

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

Appeal Number: 04A-UI-01695-ET  
OC 01-18-04 R 02  
Claimant: Appellant (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.

DONALD BURTON  
4872 – 63<sup>RD</sup> ST  
URBANDALE IA 50322

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.

CENTRAL IOWA  
HOSPITAL CORPORATION  
c/o HUMAN RESOURCES  
1313 HIGH ST STE 111  
DES MOINES IA 50309-3119

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge/Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the February 17, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on March 8, 2004. The claimant participated in the hearing with friend/paralegal Joann Prince. Cindy Fullerton, Human Resources Business Partner and Kevin Boyd, Manager of Nursing Unit N-4, participated in the hearing on behalf of the employer.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time cardiovascular technician for Central Iowa Hospital Corporation from March 3, 1997 to December 31, 2003. In September 2002, the claimant transferred to the catheterization lab. He was on probation at that time because of his attendance. On August 18, 2003, the claimant was warned about excessive absenteeism, tardiness and failure to notify the employer of his absences. The employer referred the claimant to the employee assistance program (EAP) because of his attendance. When the claimant indicated he was suffering from depression and was under the care of a physician, the employer referred him to its disability coordinator to determine if he would be eligible for FMLA or worker's compensation. The claimant did not pursue those options. On October 29, 2003, he was 40 minutes late and the employer issued another written warning and placed him on probation for 90 days. He did not tell the employer at that time that his absences were due to depression. On December 24, 2003, the claimant failed to call or show up for work. He testified he thought he took the day off, but he had not made arrangements with the employer for a vacation day and the employer was not aware he would not be at work. On December 26, 2003, Kevin Boyd, Manager of Nursing Unit N-4, met with the claimant with the intention of discharging him for his December 24, 2003, absence. Mr. Boyd reviewed the claimant's ten absences during the previous six months and the claimant attributed his absences to depression. In response to the claimant's statement Mr. Boyd allowed him one week to provide information to the employer's medical review officer regarding his medical condition and he supplied that information December 27, 2003. The medical documentation provided by the claimant's physician did not include information stating the claimant could not work or that his depression caused him to be late and after examining the record, the medical review officer determined the claimant did not qualify for a medical leave of absence and the employer terminated his employment December 31, 2003. The claimant did not provide medical certification for the absences the employer used in making its decision to discharge the claimant.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related 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.

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). On August 18, 2003, the claimant received a written warning about his attendance and a referral to the EAP. He then notified the employer that he suffers from depression. As a result of that disclosure, the claimant's supervisor referred him to the disability benefits coordinator to see if he was eligible for FMLA, short-term disability or worker's compensation but the claimant did not pursue those options. On October 29, 2003, he was placed on a 90-day probation but did not mention his depression as the reason for his absences and tardiness at that time. On December 24, 2003, the claimant was a no-call/no-show. While he testified he thought he had the day off he admits he had not made the proper arrangements and the employer had not granted him permission to take the day off. Although the evidence does not indicate that the claimant's absence December 24, 2003, was related to illness, he discussed his depression and attention deficit disorder with his supervisor when they met about the situation December 26, 2003. Consequently, the employer allowed him the opportunity to provide medical documentation regarding his illness to the medical review officer and gave him one week to do so. The claimant supplied the information to the medical review officer December 27, 2003, but the documentation provided to the employer did not state the claimant could not work or that his condition would manifest itself in tardiness. While the administrative law judge recognizes that depression is a serious illness and is sympathetic to the claimant's condition, the depression did not relieve the claimant of the responsibility of communicating with the employer or following up with the disability coordinator when referred by the employer in August 2003. The claimant did

not cite his depression as the reason for his absences when placed on probation October 29, 2003, and his December 24, 2003, absence was not related to his illness. While Ms. Prince believes the employer should have been of more assistance to the claimant because of his depression, the claimant was functioning as a cardiovascular technician at least while at work and his supervisor referred him to the proper resources. At which point it was the claimant's responsibility to pursue his available options, whether meeting with the disability coordinator, asking questions if he was not sure what steps he needed to take beyond that, and either providing pertinent medical information or asking the disability coordinator exactly what documentation was necessary. Mr. Boyd and the human resources department were limited in what they could ask the claimant or learn from his records because of strict confidentiality laws, including the recent HIPPA provisions. The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Benefits are withheld.

**DECISION:**

The February 17, 2004, reference 01, decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

je/kjf