

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ROBIN L MARTIN**  
Claimant

**APPEAL NO. 11A-UI-12127-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HEARTLAND HEALTH MANAGEMENT**  
Employer

**OC:08/14/11**  
**Claimant: Appellant (2)**

Section 96.5-2-A – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from a decision of a representative dated September 6, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 10, 2011. Claimant participated. Employer participated by Lisa Dehne, Director of Nurses. The record consists of the testimony of Lisa Dehne; the testimony of Robin Martin; and Employer's Exhibits 1-6.

**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 located in Mount Pleasant, Iowa. The claimant was hired on October 15, 2008. She worked as needed on day shifts. The claimant's job at the time her employment ended was restorative aide. The claimant's last scheduled day of work was August 7, 2011. She was terminated on August 10, 2011, for chronic absenteeism and failure to follow the employer's attendance policy.

The claimant worked on August 6, 2011. The claimant injured her ribs while she was helping a resident get out of a chair. She reported the injury to a nurse. The nurse said something to the effect of "that must hurt." The nurse told the claimant to go back to work. The claimant had approximately one to one and one-half hours left on her shift.

The claimant was scheduled to be at work on August 7, 2011, at 6:00 a.m. During the night the claimant became ill and was vomiting. The claimant has chronic obstructive pulmonary disease (COPD). At 5:30 a.m., the claimant called the employer to inform the employer that she was unable to come to work. The claimant was unable to see a health care provider until Monday. She then consulted both her chiropractor and her medical doctor.

The claimant got a message from Lisa Dehne. Ms. Dehne wanted to talk to the claimant. The claimant came to work on August 10, 2011, and was informed that she was terminated.

The employer has a written policy, of which the claimant was aware, that requires an employee to report any absence two hours prior to the start of the shift and to find her own replacement. If an employee could not find a replacement, a list of the individuals that the employee tried to contact must be provided to the supervisor. The claimant had been ill on June 11, 2011, and June 12, 2011, and had not followed the policy. She was given a written warning. On May 13, 2011, the claimant was ill and did not call until 5:00 a.m.

#### **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 leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct 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). 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). 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.

The issue in this case is whether the claimant's absence from work on August 7, 2011, is an excused absence or an unexcused absence. Iowa law determines whether an absence is excused or unexcused. As a general rule, absence due to personal illness is excused if the employee properly notified the employer. Unreported absences due to mental incapacity or the nature of the reasons for absence will be considered excused. See Roberts v. IDJS, 356 N.W.2d 218 (Iowa 1984), and Gimbel v. Employment Appeal Board, 489 N.W.2d 36 (Iowa App. 1992).

The evidence showed that the claimant was ill and vomiting just prior to the start of her shift on August 7, 2011. The employer's policy required the claimant both to call in two hours prior to the start of the shift and to find her own replacement. The claimant would have been required to do all of this before 4:00 a.m. Given the claimant's physical condition, it was unrealistic to require her both to call prior to 4:00 a.m. and call around to find another employee to take her place. Given the reason why the claimant was not able to work, which was an unexpected illness, the administrative law judge concludes that the absence is excused. Because the final absence is excused, the claimant was not discharged for a current act of misconduct. Benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated September 6, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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