

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**BARBARA A GRIFFITHS**

Claimant

**APPEAL NO. 09A-UI-07835-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CASEY'S MARKETING COMPANY**

Employer

**Original Claim: 04/26/09  
Claimant: Respondent (1-R)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the May 18, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on June 15, 2009. Claimant Barbara Griffiths did not respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Angie Himes, Store Manager, represented the employer. Exhibits One through Five were received into evidence.

Ms. Griffiths contacted the administrative law judge hours after the hearing record had closed and indicated at that time that she had been out-of-town and had not collected the hearing notice from her mailbox until after the hearing had taken place. The administrative law judge concluded that the Appeals Section had given Ms. Griffith's proper notice of the hearing and that Ms. Griffith's had not provided good cause to reopen the hearing record.

**ISSUE:**

Whether Ms. Griffiths separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Barbara Griffiths was employed by Casey's Marketing Company as a cook/cashier at the employer's store in Mount Vernon. The employment began on January 16, 2008. In June 2008, Ms. Griffiths went from part-time to full-time status. Ms. Griffiths last appeared and performed work for the employer on February 28, 2009. Angie Himes, Store Manager, was Ms. Griffiths' immediate supervisor.

On March 1, 2009, Ms. Himes discharged Ms. Griffiths from the employment for attendance. The final absence that triggered the discharge occurred on March 1, 2009, when Ms. Griffiths was absent and failed to notify the employer. Ms. Griffiths had been two hours late for personal reasons on February 28, 2009.

In making the decision to discharge Ms. Griffiths from the employment, Ms. Himes considered prior attendance issues and reprimands. On May 17, 2008, Ms. Griffiths was absent without notifying the employer. Ms. Himes issued a written reprimand on May 31, 2008. On June 2 and 12, 2008, Ms. Griffiths was late to work for personal reasons. Ms. Himes issued a written reprimand on June 19, 2008.

The employer has a written attendance policy contained in an employee handbook. On January 16, 2008, Ms. Griffiths signed an Employee Handbook Verification Form indicating the handbook had been made available for her review and would be available at the store for her review during the employment. The written policy required that Ms. Griffiths notify the employer prior to the scheduled start of her shift if she needed to be absent.

During the period of employment, Ms. Griffiths' sister was suffering from a terminal illness. During period of February 6-20, Ms. Griffiths was on a leave of absence from the work due to the need to be with and assist her sister.

### **REASONING AND CONCLUSIONS OF LAW:**

A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

The administrative law judge notes that Ms. Himes' testimony that Ms. Griffiths voluntarily quit the employment is squarely contradicted by employer's Exhibit One, which indicates Ms. Himes discharged Ms. Griffiths for attendance on March 1, 2009. The weight of the evidence indicates that Ms. Griffiths was discharged and did not voluntarily quit the employment.

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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The weight of the evidence indicates an unexcused tardiness on February 28, 2009 and an unexcused absence on March 1, 2009. The evidence indicates that the next most recent unexcused absence occurred on June 12, 2008. There were additional unexcused absences on May 17 and June 2, 2008. The evidence indicates a seven-month span between the final two unexcused absences and the next most recent absence. The evidence indicates that the final two unexcused absences occurred in the context of Ms. Griffiths dealing with a terminally ill sibling. The weight of the evidence establishes unexcused absences, but fails to establish excessive unexcused absences.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Griffiths was discharged for no disqualifying reason. Accordingly, Ms. Griffiths is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Griffiths.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially

unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The evidence in the record and Ms. Griffiths' late phone call raise the issue of whether Ms. Griffiths has met the work availability requirements of Iowa Code section 96.4(3) since she established her claim for benefits. Ms. Griffiths told the administrative law judge she was not home and did not open the hearing notice that was mailed to her on May 29, 2009 until the afternoon of June 15, 2009 because she was out-of-town. This matter will be remanded to the Claims Division for determination of Ms. Griffiths' availability for work since she established her claim for benefits.

**DECISION:**

The Agency representative's May 18, 2009, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

The matter is remanded to the Claims Division for determination of the claimant's availability for work since she established her claim for benefits.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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