

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

ERICA M JENNINGS
Claimant

APPEAL NO. 15A-UI-05636-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 10/19/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Care Initiatives filed a timely appeal from a representative's decision dated May 7, 2015, reference 07, which held claimant eligible to receive unemployment insurance benefits finding that the claimant was dismissed for excessive absences but finding that the absences were due to illness and were properly reported. After due notice was provided, a telephone hearing was held on June 23, 2015. Claimant participated. The employer participated by Ms. Alyce Smolsky, Hearing Representative and witnesses, Phyllis Farrell, Unemployment Insurance Consultant and Ms. Kathy Ewoldt, Director of Nursing. Employer's Exhibits One through Four were admitted into evidence. Claimant's Exhibit A was admitted into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all the evidence in the record, the administrative law judge finds: Erica Jennings was employed by the captioned employer, doing business as Odebolt Nursing Center, from February 26, 2015 until April 23, 2015 when she was discharged for excessive absenteeism. Ms. Jennings was employed as a full-time registered nurse and was paid by the hour. Her immediate supervisor was Kathy Ewoldt.

Ms. Jennings was discharged from her employment with the Odebolt Nursing Center on April 23, 2015 because she had exceeded the permissible number of absences allowed to an employee during the employee's initial 90-day probationary period of employment. Company policy provides that an employee is subject to discharge if they have more than three absences in the probationary period. Ms. Jennings was aware of the policy and had been warned about her attendance on April 5, 2015.

The claimant had left early due to illness on two occasions on March 14 and 15, 2015. The claimant had called off work because of illness on March 19, 2015 and had been absent on March 17 and 18 because the company had lost her paycheck twice and the claimant could not attend training. The claimant was absent due to illness on April 2 and April 1, 2015 and was absent on March 19, 2015 because her father suffered a heart attack.

The final infraction that caused the claimant's discharge took place on April 22, 2015 when the claimant was ill at work and requested to leave work early. Although the claimant secured a replacement with the assistance of the director of nursing, a decision was made to terminate Ms. Jennings from her employment because of her absences.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

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.

In discharge cases, the employer has the burden of proof to establish disqualifying conduct on the part of a claimant. See Iowa Code section 96.6-2. Misconduct must be substantial in order

to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

A reported absence related to illness or injury is excused for the purposes of the Employment Security Act. The employer's no-fault absenteeism policy or policy during a probationary period is not a dispositive of the issue of qualification for benefits. The term absenteeism also encompasses conduct referred to as leaving early or tardiness.

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's unexcused absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was not excused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation or oversleeping are considered unexcused. Absence related to illness are considered excused providing the employee has complied with the employer's policy regarding notifying the employer of the absence.

The evidence in the record establishes that the claimant's absences were due to illness or other excusable reasons and that the claimant properly notified the employer of all impending absences or leaving early and that the claimant had supplied medical documentation when requested by the employer to support her need to be absent for medical reasons.

The evidence in the record establishes the claimant's absences were primarily for medical reasons and were properly reported. Under those circumstances, the absences are considered excused for the purposes of the Unemployment Security Law and did not constitute misconduct sufficient to disqualify the claimant from the receipt of unemployment insurance benefits providing that she is otherwise eligible.

DECISION:

The representative's decision dated May 7, 2015, reference 07, is affirmed. The claimant was discharged under non-disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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