

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MARY D GILLETTE**

Claimant

**APPEAL NO. 12A-UI-10804-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**IOWA JEWISH SENIOR LIFE CENTER**

Employer

**OC: 08/05/12**

**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed an appeal from a decision of a representative dated August 27, 2012, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 4, 2012. The claimant failed to respond to the hearing notice and did not participate. The employer participated by Cybil Hines, director of nursing, and Nora Cable, nursing secretary. The record consists of the testimony of Nora Cable; the testimony of Cybil Hines; and Employer's Exhibits 1 through 7.

**ISSUE:**

Whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer is a long-term care facility. The claimant was hired on April 2, 2012, as a full-time certified nursing assistant. Her last day of work was June 22, 2012. She was terminated on June 22, 2012, due to excessive absenteeism in violation of the employer's policy.

The claimant's attendance record is as follows:

- April 7, 2012 – Personal Illness
- April 8, 2012 – Personal Illness
- May 6, 2012 – Car Broke Down
- May 11, 2012 – Tardy
- May 26, 2012 – Tardy
- May 31, 2012 – Tardy
- June 5, 2012 – Tardy
- June 8, 2012 – Personal Illness
- June 9, 2012 – Personal Illness
- June 10, 2012 – Personal Illness

The employer has a written policy, of which the claimant was aware, that four “occurrences” within a 90-day probationary period leads to termination.

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

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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984).

In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

In this case, the evidence showed that the claimant was not discharged for a current act of misconduct because the final absence that led to the claimant's termination was for personal illness properly reported. The claimant clearly had excessive absences but the final absence is considered an excused absence under Iowa law and cannot be the basis for disqualification. The employer had every right to enforce its attendance policy but in this case the claimant cannot be disqualified from receiving unemployment insurance benefits. Benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated August 27, 2011, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/kjw