IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

YOREL A HARMON
Claimant

BOSTON WINDOW CLEANING INC
Employer

APPEAL NO. 06A-UI-11190-HT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/22/06 R: 03
Claimant: Respondent (1)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Boston Window Cleaning, filed an appeal from a decision dated November 14, 2006, reference 01. The decision allowed benefits to the claimant, Yorel Harmon. After due notice was issued, a hearing was held by telephone conference call on December 6, 2006. The claimant did not provide a telephone number where he could be contacted and did not participate. The employer participated by Supervisor Francine Hannon and was represented by Personnel Planners in the person of Joseph McDonald. Exhibit One was admitted into the record.

ISSUE:

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

FINDINGS OF FACT:

Yorel Harmon was employed by Boston Window Cleaning from April 17 until September 19, 2006. He was a full-time janitor. Mr. Harmon received a number of written warnings regarding poor work performance and absenteeism. Around August 9, 2006, Supervisor Francine Hannon did tell the claimant he would have to bring in a doctor's excuse if he missed any more work, but even though he was absent at least two other times after that, he did not bring in an excuse and was not disciplined or discharged.

Mr. Harmon was given a three-day suspension for the same issues of absenteeism and poor work performance. He was to return to work on Monday, September 18, 2006. He called in four hours before the start of his shift as required and said he would not be in because he was sick. He was discharged the next day by Ms. Hannon, who felt he was "not taking his job seriously" if he called in absent after a three-day suspension.

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.

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.

The claimant was discharged for a final incident of absenteeism after being warned. The employer acknowledged he did call in prior to the shift as required. A properly reported illness cannot be considered misconduct as it is not volitional. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). Mr. Harmon did not have a doctor's excuse to cover the absence even though the employer had required him to bring one. However, the employer had not disciplined him for not having an excuse on either of the prior two occasions when he did not provide one.

The record does not establish there was a current, final act of misconduct as required by 871 IAC 24.32(8), and disqualification may not be imposed.

DECISION:

The representative's decision of November 14, 2006, reference 01, is affirmed. Yorel Harmon is qualified for benefits, provided he is otherwise eligible.

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Bonny G. Hendricksmeyer
Administrative Law Judge

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Decision Dated and Mailed

bgh/css