

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

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FIVE STAR QUALITY CARE INC  
C/o THOMAS & THORNGREN INC  
PO BOX 280100  
NASHVILLE TN 37228

Appeal Number: 06A-UI-05544-S2T  
OC: 04/16/06 R: 01  
Claimant: Respondent (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.

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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Five Star Quality Care (employer) appealed a representative's May 19, 2006 decision (reference 01) that concluded Christopher Nord (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 14, 2006. The claimant participated personally and through his fiancée, Jennifer James. The employer participated by Darlene Brown, Human Resources Assistant, and Regina Webster, Director of Nursing.

#### 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 March 29, 2005, as a full-time direct support professional working from 9:45 p.m. to 6:15 a.m. At the end of the claimant's overnight shift he was supposed to wait until he was released before he could leave work. In general, most employee's left at 6:15 a.m., unless asked to stay. On April 11, 2006, the employer issued the claimant a verbal warning for leaving at 6:15 a.m., prior to being released.

On April 12, 2006, the claimant became violently ill while at work. He could not leave the restroom for very long due to stomach cramps and vomiting. His supervisor knew he was sick. At approximately 1:25 a.m. on April 13, 2006, a co-worker told the claimant to go home. The claimant did not see his supervisor but understood there to be enough staff to cover his duties. The claimant left and drove the ten miles to his home. He was so sick that he had to stop half way home to vomit.

When he arrived at home his fiancée noticed the claimant was not thinking clearly. He was dizzy, feverish, could not hold his head upright and vomiting blood. The claimant's medical facility opened at 7:00 a.m. and the claimant entered the emergency room as soon as it opened. The claimant was admitted to the hospital and placed in quarantine until the medical personnel could determine the cause of the claimant's illness. The claimant was scheduled to work on April 14, 2006. His mother telephoned the employer in the morning. The claimant telephoned his supervisor at the start of his shift. The employer understood the claimant was hospitalized. The claimant was diagnosed with colitis.

On April 17, 2006, the claimant telephoned the employer again from the hospital. The employer told the claimant he was terminated for walking off the job without notice on April 13, 2006.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons the administrative law judge concludes he was not.

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(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). Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. Roberts v. Iowa Department of Job Service, 356 N.W.2d (Iowa 1984). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a serious illness which began on April 12, 2006. The claimant's absence does not amount to job misconduct because it was properly reported to the best of his mental ability at that time. 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.

DECISION:

The representative's May 19, 2006 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

bas/cs