

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAURA A BEST
Claimant

APPEAL NO. 11A-UI-13941-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OPPORTUNITY VILLAGE
Employer

**OC: 10/02/11
Claimant: Appellant (2-R)**

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated October 18, 2011, reference 01, that held the claimant was discharged for excessive unexcused absenteeism on September 19, 2011, and which denied benefits. A hearing was held on November 17, 2011. The claimant participated. Monica Ver Helst, team advisor, participated for the employer.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered the evidence in the record, finds that: The claimant worked as a full-time personal support professional from June 7, 2011 to September 19. She participated in employee orientation prior to starting work and received the employer's policy in a handbook. The policy requires an employee to make direct notification when reporting an absence from work.

The employer issued claimant a written discipline on July 12 for leaving work early without supervisor approval on July 4. The claimant reported for the start of her shift at 3:00 p.m., but felt ill and told a team leader she needed to leave at 4:30 p.m. The discipline states a further incident might result in suspension or termination.

Claimant is pregnant. She was scheduled to work a weekend shift on September 17/18. She became ill to the point she had her cousin report an absence from work on September 17. She called to report an absence from work due to the continuing illness on September 18, and was told she would need a doctor's excuse upon her return to work.

When claimant reported for work on September 19, she was immediately terminated for violation of the employer's attendance policy, given she was a 180-day probationary employee. Although she had a doctor's excuse for her absences due to illness (September 17/18), the

employer believed she had violated the notification policy such that it did not consider the excuse.

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(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.

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 administrative law judge concludes that the employer failed to establish misconduct in the discharge of the claimant on September 19, 2011, for excessive "unexcused" absenteeism.

Since claimant reported for work at her start time on July 4, absence notification is not an issue. Leaving work early due to illness is for an excusable reason, and telling a lead person is sufficient to put the employer on notice such that a technical policy notification requirement is not misconduct.

While claimant did not directly notify the employer of an absence on September 17, the employer did receive notice through another person, and claimant personally reported her absence on the following day. Employer's policy absence notification requirements are not controlling when the employer chooses to disregard the substance of the reason for failure to comply.

The employer knew claimant was pregnant and, based on her health issues that caused her to miss work, could reasonably anticipate an absence re-occurrence in the future. Knowing she was a probationary employee, it relied on this factor as a reason for employment termination, which mitigates any misconduct for absence notification issues.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Since claimant is pregnant, which had led to her missing work, an able and availability issue for work is hereby remanded to claims for a department fact-finding and decision.

DECISION:

The representative's decision dated October 18, 2011, reference 01, is reversed. The claimant was not discharged for misconduct in connection with employment on September 19, 2011. Benefits are allowed, provided the claimant is otherwise eligible. The able and available for work issue is remanded to Claims for a department fact-finding.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw