

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GLEND A M GRADY
Claimant

APPEAL NO. 09A-UI-06046-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

GOOD SAMARITAN SOCIETY INC
Employer

OC: 03/22/09
Claimant: Appellant (1)

Section 96.5-a – Discharge

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated April 9, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 19, 2009. Claimant participated. Claimant was represented by Jeff McDaniel, Attorney at Law. Employer participated by Paula Clark, Director of Nursing, and K.D. Calber, Human Resources Director. The record consists of the testimony of Paula Clark; the testimony of K.D. Calber; the testimony of Glenda Grady; and Employer's Exhibits 1-18.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, makes the following findings of fact:

The claimant was hired on February 18, 2008, as a full time certified nursing assistant (CAN). She was assigned to the night shift. The hours for the night shift were 10:15 p.m. through 6:45 a.m. When the claimant was hired, she was informed that she would be assigned to be on call for the weekend every six weeks. She needed to be available to work and to come into work if called when she was assigned to be on call. The employer's written policy for on-call duty states that an employee will be considered on call for thirty minutes prior to the beginning of the shift and for sixty minutes following the start of such shift.

The claimant's last day of work was March 14, 2009. She was terminated on March 17, 2009, for excessive absenteeism. The final incident that led to the claimant's termination occurred on March 14, 2009. The claimant was on call. She turned off her phone at 9:45 p.m. and she was called by the employer at 9:50 p.m. She did not return the call to her employer and did not report to work as required. The claimant had previously violated the on-call policy on December 21, 2008. She was given a written warning concerning this violation on

December 21, 2008. She was also given a written warning for a no-call/no-show which occurred on December 31, 2008. The claimant overslept and did not wake up until 3:00 a.m. She did not report for work on December 31, 2008.

The employer had a written attendance policy and a copy of that policy had been given to the claimant. In addition to the violations previously set forth, the claimant had had three tardies and ten excused absences. The ten excused absences did not play any role in the claimant's termination.

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(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 the claimant violated the employer's attendance policy and that final incident was not excused. The employer, a nursing home, had to ensure that adequate staff was present to provide needed medical care to its residents. An on-call policy was therefore essential to the employer's business as a way of making certain trained staff would be available. When the claimant was hired she was told that she would need to be on call and that she was considered on call thirty minutes before and sixty minutes after a shift began. On two occasions she did respond to a phone call from her employer to come to work when she was on call.

These violations of the employer's attendance policy are serious, given the nature of the employer's business. The claimant tried to excuse her actions by claiming that she did not think the employer would call by 9:45 p.m. and therefore it was permissible to turn off her phone. She also could not offer any excuse on why she did not come to work and did not call on December 31, 2008. By her actions the claimant showed an intentional and substantial disregard of her employer's interest.

DECISION:

The decision of the representative dated April 9, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css