

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**DUSTY D NYONEE**  
Claimant

**APPEAL NO. 09A-UI-06701-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**RESCARE INC**  
Employer

**OC: 04/05/09**  
**Claimant: Appellant (2)**

Section 96.5-2-A – Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated April 28, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 7, 2009. Claimant participated. Employer participated by Idah Newquist, director of support services. The record consists of the testimony of Idah Newquist and the testimony of Dusty Nyonee.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant was hired on January 9, 2008. The employer provides mental health services for adults and in connection with providing those services, operates family homes with 24-hour on-site supervision. The claimant was a community support staff member. He was assigned to a 4-12:00 p.m. shift at one of the homes. He would assist the residents as needed.

On April 3, 2009, the claimant left his shift early at 9:00 p.m. He was feeling ill. He called the employer's on call service and informed the service that he was sick and needed to go home. The on call service told the claimant that he must find his own replacement. The home where the claimant was on duty was actually one half of a duplex and it was agreed that the staff on the other side of the duplex could fill in for the claimant.

The next day, April 4, 2009, the claimant was scheduled to work a double shift. The shift began at 8:00 a.m. The claimant called the on call service to say that he could not come to work as he was still sick. He was told that he needed to find his own replacement. The claimant made two different calls, but the staff members he called would not work on the weekend. The net result was that there was no one present when the claimant's shift was supposed to begin.

The claimant was then terminated on April 7, 2009. The employer had no record that the on call service had been contacted on April 4, 2009. The employer also took into consideration prior written warnings given to the claimant on March 31, 2009, for failing to come to a mandatory staff meeting and on November 4, 2008, for being late and leaving early.

### **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(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three

incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary interpretation is best derived from the facts presented.

After carefully reviewing the evidence in this case it is determined that the employer has failed to sustain its burden of proof that the claimant was discharged for misconduct. The claimant testified that he tried to find a replacement on April 4, 2009, and was unable to do so. The claimant had been permitted to leave early the night before because he was sick. Although there were some other instances where the claimant was counseled concerning his attendance, the totality of the circumstances do not constitute misconduct that would disqualify the claimant from benefits.

**DECISION:**

The decision of the representative dated April 28, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs