

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RENEE M WAKE
Claimant

APPEAL NO. 08A-UI-08911-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUCKWALL – ALCO STORES INC
Employer

**OC: 09/09/08 R: 01
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The employer filed a timely appeal from the September 25, 2008, reference 03, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on October 20, 2008. Claimant participated. Employer participated through Cyndi Eighmy and was represented by Lisa Harroff of Frick UC Express. Employer's Exhibit 1 (pages 1 through 6) was received.

ISSUE:

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

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was employed as a part-time seasonal garden center helper and cashier from April 22, 2008 until July 22, 2008 when she was discharged. Her last day of work was July 19. On July 22, 2008 she had a migraine and called the store's main number from her neighbor's telephone and left a message with an associate, because she was having difficulty opening her eyes due to the pain from the migraine and did not wait for Eighmy to get to the phone as she had trouble reaching her in the past. When claimant called to check what time her shift was to begin and Amanda told her she was not on the schedule. She was a no-call/no-show on May 17 and called in due to a migraine on June 11. On June 12, 2008 she thought that she called in due to a migraine but employer has no record of her call. Claimant does not recall a verbal warning on June 14 about reporting procedures or attendance. The handbook requires an employee call a member of management or a supervisor for each scheduled shift missed but since the jeans dress policy was not routinely followed she did not believe the handbook was strictly enforced. There were no written warnings and she was not aware her job was in jeopardy. The bottom half of the exit interview (Employer's Exhibit 1, page 2) was blank when claimant signed it.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. In the case of an illness, it would seem reasonable that employer would not want an employee to report to work if they are at risk of infecting other employees or customers. Certainly, an employee who is ill or injured is not able to perform their job at peak levels. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Because the final absence for which she was discharged was related to reasonably reported illness given the circumstances of her illness and using her neighbor's phone, no final or current incident of unexcused absenteeism has been established. Benefits are allowed.

DECISION:

The September 25, 2008, reference 03, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/css