

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PHILIP M WING**  
Claimant

**APPEAL NO. 15A-UI-11562-S1-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**GOVERNMENT EMPLOYEES INSURANCE  
COMPANY**  
Employer

**OC: 09/06/15**  
**Claimant: Respondent (1/R)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Government Employees Insurance Company (employer) appealed a representative's October 7, 2015 (reference 01) decision that concluded Philip Wing (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for November 2, 2015. The claimant participated personally. The employer was represented by Marlene Sartin, Hearings Representative, and participated by Nicole Parks and Leslie Brown, Human Resources Compliance Specialists. Exhibit D-1 was received into evidence. The employer offered and Exhibit One was received into evidence.

**ISSUE:**

The issue is whether the claimant was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 12, 2013 as a full-time service representative two. The claimant signed for receipt of the employer's handbook on October 17, 2014 and March 3, 2015. The employer had a policy that required employees to be at work 97 percent of the time. If they fell below the standard of dependability, they could be terminated. On April 1 and July 20, 2015, the employer gave the claimant warnings for absenteeism. The employer notified the claimant that further infractions could result in termination from employment.

The claimant's wife suffers from post-traumatic stress disorder (PTSD), depression, and anxiety. In August 2015, the claimant's son was less than a year old. The claimant had been granted Family Medical Leave to care for both of them but the leave had expired. On August 21, 2015, the claimant's son had a high fever and the claimant had the family's only car. He took time off work to take the child to the doctor. On August 23, 2015, the claimant properly reported his

absence due to illness. The claimant had a migraine. On August 24, 2015, the claimant's wife's PTSD caused her not to be able to care for their infant son. The backup babysitter was not available. The claimant took time off work to care for his infant son and his wife on August 24, 2015. On August 8, 2015, the employer terminated the claimant for absenteeism.

The claimant filed for unemployment insurance benefits with an effective date of September 6, 2015. The employer participated at the fact-finding interview on October 6, 2015.

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

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(1)a and (8) provide:

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

(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 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 employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident provided by the employer occurred on August 24, 2015. The claimant was not discharged until September 8, 2015. The employer has failed to provide any evidence of willful and deliberate misconduct which was the final incident leading to the discharge and disqualification may not be imposed.

The issue of whether the claimant is able and available for work is remanded for determination.

**DECISION:**

The representative's October 7, 2015 (reference 01) decision is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed, provided claimant is otherwise eligible. The issue of whether the claimant is able and available for work is remanded for determination.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

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