

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LYNNAE S JAVORINA
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 13A-UI-09650-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/21/13
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(1) – Definition of Misconduct

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated August 12, 2013, reference 01, that held she was discharged for excessive unexcused absenteeism and tardiness on July 23, 2013, and benefits are denied. A hearing was held on October 15, 2013. The claimant participated. Kortney Williams, Administrator, Cindy Hambly, DON, and Alice Smolsky, Representative, participated for the employer. Claimant Exhibits A and B and Employer Exhibits 1 – 3E, were received as evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record finds that: The claimant was hired on May 21, 2012 and last worked as a full-time C.N.A. on July 23, 2013. The claimant received the employer attendance policy that provides for discipline. The policy states that two no-call/no-show to work incidents is employment termination. An employee is given a final warning for the first offense.

During the last months of employment, claimant was upset about newly hired C.N.A.'s getting a pay rate commensurate to her. Claimant denies she was a no-call/no-show to work on April 27, 2013 and July 18. The employer did not offer any written discipline record for April 27 other than a reference to it on a July 24 employment termination form. Although the form does recite an absenteeism record, the employer did not offer it was based on ten unscheduled absences with in twelve months.

Claimant was scheduled to report to work at 6:00 a.m. on Saturday July 18. She had an anxiety episode the day before and she took some prescription medication. Claimant did oversleep and texted a message to the DON at 10:20am about her absence from work. When she asked about the effect of her absence, the DON replied "U r fine yes still on schedule."

Claimant worked the weekend of July 20/21. She had a problem with her headset used to record resident treatment not working. She used a manual means to record the information. Claimant last worked on July 23. The employer terminated claimant on July 24 for two no-call/no-show to work (April 27 and July 18), and refusing to document resident treatment using the employer Accu-nurse system.

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.

The administrative law judge concludes that the employer failed to establish misconduct in the discharge of the claimant on July 24, 2013.

The employer failed to establish claimant was a no-call/no-show on April 27. Claimant denies it and the employer offered no evidence of a separate written discipline for the occurrence as evidence. Its policy requires a first written warning for it and there is no document to support it. In addition, while claimant made a late reported absence for July 18, it is not a traditional no-call/no show to work. The employer offered this as the absenteeism reason for termination and it is not established.

No employer witness testified claimant refused to use the employer headset recording system the weekend of July 20/21, and it offered no eyewitness statement as evidence. Claimant offers her headset was not functioning and the employer did not refute it with direct evidence.

Job disqualifying misconduct is not established for employer reasons claimant was terminated.

DECISION:

The decision of the representative dated August 12, 2013, reference 01, is reversed. The claimant was not discharged for misconduct in connection with employment on July 24, 2013. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

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