

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICOLE T FJELSTAD
Claimant

APPEAL NO. 08A-UI-01753-S2

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE UNIVERSITY OF IOWA
Employer

OC: 01/20/08 R: 03
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Nicole Fjelstad (claimant) appealed a representative's February 13, 2008 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with The University of Iowa (employer) for dishonesty in connection with her work. After hearing notices were mailed to the parties' last-known addresses of record, an in-person hearing was held in Cedar Rapids, Iowa, on April 29, 2008. The claimant participated personally and through her treating physician, Reginald Cooper. The employer was represented by David Bergeon, Human Resources Specialist II, and participated by Kathleen Dea, Pediatric Word Processing Supervisor, and Kathryn Trump, Department Human Resources Specialist. The employer offered and Exhibits One, Two and Three were received into evidence.

ISSUE:

The issue is whether the 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, finds that: The claimant was hired on June 9, 2003, and at the end of her employment she was working as a full-time secretary II in transcription working from 6:45 a.m. to 3:15 p.m. The claimant received a copy of the employer's work rules and master contract. The employer issued the claimant a written warning and one day suspension on August 6, 2007, for excessive absenteeism. The warning covered 17 absences. Ten were for properly reported absences due to illness. Seven were for improperly reported absences for personal reasons. On December 18, 2007, the employer issued the claimant a written warning and three-day suspension for excessive absenteeism. The claimant had 24 absences due to illness or injury that were properly reported. Eight absences were not properly reported. The employer notified the claimant in both warnings that further infractions could result in termination from employment. The claimant applied for and was granted Family Medical Leave (FMLA).

On January 1, 2008, the claimant was involved in an altercation. She was incarcerated and released on bond between 6:00 and 7:00 p.m. The claimant understood she was to make a court appearance the following morning. The claimant left a message for the employer at 8:16 p.m. stating she would appear for work between 9:00 and 9:30 a.m. on January 2, 2008, due to a FMLA medical issue. On January 2, 2008, at 7:30 a.m. she took hydrocodone. At 8:00 a.m. she participated in an initial court appearance. At 10:00 a.m. she saw her physician and did not feel well enough to return to work. She did not explain to the employer that she was absent partially to make a short court appearance because she was embarrassed. The claimant did not appear for work but properly reported her FMLA absence from January 3 through 9, 2008. The claimant returned to work on January 10, 2008.

On or about January 15, 2008, the employer heard a rumor that the claimant appeared in court on January 2, 2008. The employer investigated and discovered the claimant's activities on January 2, 2008. The employer terminated the claimant on January 23, 2008.

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). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). The employer did not provide sufficient evidence of job-related misconduct. The claimant's failure to disclose the short court appearance does not negate the fact that the claimant was ill on January 2, 2008, and properly reported her absence due to illness. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct. Benefits are allowed.

DECISION:

The representative's February 13, 2008 decision (reference 01) is reversed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs