

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUANITA HELGENBERGER
Claimant

APPEAL NO. 10A-UI-06314-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 03/21/10
Claimant: Respondent (1)

Section 96.5-2-A -- Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated April 14, 2010, reference 01, which held claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 9, 2010. Employer participated by Amy Johnson, Administrator, and Miriam Ramsden, Director of Nursing. The employer was represented by Tom Kuiper. Although the claimant provided a telephone number at which she could be reached, she did not answer the phone when that number was called. A detailed message was left for the claimant on how to participate in the hearing. The claimant did not call in prior to the closing of the record. The record consists of the testimony of Miriam Ramsden and Employer's Exhibits 1-3.

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 called Heritage Nursing and Rehabilitation located in Cedar Rapids, Iowa. The claimant worked as a full-time certified nurse's aide. She was initially hired on September 12, 2000. Her last day of work was March 21, 2010. She was terminated on March 22, 2010.

The claimant was terminated for excessive absenteeism. The employer gives each employee six unexcused days per twelve-month period. The seventh unexcused day leads to a verbal warning and on the eighth day, a written warning is given. On the ninth day a final written warning is given with notice that a tenth day will lead to termination. An employee may erase some of these days by working extra shifts. The claimant had a final written warning on June 2, 2009, and she did work extra shifts that brought her below the warning threshold. The claimant received another final warning on January 6, 2010. This time she did not ask for extra shifts.

The incident that led to the claimant's termination occurred on March 22, 2010. The claimant called in two hours prior to her shift to notify her employer that she was sick. This placed the claimant at the level of termination and the claimant was terminated on March 22, 2010.

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.

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 notified 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 also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988) The employer has the burden of proof to show misconduct.

The evidence in this case established excessive absenteeism. However, in order to disqualify the claimant, the final instance of absenteeism must be unexcused as that term is defined in Iowa law. Personal illness is an excusable absence if the claimant properly notified the employer. The employer required an employee to call in two hours prior to the start of a shift if

the employee was going to be absent. The claimant complied with the notification procedure. Her final absence was therefore excused and is not a current act of misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated April 14, 2010, reference 01, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css