

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DIANE E NEVIUS

Claimant

APPEAL NO. 10A-UI-00997-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CHILDSERVE HABILITATION CTR INC.

Employer

OC: 12/27/09

Claimant: Respondent (1)

Section 96.5-2-A -- Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated January 15, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 26, 2010. Claimant participated. Employer participated by Missy McCann, Continuing Care Unit A.M. Supervisor, and Amanda Blackman, Staff Relations Coordinator. The record consists of the testimony of Amanda Blackman; the testimony of Missy McCann; the testimony of Diane Nevius; and Employer's Exhibits 1-9.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer operates a residential facility that supports children with healthcare needs. The claimant was a full-time certified medication aide on the skilled nursing unit. She was hired on January 10, 2007. Her last day of work was December 29, 2009. She was terminated on that day for excessive absenteeism.

The incident that immediately preceded the claimant's termination took place on December 28, 2009. The claimant had taken a neighbor to the scene of a car accident. As she was doing so she blew a tire out on her car and was unable to get the car fixed in time to get to work. She did call in two hours prior to the start of her shift as required by the employer's policy. She also missed work on December 21, 2009, for her ex-mother-in-law's funeral, an absence that had been excused by the employer. She also missed work on November 19, 2009 and December 9, 2009, and December 10, 2009, because of travel conditions. The employer does not have a policy that specifically states whether these latter absences were excused or unexcused. The employer does encourage staff to stay at the facility if there is bad weather

approaching and provides a bed; showers; and food for staff. The claimant did not take advantage of the opportunity to stay at the worksite.

The claimant had been given a three-day suspension for absenteeism violation on April 22, 2009. At that time she was informed that should she have more unscheduled absences within an eight-month period, she would be terminated.

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.

Misconduct that leads to termination does not necessarily constitute misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the duty a worker owes to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) Absence due to matters of "personal responsibility", e.g. transportation problems and oversleeping is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984)

The evidence in this case fails to establish excessive unexcused absenteeism. The final incident that occurred on December 28, 2009, would be an unexcused absence. However, the prior absences that led to the termination cannot be characterized easily as being unexcused. The claimant was excused to attend a funeral. The claimant also had three absences due to

weather. The claimant was unable to travel the interstate from her home to get to work due to weather. The employer does not have a policy that specifically states these absences are unexcused. If the interstate was closed, as the claimant testified, it was impossible for her to get to work. She may have used poor judgment in not staying at work, where a bed, food, and a shower were available, but the totality of the circumstances surrounding her absences does not show misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated January 15, 2010, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css