employer contacted her and informed her that the business client had determined to end her assignment due to her attendance.

Prior to December 13, the claimant had missed work on November 25 through November 29, December 4, and December 9 through December 12. She had called in each of these days. Three of the days, which she recalls were the first days referenced in November but the

employer believed were the last three days referenced in December were due to her grandfather being hospitalized¹. The remaining days were due to the claimant being sick with strep throat and bronchitis. She was not given any warnings with regard to her absences, but being personally concerned about the number of days she had missed, when on December 14 she learned that she was going to be unable to work at the assignment due to her light duty restrictions she broached the subject with the supervisor at the client site, who told her not to worry about her absences, but to get better so she could return.

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).

Iowa Code § 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

¹ Ultimate determination as to which three days this was is not critical to the outcome of this case.

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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. 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. Cosper, supra. Also, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job, therefore requiring that she have been given some warning her job was in jeopardy. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). If the final absence prior to December 13 for the claimant's illness and not for the grandfather's illness, there was a properly reported illness, so no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Even if the final absence was due to the grandfather's illness, however, and even if this were deemed not to be a sufficient reasonable ground upon which the absence could be excused, the claimant had not previously been warned that future absences could result in termination. Higgins, supra. 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 March 12, 2007 decision (reference 02) 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.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs