

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MELANIE FLORES**  
Claimant

**APPEAL NO. 09A-UI-07651-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IOC SERVICES**  
Employer

**OC: 04/19/09**  
**Claimant: Appellant (2)**

Section 96.5-1 – Voluntary Quit  
Section 96.5-2-a – Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated May 14, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 11, 2009. Claimant participated. Employer participated by Sara Frank, benefits and training supervisor. The record consists of the testimony of Melanie Flores and the testimony of Sara Frank.

**ISSUES:**

Whether the claimant voluntarily quit for good cause attributable to the employer.  
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 claimant was employed as a part-time cashier server. The employer is a casino. The claimant worked her scheduled shift on April 19, 2009. She was not scheduled to work on April 20, 2009. On April 21, 2009, the claimant was scheduled to work starting at 6:45 a.m. She got sick and called her employer to leave a voice mail message that she would not be able to work. She used the proper method of notification.

The employer has a point system and as a result of the claimant missing work, she “pointed out” and was subject to termination. The claimant’s supervisor called her on April 21, 2009, and told her that unless she had a doctor’s slip she was terminated. The claimant did not have a doctor’s slip and considered herself terminated. As a result, she did not call in on either April 22, 2009, or April 23, 2009.

## REASONING AND CONCLUSIONS OF LAW:

A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer. See 871 IAC 24.25.

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 gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job

Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

The evidence in this case established that claimant did not voluntarily quit her employment. Rather she was terminated for accumulating too many points on the employer's attendance policy. The reason she accumulated that final point was that she was sick. Although the claimant may have been terminated pursuant to an attendance policy, this termination does not constitute a voluntary quit simply because the claimant failed to call in after she was told she had pointed out. Benefits will be awarded if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated May 14, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs