

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ROXANNE M EMGE
Claimant

APPEAL NO. 12A-UI-01283-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

JENNIE EDMUNDSON
MEMORIAL HOSPITAL
Employer

OC: 12-18-11
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.4(3) – Able and Available

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 24, 2012, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 28, 2012. The claimant did participate. The employer did participate through Kathy Heuwinkel, staff assistant. Claimant's Exhibit A was entered and received into the record.

ISSUE:

Was the claimant discharged due to job-connected misconduct?

Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a cleaning technical, full-time, beginning November 5, 2007 through August 13, 2011, when she was discharged. The claimant sustained a work-related incident on July 4, 2011. She was off work from that point onward until her discharge on August 13, 2011. The claimant was discharged when her leave time expired. She had used up all of her allotted family medical leave act (FMLA) time and, while her treating physician had released her to return to work on a limited duty basis, the employer would not or could not accommodate her work restrictions. The claimant is currently physically able to work within her work restrictions.

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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system, no-fault absenteeism policy or leave policy is not dispositive of the issue of qualification for benefits.

In spite of the expiration of the FMLA and other leave period, because the final cumulative absence for which she was discharged was related to properly reported illness or injury and related ongoing medical treatment, no misconduct has been established and no disqualification is imposed. Benefits are allowed, provided claimant is otherwise eligible.

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work effective August 13, 2011.

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 claimant is currently physically able to work within her work restrictions. She is able to and available for work effective August 13, 2011.

DECISION:

The January 24, 2012, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. She is able to and available for work as of August 13, 2011. Benefits are allowed, provided the claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/kjw