

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBORAH K EMEHISER
Claimant

APPEAL NO. 09A-UI-11732-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

VILLAGE CREDIT UNION
Employer

**Original Claim: 07/05/09
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Village Credit Union (employer) appealed a representative's August 5, 2009 decision (reference 01) that concluded Deborah Emehiser (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 31, 2009. The claimant participated personally. The employer participated by Ruth Christensen, Loan Manager, and Deborah Whittie, Chief Executive Officer.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on August 23, 2007, as a full-time loan officer. The employer had a handbook but the claimant did not receive it. The employer did not issue the claimant any warnings during her employment.

The claimant worked until May 27, 2009. She informed the employer that she needed gall bladder surgery and the employer consented to her absence from work. The claimant suffered from complications and was in the hospital on June 1, 2, 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, and 26. The employer advised the claimant to keep it posted. The claimant understood this to mean she should notify the employer when her condition changed. The claimant or her husband notified the employer when the claimant went in and out of the hospital.

On July 8, 2009, the claimant's physician released her to return to work on July 13, 2009. She went to talk to the employer immediately after the appointment. The employer told the claimant that it would call her in the future. On July 9, 2009, the employer terminated the claimant for excessive absenteeism and failure to properly notify the employer of her absences.

REASONING AND CONCLUSIONS OF LAW:

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

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 employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. Roberts v. Iowa Department of Job Service, 356 N.W.2d 218 (Iowa 1984). The employer must establish not only misconduct, but that there was a final incident of misconduct that precipitated the discharge. The last incident of absence was a reported illness that occurred in June and July 2009. The claimant's absence does not amount to job misconduct, because it was either properly reported (as the claimant understood

proper reporting) or the claimant could not properly report her absence due to physical incapacity. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

DECISION:

The representative's August 5, 2009 decision (reference 01) is affirmed. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw