IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PEGGY S MIHALAKIS Claimant	**APPEAL NO. 13A-UI-09421-NT** **ADMINISTRATIVE LAW JUDGE DECISION**
DUBUQUE COUNTY Employer	**OC: 04/07/13** **Claimant: Respondent (1)**

Section 96.5-2-a – Discharge
871 IAC 26.8(5) – Decision on the Record

STATEMENT OF THE CASE:

The employer filed a timely appeal from a representative's decision dated August 6, 2013, reference 05, which held claimant eligible to receive unemployment insurance benefits finding that the claimant was dismissed from work on July 15, 2013 for excessive absences but finding that the absences were due to illness and were properly reported. After due notice was provided, a telephone hearing was scheduled for October 10, 2013. Although duly notified, the employer did not respond to the notice of hearing and did not participate. The claimant participated and participating on behalf of the claimant was Mr. Brian Spannagel, Attorney at Law. Claimant's Exhibits A, B, C and D were received into evidence.

ISSUE:

At issue is whether the representative's decision finding that the claimant was dismissed under nondisqualifying conditions should be affirmed.

FINDINGS OF FACT:

The parties were properly notified of the scheduled hearing on this appeal. The appellant failed to provide a telephone number at which the appellant could be reached for the hearing and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice.

Peggy Mihalakis was employed by the captioned employer, doing business as Sunny Crest Manor, from March 5, 2012 until July 15, 2013 when she was discharged from employment. The claimant was employed as a full-time certified nursing assistant and was paid by the hour. The claimant was discharged when she exceeded a number of attendance infractions allowed under Sunny Crest Manor's time and attendance policy. The final occurrences took place on July 11 and July 12, 2013. On July 11, 2013, the claimant was diagnosed with pneumonia and provided the employer notice that she would be unable to report to work that day or the next day, July 12, 2013 due to her medical condition. The claimant also supplied a doctor's note verifying that she was unable to report for work on those days. Ms. Mihalakis properly notified the employer of her impending absence by calling in as well on July 11, 2013. Although the employer was provided advance notice that the claimant could not report the following day, July 12, 2013 to due illness, Ms. Mihalakis also called in to ensure that the employer was aware

that she could not report because she was ill. Because the claimant was drowsy from medications that had been prescribed to her, she called in approximately ten minutes later than she would have done otherwise. Although the claimant was absent due to illness and had properly reported her impending absences in advance, the claimant was discharged from employment.

REASONING AND CONCLUSIONS OF LAW:

871 IAC 26.8(3), (4) and (5) provide:

> Withdrawals and postponements.
>
> (3) If, due to emergency or other good cause, a party, having received due notice, is unable to attend a hearing or request postponement within the prescribed time, the presiding officer may, if no decision has been issued, reopen the record and, with notice to all parties, schedule another hearing. If a decision has been issued, the decision may be vacated upon the presiding officer's own motion or at the request of a party within 15 days after the mailing date of the decision and in the absence of an appeal to the employment appeal board of the department of inspections and appeals. If a decision is vacated, notice shall be given to all parties of a new hearing to be held and decided by another presiding officer. Once a decision has become final as provided by statute, the presiding officer has no jurisdiction to reopen the record or vacate the decision.
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> (4) A request to reopen a record or vacate a decision may be heard ex parte by the presiding officer. The granting or denial of such a request may be used as a grounds for appeal to the employment appeal board of the department of inspections and appeals upon the issuance of the presiding officer's final decision in the case.
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> (5) If good cause for postponement or reopening has not been shown, the presiding officer shall make a decision based upon whatever evidence is properly in the record.

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:
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> 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.
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> 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 administrative law judge has carefully reviewed the evidence in the record and concludes that the unemployment insurance decision previously entered in this case is correct and should be affirmed. The claimant was discharged from employment for excessive absenteeism, however, her last absences were due to illness and were properly reported. The claimant had provided advance notice that she was unable to report for work due to illness for July 11, and July 12. The claimant had properly called in on July 11 and called in approximately ten minutes late on July 12 because she was drowsy from medications that had been prescribed for her because of her medical condition. The administrative law judge concludes this matter is governed by Supreme Court decision in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). In cases of Roberts v. Iowa Department of Job Service, 356 N.W.2d 218 (Iowa 1984) and Gimbel v. Employment Appeal Board, 489 N.W.2d 36 (Iowa 1992). The claimant's most recent absence were due to illness and were properly reported and had provided advance notice of her inability to report for work on July 12 and supplied medical documentation to support her inability to report for work for medical reasons. The claimant's calling in ten minutes late on July 12, 2013 is not considered to be misconduct as the employer had advance notice of the absence and the late call on July 12, 2013 was due to incapacity and considered excused.

DECISION:

The unemployment insurance decision dated August 6, 2013, reference 05, is affirmed. The decision allowing benefits without disqualification remains in effect. This decision will become final unless an appeal is made to the Employment Appeal Board within 15 days of the date of this decision.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

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