

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

SUE BURKMAN  
PO BOX 335  
DEXTER IA 50070

DILLARD DEPARTMENT STORES INC  
ATTN MS BILLIE TREAT  
1600 CANTRELL RD  
LITTLE ROCK AR 72201-1110

Appeal Number: 05O-UI-04278-HT  
OC: 01/23/05 R: 02  
Claimant: Respondent (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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer, Dillard Department Stores, Inc. (Dillard), filed an appeal from a decision dated February 16, 2005, reference 01. The decision allowed benefits to the claimant, Sue Burkman. After due notice was issued a hearing was held by telephone conference call on May 11, 2005. The claimant participated on her own behalf. The employer participated by Store Manager David Markoff.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Sue Burkman was employed by Dillard from July 10,

2004 until January 23, 2005. She was a full-time sales associate. She received a written warning on August 30, 2004, for an unexcused absence, but had received no other disciplinary action.

On January 22, 2005, the claimant worked from 8:30 p.m. until 7:00 a.m. on inventory. Store Manager David Markoff had stated all employees who were scheduled to work inventory must be to work, no excuses or exceptions. Ms. Burkman was scheduled to work the next day from 6:00 p.m. until 6:00 a.m., but woke up at noon with a serious headache and could not go back to sleep. She took medication for her headache but it did not get better. Around 4:00 p.m. she called her supervisor, Amy Shane, and said she would not be in to work. The supervisor reminded her of the manager's orders that there would be no exceptions to the requirement to be at work for inventory, and if the claimant did not come to work she would be fired. The claimant did not come to work and was fired.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is not.

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 claimant was not at work because she was suffering from a headache and lack of sleep. She properly reported her absence to her supervisor but was told she must come in or be fired per the orders of the store manager. While the administrative law judge questions whether a headache actually constitutes an illness, the absence was due to medical reasons and she notified the employer prior to her shift. A properly reported illness cannot be considered misconduct as it is not volitional. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). There was no current, final act of misconduct as required by 871 IAC 24.32(8) in order to disqualify a claimant from receiving unemployment benefits. Benefits are allowed provided the claimant is otherwise eligible.

DECISION:

The representative's decision of February 16, 2005, reference 01, is affirmed. Sue Burkman is qualified for benefits provided she is otherwise eligible.

bgh/pjs