

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**SEBINA KOSTIC**  
Claimant

**APPEAL NO. 08A-UI-05568-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**A TO Z CORPORATION**  
**A TO Z DAYCARE & LEARNING CENTER**  
Employer

**OC: 04/13/08 R: 03**  
**Claimant: Respondent (1)**

Section 96.5-2-a Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed an appeal from a decision of a representative dated June 6, 2008, reference 02, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 1, 2008. Claimant participated. The employer participated by Christine York, Executive Director and Angela Shuey, Assistant Director. Exhibits One through Six were received into evidence.

**ISSUE:**

This issue in this matter is whether the claimant was discharged for intentional misconduct in connection with her work.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony and considered all of the evidence in the record, finds: The claimant worked for this employer from February 27, 2008 until March 31, 2008 when she was discharged from employment. Ms. Kostic was employed as a part-time childcare provider and was paid by the hour. Her immediate supervisor was Angela Shuey.

The claimant was discharged because of excessive absenteeism. During the course of her employment, Ms. Kostic had been absent on a number of occasions. The claimant's absences caused staffing problems for the employer. At the time of hire the claimant was informed that if she were absent for three consecutive days it would be necessary to supply a doctor's statement upon returning to work. The claimant was also informed that within one month of her hire date she would be required to undergo a physical examination and provide a report indicating that she had no communicable diseases to the employer.

On March 26, 2008, Ms. Kostic called in to indicate that she was unable to report to work that day due to an automobile accident. The claimant spoke to Angela Shuey, her supervisor. Ms. Shuey informed the claimant at that time that because of her ongoing attendance issue that the company would "keep her as a substitute." The claimant was absent for two more days and properly reported her absences due to her injuries. Ms. Kostic attempted to report back to work

on March 31, 2008. At that time the employer confirmed that the claimant would be kept on as a "substitute." The employer at that time apparently waived the doctor's release requirement because the employer had chosen to change the claimant's employment status retaining her only as a substitute. The claimant was expected, however, to supply a doctor's physical to continue employment. At the time of hearing the claimant had not obtained a physical examination that would allow her to resume employment.

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

The question is whether the evidence in the record establishes that Ms. Kostic was discharged for misconduct in connection with the employment. It does not.

The evidence in the record establishes that Ms. Kostic was informed at the time of hire that if she were absent for three or more consecutive days that she would need a doctor's release to return to work. The claimant was also informed that within a one month period she would have to submit verification that she had obtained a physical examination and was free from communicable diseases. The evidence establishes that the employer was dissatisfied with Ms. Kostic's absences during the short period of time that she was employed.

On March 26, 2008, the claimant called in to report her impending absence because she had been involved in an automobile accident and was physically unable to return to work that day. The evidence establishes that the claimant was not discharged but instead was told by her supervisor that her status with the company had changed from a regular employee to that of a "substitute." The employer thus had made a decision to retain the claimant as an employee. The employer's decision to retain the claimant in its employ was verified on March 31, 2008 when the claimant attempted to report back to work and again was told that she was being retained as a substitute only and reminded of her obligation to obtain a physical.

The Supreme Court of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is one form of misconduct. The court held that it must be both excessive and unexcused. The court further held, however, that absence due to illness and other excusable reason is deemed excused if the employee properly notifies the employer. The evidence in this case establishes that Ms. Kostic's absence was due to injury and properly notified the employer of her impending absences.

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.

For the reasons stated herein the administrative law judge concludes that intentional disqualifying misconduct at the time of separation has not been shown. Unemployment insurance benefits are allowed providing the claimant meets all other eligibility requirements of Iowa law.

**DECISION:**

The representative's decision dated June 6, 2008, reference 02, is hereby affirmed. Claimant was separated under nondisqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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