

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**WANDA J MARK**  
Claimant

**APPEAL NO. 08A-UI-08258-LT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**MCSOIFER'S INC**  
Employer

**OC: 08/10/08 R: 02**  
**Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge/Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism  
Iowa Code § 96.5(1) – Voluntary Leaving

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the September 12, 2008, reference 01, decision that allowed benefits. After due notice was issued, a telephone conference hearing was held on September 30, 2008. Claimant participated with Dale Caruth and was represented by James Walters, Attorney at Law. Employer participated through Sam Soifer, Sara Myers, and Lacey Soifer. Employer's Exhibits A through F were received.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits or she quit the employment without good cause attributable to the employer.

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant was hired as a crew member on May 21, 2007 and most recently earned \$7.80 per hour working part time until August 4, 2008, when she was discharged. Her last day of work was July 25, 2008. She called employer to report absences related to illness (flu with vomiting and diarrhea) on July 28, 29, and August 1, 2008. She had missed one other day due to reported illness in October 2007. On August 4 claimant reported for work as scheduled and first assistant manager Sara Myers told her she needed a doctor's excuse since she was off work a week. Claimant told her she could not afford to go to the doctor and the doctor would require \$65.00 before it would set an appointment, since she had an outstanding balance. Myers reiterated that she could not work and would need a medical excuse to return to work and claimant responded, "Well I guess I'll go home then." Claimant never said she quit, but employer assumed she quit. She did not have medical insurance through employer, as Lacey Soifer told her when she went to part time that only full time employees get insurance benefits. The policy handbook claimant received upon her hire dated 2006 did not include the requirement that she obtain a doctor's excuse to return to work after an illness.

## REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.26(21) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

Although claimant left after Myers told her a second time she needed a doctor's excuse to be there, she was merely following instructions. Requiring a medical excuse to return to work when employer knew she could not afford one was an effective discharge. Accordingly, the administrative law judge concludes the 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.

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).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job-related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. In spite of employer's policy requiring a medical excuse or release to return to work for any absence related to illness, claimant's absence was excused. The inability to afford a medical appointment because of lack of health insurance excused the failure to provide a medical excuse or release. Because the final absence period for which she was discharged was related to properly reported illness or injury, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

#### **DECISION:**

The September 12, 2008, reference 01, decision is affirmed. The claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Dévon M. Lewis  
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw