

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUSAN A STONE
Claimant

APPEAL NO. 09A-UI-10088-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ENCOMPASS
Employer

**Original Claim: 05/24/09
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated July 8, 2009, reference 01, that held the claimant was discharged for misconduct on May 21, 2009, and that denied benefits. A hearing was held on July 30, 2009. The claimant participated. Dan Shipley, Director, 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 began worked as a full-time review technician on May 1, 2006. The employer has an attendance policy that anything other than a “planned” absence from work (i.e. vacation) is an “unexcused” absence, and that seven such absences may result in termination from employment.

The claimant suffers from degenerative arthritis. The claimant’s doctor recommended she be off work from February 12, 2009. The employer granted FMLA leave that it later extended for a period of twelve weeks to May 13, 2009. The claimant had a right knee total replacement surgery on March 27, and then scheduled a left knee surgery for May 14. On May 4, the claimant requested an extended medical leave of absence for May 14 to July 6, 2009 based on her doctor’s recommendation. The employer denied the request. The claimant had enough paid personal leave time (sick, vacation etc.) to cover her absences from May 14 to May 22. The employer issued the claimant a final warning on May 19 for six absences that involved her missing work during the period for her surgery. When the claimant missed work due to a properly reported absence on May 22, she was discharged for excessive absenteeism.

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(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 misconduct in the discharge of the claimant on May 22, 2009, because the claimant's properly reported absences due to illness/surgery do not constitute excessive "unexcused" absenteeism. The claimant used the extent of FMLA and personal leave of absence to cover her surgeries.

The employer did not dispute the reasons offered by the claimant for missing work or that they were properly reported, but it emphasized the number of absences as the basis for discharge. In order for excessive absenteeism to be considered misconduct, it must be for inexcusable reasons, and properly reported illness is excusable. The employer's policy is not controlling on the definition of an unexcused absence for determining misconduct.

DECISION:

The representative's decision dated July 8, 2009, reference 01, is reversed. The claimant was not discharged for misconduct in connection with employment on May 22, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw