

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CHRISTENE A KLEIN**  
Claimant

**APPEAL NO: 15A-UI-13045-JE-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**AMERISERVE INC**  
Employer

**OC: 05/17/15  
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the November 17, 2015, reference 02, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on December 15, 2015. The claimant participated in the hearing. Andy Mettert, Director of Ameriserve's University of Dubuque site, and Jeffrey Scher, Employer Representative, participated in the hearing on behalf of the employer.

**ISSUE:**

The issue is whether the employer discharged the claimant for work-connected misconduct.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time cashier for Ameriserve from April 4, 2013 to September 14, 2015. She was discharged while she was on a leave of absence.

The claimant worked full time during the school year, which ended May 13, 2015, and was laid off unless there was a special event at the school over the summer. Shortly before that date the claimant notified the employer she might be having surgery over the summer and would keep him posted. In August 2015, the claimant told the employer she was going to have surgery and asked if she was eligible for family and medical leave (FMLA). The employer contacted human resources and was told he could offer the claimant a 30-day unpaid leave of absence. The parties never discussed when her 30-day leave of absence would start or end, and consequently the claimant assumed it would start the first day of school which was August 24, 2015. The claimant had surgery September 8, 2015. She learned September 12, 2015, that following her surgery she would be placed on a six-week healing period and immediately notified the employer. On September 14, 2015, the employer notified the claimant that her employment had been terminated because she could not return to work after her 30-day leave of absence which it believed had expired.

The 30-day leave of absence expired September 23, 2015 but the claimant had not been released to return to work yet as she had not completed the six-week healing period following her surgery.

The claimant did not claim or receive benefits during her surgery/six-week healing period; which ran from the week ending September 12 through the week ending October 17, 2015.

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

For the reasons that follow, 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.

Iowa Admin. Code r. 871-24.32(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 cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The standard in attendance cases is whether the claimant had an excessive unexcused absenteeism record. (Emphasis added). While the employer's policy may count absences accompanied by doctor's notes as unexcused, for the purposes of unemployment insurance benefits those absences are considered excused.

The claimant was on a seasonal/summer layoff from her job with the employer at the University of Dubuque. She notified the employer at the time of the layoff in May 2015 that she was likely going to have surgery on her neck over the summer and maintained contact with the employer throughout the layoff. She did not qualify for FMLA but was granted a 30-day leave of absence. While the parties did communicate frequently about the claimant's situation, they did not discuss when her 30-day leave of absence would begin. The claimant reasonably believed that because she was on a seasonal layoff her leave would begin the first day of school, which was August 24, 2015, and end September 23, 2015, which was 30 days later. She had surgery September 8, 2015, and her surgeon informed her on September 12, 2015 that she would require a six-week healing period following the surgery. The claimant notified the employer of that situation and two days later, when she asked the employer the status of her employment, she was told her employment had been terminated. The employer filled her position in approximately mid-September 2015.

The claimant was off work due to a non-work-related injury and subsequent surgery. Her absences were properly reported to the employer but she had not recovered prior to the time her 30-day leave of absence was exhausted. The employer has not made any allegations of misconduct on the part of the claimant. Because the final absence was related to properly reported injury/illness, no final or current incident of unexcused absenteeism has been established. Therefore, benefits are allowed.

**DECISION:**

The November 17, 2015, reference 02, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder  
Administrative Law Judge

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Decision Dated and Mailed

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