

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CINDY S SHAH
Claimant

APPEAL NO. 10A-UI-06785-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

PACIFICA HEALTH SERVICES LLC
Employer

OC: 03/28/10
Claimant: Respondent (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated April 26, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 28, 2010. Claimant participated. Employer participated by Kim Miles, human resources manager, and Lilly Baker, former director of nursing. The record consists of the testimony of Kim Miles; the testimony of Lilly Baker; the testimony of Cindy Shah; and Employer's Exhibits 1-25.

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 employer is known as Fleur Heights Health Care Center and is located in Des Moines, Iowa. The employer is a skilled nursing and long term care facility. The claimant was hired on February 24, 2010, as a director of nursing. She was terminated on March 29, 2010.

The incident that led to the claimant's termination occurred on March 24, 2010. The employer has a policy that a single no call/no show leads to immediate termination. The claimant was sick with a bad headache and had texted her employer that she would not be coming in. She was required to make a personal phone call. The employer did not hear from the claimant until 11:15 a.m. The employer considered the claimant to be a no call/no show and terminated her in accordance with its policy.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The absenteeism must be both excessive and unexcused. The employer has the burden of proof to show misconduct.

A single instance of no call/no show is not misconduct. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). The employer may have a policy that calls for termination in the case of a single no call/no show. Regardless of that policy, however, a disqualification from receiving unemployment insurance benefits requires a showing of excessive unexcused absences. The employer has not shown evidence of more than one no call/no show. Kim Miles and Lilly Baker both testified that the claimant was discharged for this reason, even though the employer had other performance related issues with the claimant. Since the employer has not shown misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated April 26, 2010, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs