

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KELLY K VAUGHN
524 E 7TH ST
CARROLL IA 51401

MCCORKLE INVESTMENTS LTD
D/B/A CARROLL HEALTH CENTER
2241 N WEST ST
CARROLL IA 51401

Appeal Number: 05A-UI-03380-RT
OC: 02-27-05 R: 01
Claimant: Appellant (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Kelly K. Vaughn, filed a timely appeal from an unemployment insurance decision dated March 24, 2005, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on April 19, 2005, with the claimant participating. Carol Bellinghausen testified for the claimant. Melissa McGinnis, Administrator, participated in the hearing for the employer, McCorkle Investments, Ltd., doing business as Carroll Health Center. The administrative law judge takes official notice of Iowa Workforce Development unemployment insurance records for the claimant. Employer's Exhibits One and Two were admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full time certified nurses aide from July 24, 1995 until she was discharged on March 3, 2005 for poor attendance, in particular tardies. On February 28, 2005, the claimant was absent. The claimant did report this absence. The employer has a rule or policy that provides that an employee must notify the employer prior to the start of the employee's shift if the employee is going to be absent or tardie. The employer also requires a doctor's slip if the employee is going to be absent for two consecutive days. At least some of the employer's rules or policies are shown at Employer's Exhibit One. The claimant received a copy of the policies as contained in the employee handbook and signed an acknowledgement also as shown at Employer's Exhibit One. From February 12, 2005 until February 26, 2005, the claimant had four tardies from 12 to 45 minutes. The claimant could offer no reasons for the tardies. The claimant did not properly report all of the tardies. The claimant was absent on February 11, 2005 for personal illness and this was properly reported. The claimant was also tardy seven out of nine scheduled days from January 2, 2005 to January 15, 2005. At least some of the tardies were because the claimant left her house late. On January 3, 2005, the claimant was absent for personal illness and this was properly reported. On January 1, 2005, the claimant was tardy but could not provide a reason. On December 18 and 19, 2004, the claimant was absent for illness. She properly reported the absences but did not bring in a doctor's slip as required by the employer's policy. The claimant received a number of warnings as shown at Employer's Exhibit Two. The claimant received two oral warnings in 2001 and a written warning in 2002 for her attendance. In a performance appraisal on December 5, 2003, the claimant's attendance was noted as improving. However, the claimant received a written warning on November 2, 2004 for attendance and then her attendance was specifically mentioned as needing improvement in her performance review dated December 8, 2004. After the tardies in January 2005, the claimant was suspended for her tardies.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on March 3, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism including tardies. The claimant's absences and tardies are set out in the findings of fact. The claimant had four tardies in the span of 15 days. These tardies followed a suspension on January 18, 2005 for prior tardies. The claimant did not deny the tardies. She indicated that she did not think or did not believe that she had those tardies but her testimony was equivocal and not credible. The claimant also had seven tardies out of nine scheduled days from January 2, 2005 until January 15, 2005. The claimant conceded to at least some of these tardies and at least of some of the tardies were even confirmed by the claimant's own witness, Carol Bellinghausen. The claimant received a suspension for these tardies. Just a little over one month prior to the suspension the claimant received a performance review indicating that her attendance needed improvement. A little more than one month before the performance review, the claimant received a written warning for her attendance. As noted above, the claimant equivocated about the reason for her tardies but at one point simply said that she left home

late. The administrative law judge must conclude on the evidence here that the claimant's tardies were unreasonable in number, not for reasonable cause or personal illness, and not properly reported and were excessive unexcused absenteeism. The claimant did have absences but most of the absences prior to February 28, 2005, were for personal illness and were properly reported. The claimant did have an absence on February 28, 2005. The claimant testified that it was a tardy but at fact finding the claimant conceded that she was absent that day but that it was for personal illness but that it was not properly reported. In any event, the administrative law judge concludes that with the exception of the absence on February 28, 2005, the claimant's other absences were for reasonable cause or personal illness and properly reported and not excessive unexcused absenteeism themselves. However, the administrative law judge, as noted above, concludes the claimant's tardies and absence on February 28, 2005 were not for reasonable cause and were not properly reported and were excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, the claimant is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

DECISION:

The representative's decision dated March 24, 2005, reference 01, is affirmed. The claimant, Kelly K. Vaughn, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits, because she was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism.

sc/pjs