

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LISA M BIRD**  
Claimant

**APPEAL NO. 13A-UI-08570-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ABCM CORPORATION**  
Employer

**OC: 06/23/13**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Claimant filed a timely appeal from a representative's decision dated July 18, 2013, reference 01, which denied benefits finding that the claimant was discharged for excessive unexcused absenteeism. After due notice was provided, a telephone hearing was held on August 28, 2013. Claimant participated. The employer participated by Mr. Ted Boese, Administrator.

**ISSUE:**

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

**FINDINGS OF FACT:**

Having considered the evidence in the record, the administrative law judge finds: Lisa Bird was employed by the captioned employer, doing business as Parkview Rehabilitation Center, from June 1, 2012 until June 20, 2013 when she was discharged from employment. Ms. Bird was employed as a full-time certified nursing assistant and was scheduled to work on the facility's 2:00 p.m. to 10:00 p.m. shift. The claimant was paid by the hour. Her immediate supervisor was the charge nurse, the director of nursing or the administrator.

Ms. Bird was discharged on June 20, 2013 after a replacement that she had secured to cover her shift did not report for work. Ms. Bird had notified the charge nurse that day that she would not be reporting to work for personal reasons but that she was "seeking" a replacement. Ms. Bird secured a replacement and believed that the replacement would be reporting to work as agreed. When notified she had been terminated from employment, the claimant did not call back or attempt to present any information from her side about the final incident.

Ms. Bird had received a warning from her employer about excessive absenteeism in March of 2013. The claimant was warned at that time that any further absences could result in her termination from employment. The employer had issued the warning at that time because the claimant had accumulated approximately 21 days of absence since being employed by the facility.

The employer uses two different attendance policies to govern attendance infractions of its employees. In most cases the employer utilizes a progressive warning policy that warns an employee in increments as they draw closer to termination from employment whether it be due to attendance or other reasons. The second policy used by the company dispenses with the requirement that the employer provide additional warnings if, the employer considers an employee's attendance infractions to have become "excessive." Although Ms. Bird had only called off absent to work on two occasions, June 12 and June 13 due to illness, the employer determined that her absences had become excessive due to the claimant's call in on June 20 and discharged the claimant without further warning or review.

#### **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.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial of unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of unemployment insurance benefits. Such misconduct must be “substantial.”

The Supreme Court of the state 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 a form of job misconduct. The Court held that the absences must be both excessive and unexcused and that the concept includes tardiness, leaving early, etcetera. The Court further held, however, that absence due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer.

In the case at hand the claimant was discharged because the employer considered her three additional absences after her March 15, 2013 warning to be excessive. The claimant had been warned in March because she had been absent on numerous occasions and her absences were excessive at that time. The evidence in the record, however, establishes that the claimant made a concerted effort to improve her attendance and that her absences were not excessive at the time of her discharge. The absences on June 12 and 13, 2013 were due to illness and were properly reported and thus were excused. While the claimant’s final absence may have been questionable, that absence in and of itself is not sufficient to constitute disqualifying misconduct under the provisions of the Iowa Employment Security Law. Because the claimant’s absences at the time of discharge were not excessive, the administrative law judge concludes that the claimant was discharged under non-disqualifying conditions.

**DECISION:**

The representative’s decision dated July 18, 2013, reference 01, is reversed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant is otherwise eligible.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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