

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ELIZABETH BRISENO**  
Claimant

**APPEAL NO. 07A-UI-11175-DT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DES STAFFING SERVICES**  
Employer

**OC: 10/28/07 R: 02  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

DES Staffing Services, Inc. (employer) appealed a representative's November 29, 2007 decision (reference 02) that concluded Elizabeth Briseno (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 19, 2007. The claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Amy MacGregor appeared on the employer's behalf. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

Was the claimant discharged for work-connected misconduct?

**FINDINGS OF FACT:**

The employer is a temporary employment firm. After prior periods of employment with the employer ending in January 2006, the claimant most recently resumed taking assignments with the employer on September 28, 2007. She began an assignment on that date as a full-time laborer in a temp-to-hire position. Her last day on the assignment was October 11, 2007. The assignment ended because the business client determined to terminate the assignment due to absenteeism.

The claimant had been absent from work on October 8 and October 9 due to a funeral. The claimant had made arrangements in advance for those days of absence, but the employer did not know what level of family affiliation there had been and did not make a conclusion as to whether the absence would be treated as excused or unexcused, as the employer has, in essence, a no-fault attendance policy. Again, as the employer did not make a determination as to whether the absence was excused or unexcused, no disciplinary action was taken or warning issued against the claimant regarding the absence.

On October 11, about two hours into the claimant's shift, the employer received a call from the claimant's babysitter indicating an at-least-somewhat urgent need to contact the claimant. The employer contacted the claimant and passed on the message; the claimant contacted the babysitter and, as a result, the claimant left work for the rest of that day. The employer did not maintain records regarding the reason for the babysitter's call or what discussion took place between the claimant and the employer representative who spoke to her that day. Later that day, as a result of the claimant's absence from work for the remainder of that day in addition to the two days missed for the funeral, the business client informed the employer that it was ending the claimant's assignment.

The claimant established an unemployment insurance benefit year effective October 28, 2007, but has filed no weekly claims and has received no unemployment insurance benefits.

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

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Cosper, supra. While an employer can choose to have a "no-fault" attendance policy, a determination as to whether misconduct occurred for purposes of unemployment insurance benefit eligibility will, of necessity, require a finding as to whether or not the reason for the absence would be for reasons understandably outside of the employee's choice or control.

The claimant, in essence, had two periods of absence, one due to a funeral that the employer cannot establish was of sufficiently extended relation as to not be reasonably considered excused, and the other due to some situation regarding the claimant's children, which might or might not have been due to a bona fide emergency. The employer has not established that the claimant had excessive unexcused absences. Further, while excessive unexcused absences can constitute misconduct, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant was never advised that after her funeral-related absence her job was in jeopardy should she have an additional absence. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

An issue as to whether the claimant might not be able and available for work due to childcare issues arose as a consequence of the testimony provided at hearing. As this was an issue that was not included in the notice of hearing for this case, the administrative law judge considered remanding that matter for an investigation and preliminary determination. 871 IAC 26.14(5). However, because a claimant's able and available status is subject to change on a week-to-week basis and because the claimant has not filed any weekly claims for which she might be ineligible if she were found to have been not able and available for work, the administrative law judge declines to make such a remand. The employer remains in a position to raise the question with the Agency of the claimant's able and available status should the claimant reactivate her claim in the future.

**DECISION:**

The representative's November 29, 2007 decision (reference 02) is affirmed. The employer did discharge the claimant, but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner  
Administrative Law Judge

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Decision Dated and Mailed

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