

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**EARMALENE BUTLER**  
Claimant

**APPEAL NO. 08O-UI-06647-H2T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ACC ENTERPRISES LLC**  
**CEDAR HEALTH**  
Employer

**OC: 04-20-08 R: 02**  
**Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the May 22, 2008, reference 05, decision that allowed benefits. After due notice was issued, a hearing was held on August 6, 2008. The claimant did participate. The employer did participate through Dennis Sanvig, Administrator. Claimant's Exhibits A and B were entered and received. Employer's Exhibit One was received.

**ISSUE:**

Was the claimant discharged for work-related misconduct?

**FINDINGS OF FACT:**

Having reviewed the testimony and all of the evidence in the record, the administrative law judge finds: Claimant was employed as a CAN, part-time, beginning September 4, 2007, through December 21, 2007, when she was discharged. The employer considered the claimant to have voluntarily quit, as they considered her a no-call, no-show for work on December 21, 22, and 23, 2007.

The claimant was injured on the job on December 17 and taken to the emergency room of Floyd County Memorial Hospital. The discharge instructions she was given by Dr. Nelson clearly indicate that the claimant was to "see your MD if unable to return to work on 12/21." The claimant was not able to return to work on December 21 and saw her own doctor, David V. Schroot, M.D., on December 20. Dr. Schroot provided the claimant with an off work slip that indicated she was to be off work though January 3, 2008. On December 21, 2007, the employer's own records indicate the claimant spoke with Darla Spratt, whom she told that the doctor had taken her off work until January 3, 2008. The claimant faxed the doctor's off work slip to the employer, although the employer contends they never received it. Additionally, the claimant contends that Dr. Schroot's office faxed the off work slip over to the employer, who again contend that they never received that fax either.

The claimant was told by Ms. Spratt that she had to see the workers' compensation doctor, Kevin A. Kimm, D.O. The claimant saw Dr. Kimm on December 24, and he too took her off work through January 3, 2008.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 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(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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

The claimant was instructed by emergency room physician Dr. Nelson to follow up with her own physician. She did so. The claimant and Dr. Schroot's office faxed to the employer the off work note. The claimant cannot be held responsible if the employer did not receive the note. The employer considered the claimant a no-call, no-show on December 21, 2007, but the employer's own records indicate the claimant spoke to Ms. Spratt on December 21 and told her that she had been to the doctor and had an off work slip. The employer discharged the claimant on December 26, believing she did not have permission to be off work. When told to go to the workers' compensation physician, the claimant did so and that doctor also released her from work through January 3, 2008. The administrative law judge is persuaded that the employer could have remedied the mistake by merely giving the claimant time to again present the admittedly legitimate note she had excusing her from work. Under these circumstances, the administrative law judge will not find the claimant's absences from work on December 21, 22,

and 23 unexcused. The claimant was discharged for unexcused absences. Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Because the final absence for which she was discharged was related to properly reported injury, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed. Benefits are allowed, provided the claimant is otherwise eligible.

**DECISION:**

The May 22, 2008, reference 05, decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided claimant is otherwise eligible.

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Teresa K. Hillary  
Administrative Law Judge

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Decision Dated and Mailed

tkh/kjw