

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LUANN P MCCUEN
Claimant

APPEAL NO. 07A-UI-08247-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**CENTRAL IOWA HOSPITAL
CORPORATION**
Employer

**OC: 07/22/07 R: 02
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

LuAnn McCuen (claimant) appealed a representative's August 20, 2007 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Central Iowa Hospital Corporation (employer) for repeated tardiness in reporting for work after being warned. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 12, 2007. The claimant participated personally. The employer participated by Barbara Owca, Human Resources Business Partner.

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 May 16, 2005, as a full-time patient registrar. She suffers from migraines and was granted Family Medical Leave. The disability coordinator waived the notification requirement if the claimant should be absent due to a migraine. This meant the claimant did not have to notify the employer two hours prior to the start of her shift.

The employer issued the claimant a written warning on May 29, 2007 for failure to punch in when she arrived at work. The employer issued the claimant another written warning on June 26, 2007, for appearing for work tardy due to a migraine. The employer told the claimant she had to report any absence one hour prior to the start of her shift. The employer warned the claimant that further infractions could result in her termination from employment.

On July 6, 2007, the claimant was one minute tardy and on July 9, 2007, she was two minutes tardy. She would have been on time but she felt nauseous on the way to work. She had to stop and wait for a while before she could proceed. The claimant was so ill on July 9, 2007, that she forgot to punch the time clock when she arrived at work and had to leave work at 11:00 a.m.

The claimant had been tardy fourteen times between February 15 and July 9, 2007. Every tardy was due to illness brought on by a migraine. The claimant was never over four minutes tardy. The employer terminated the claimant on July 11, 2007, for tardiness in reporting to work after having been warned.

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. Iowa Department of Job Service, 356 N.W.2d (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 Family Medical Leave illness that occurred on July 9, 2007. The claimant's absence does not amount to job misconduct, because the employer knew of the claimant's medical issue and granted the claimant leave for just such illness. The claimant was unable to report the absence one hour in advance because she had reduced mental faculties as a result of the migraine. 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 20, 2007 decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/kjw