

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELINA B CALLAHAN LOPEZ
Claimant

APPEAL NO. 13A-UI-06165-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

MARKETLINK INC
Employer

**OC: 04/28/13
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated May 16, 2013, reference 04, that concluded she was discharged for work-connected misconduct. A telephone hearing was held on July 2, 2013. The parties were properly notified about the hearing. The claimant participated in the hearing with her representative, Dennis McElwain, Attorney at Law, and a witness, Alisha Richardson. Mary Funk, Attorney at Law participated in the hearing on behalf of the employer with witnesses, Amy MacGregor, Amy Campbell, and Michelle Chaney. Exhibits One through Seven and A through C were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked part time for the employer as a sales representative from December 3, 2012, to April 25, 2013. The claimant was informed and understood that under the employer's work rules, employees were required to notify the employer if they were not able to work as scheduled and were subject to discharge after receiving 12 attendance points under the employer's no-fault attendance policy.

The claimant had received a final written warning on March 27, 2013, because she was at 11.5 attendance points due to her children being sick, being sick herself, leaving work early to attend a football game, leaving work to attend her grandmother's birthday, having a medical test, not having a babysitter, and leaving work early for and not returning at the scheduled time from vacation. The claimant properly notified the employer about her absences. She was informed that she was subject to discharge for further infractions.

The employer announced that the part-time dayshift employees were not scheduled to work on April 26, 2013. The claimant believed this applied to her. The employer did not mean this to apply to the claimant because she was on a different rotation for working on Saturdays.

The claimant was to work starting at 11:00 a.m. on April 26. About 2:15 a.m. a supervisor called her and asked why she was not at work. She told the supervisor that she did not believe she was scheduled to work. The supervisor said that if she did not work 5.5 hours that day, she would be terminated. There was no way for the claimant to get to work and work 5.5 hours that day.

The employer discharged the claimant for having 12.5 attendance points.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

The unemployment insurance rules provide: "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." 871 IAC 24.32(7).

The unemployment insurance rules provide: "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." 871 IAC 24.32(8).

The findings of fact show how I resolved the disputed factual issues in this case by carefully assessing of the credibility of the witnesses and reliability of the evidence and by applying the proper standard and burden of proof.

The claimant reasonably believed she was not scheduled to work on April 26, 2013. No current act of willful and substantial misconduct has been proven in this case.

DECISION:

The unemployment insurance decision dated May 16, 2013, reference 04, is reversed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/css