

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLES H PARR
Claimant

DAVENPORT COMMUNITY SCH DIST
Employer

APPEAL NO. 11A-UI-01841-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 01/16/11
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism/Tardiness
871 IAC 24.32(8) – Current Act of Misconduct

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated February 9, 2011, reference 01, that held the claimant was not discharged for misconduct on January 14, 2011, and benefits are denied. A hearing was held on March 17, 2011. The claimant participated. Audrey Strothkamp, participated for the employer.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant worked as a full-time campus security person from January 28, 2008 to January 14, 2011. The claimant was discharged for excessive absences with the allegation he was untruthful about his reasons for missing work.

The employer had a conference with claimant on January 4, 2011 about him having an 18 percent absenteeism rate from the beginning of the school year on August 19, 2010. Some of the absences were due to personal and/or family illness. The employer advised claimant that he would be required to provide a doctor's note for any further absence due to illness, and that he had no unpaid leave to use for missing work.

Claimant is divorced and he works with his ex-wife (also employee) to provide care for two children. The children acquired the chicken pox and a doctor's note to confirm the illness was provided to the employer. Claimant negotiated an arrangement with his ex-wife to split-up the childcare during the illness period.

Claimant reported he would miss work on January 5 to provide childcare due to illness. The employer excused the absence. Claimant reported an absence on January 6 and 7 for the same reason. The employer did not offer claimant FMLA though it is available to employees.

The employer investigated the claimant reported absences and it obtained information that caused it to question his reason for absence.

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(8) provides:

(8) Past acts of misconduct. 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(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 administrative law judge concludes that the employer failed to establish a current act of misconduct in the discharge of the claimant on January 14, 2011.

The employer elected not to offer any witness and/or witness statement to refute claimant's most recent period of absence from work. The allegation claimant was untruthful about his absence period from work is not established.

While the claimant was excessively absent from the beginning of the school year, the employer did not separate those absences that might be excusable (personal/family illness) from the 18 percent. It did not issue claimant a written warning about his absenteeism. While the employer did conference claimant about his absenteeism on January 4, he was not offered FMLA as an option to him having run out of unpaid leave.

Claimant offered credible testimony he was providing childcare for sick children that was accepted and excused by the employer for January 5. Denying an excuse for the same reason on January 6 and 7 is not consistent, and excusing the same reason for absence the day before, would not put claimant on notice he could be discharged for absences on those days.

DECISION:

The decision of the representative dated February 9, 2011, reference 01, is affirmed. The claimant was not discharged for misconduct in connection with employment on January 14, 2011. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/css