

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CATHLEEN H KEANE
Claimant

APPEAL NO. 07A-UI-00537-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DAC INC
Employer

**OC: 09/03/06 R: 04
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

DAC (employer) appealed a representative's January 10, 2007 decision (reference 02) that concluded Cathleen Keane (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 31, 2007. The claimant participated personally. The employer participated by Lori Anderson, Human Resources Director, and Carol Bowen, Home Community Based Services Coordinator. The employer offered one exhibit which was marked for identification as Exhibit One. Exhibit One was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on September 15, 2006, as a full-time support living specialist. The claimant signed for receipt of the company handbook on September 15, 2006. The claimant understood that she was to report any absence to the employer four hours prior to the start of her shift. The employer provides in-home care to disabled individuals and must have another employee cover for any absent individual.

The claimant was tardy in reporting to work on October 11, 2006. On October 13, 2006, the claimant was ill. She was absent from October 15 through 29, 2006, because she cut her foot and did not provide a replacement worker for part of that time. The employer issued the claimant a written warning and one-day suspension on November 6, 2006. The employer warned the claimant that further infractions could result in her termination from employment.

On November 28, 2006, the claimant did not attend work because her brother-in-law was in the hospital. On November 30, 2006, the claimant was ill but did not provide a replacement for her hours and did not properly notify the employer of her absence. The employer issued the claimant a written warning and three-day suspension. The employer again warned the claimant that further infractions could result in her termination from employment.

On December 16, 2006, the claimant became ill at about 4:00 a.m. She did not call the employer because her cellular telephone battery was not charged. She could not charge her telephone because the dog ate her charger. She could not drive to a telephone because her car did not work. The employer attempted to reach the claimant at 8:00 a.m., the start of the claimant's shift, but the claimant did not answer. The claimant returned the call at 9:45 a.m. asking if she still had a job.

The employer terminated the claimant on December 18, 2006, for repeatedly failing to properly report her absence or find a replacement for her shift.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was an improperly reported illness which occurred on December 16, 2006. The claimant's absence does amount to job misconduct because it was not properly reported. The claimant knew she would be terminated if she did not properly report her absence. She knew that she had to be able to use her cellular telephone to make the call to the employer. The claimant did not take basic steps to be able to inform the employer of her situation. The claimant was discharged for misconduct. She is not eligible to receive unemployment insurance benefits.

DECISION:

The representative's January 10, 2007 decision (reference 02) is reversed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and has been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css