

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**TAMARA K DINE**

Claimant

**APPEAL NO. 12A-UI-06107-NT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**FIVE STAR QUALITY CARE INC**

Employer

**OC: 04/15/12**

**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

**STATEMENT OF THE CASE:**

Five Star Quality Care, Inc. filed a timely appeal from a representative's decision dated May 17, 2012, reference 01, which held claimant eligible to receive unemployment insurance benefits. After due notice was provided, a telephone hearing was held on June 19, 2012. Claimant participated. The employer participated by Ms. Kathy Schrod, Director of Nursing.

**ISSUE:**

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

**FINDINGS OF FACT:**

Having considered all of the evidence in the record, the administrative law judge finds: Tamara Dine was employed by Five Star Quality Care from October 24, 2011 until April 17, 2012 when she was discharged for excessive absenteeism. Ms. Dine was employed as a full-time certified nursing assistant and was paid by the hour.

The claimant was discharged when she exceeded the permissible number of attendance infractions allowed under company policy. The employees are subject to discharge if they accumulate nine absences within a 12-month rolling period. Ms. Dine was aware of the policy and had been warned on one occasion.

The final incident that caused the claimant's discharge took place when the claimant was unable to report for work on April 14 and April 15, 2012 due to a foot injury. Ms. Dine properly reported her absences each day and had medical documentation to confirm that she was unable to work for medical reasons. The employer at that time made a management decision to discharge Ms. Dine because the facility needed an individual who was more dependable to provide services to residents.

## REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct 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.

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(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.

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Conduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance 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. of Appeals 1992).

The Supreme Court of the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of job misconduct. The Court held that the absences must both be excessive and unexcused and that the concept included tardiness, leaving early, etc. The Court further held, however, that absence due to illness and other excusable reasons are deemed excused if the employee properly notifies the employer.

Inasmuch as the evidence in the record establishes that Ms. Dine properly notified the employer of her impending absences and that the absences were due to illness. The administrative law judge concludes based upon the application of the facts of the law that the claimant was discharged for no disqualifying reason. Benefits are allowed, providing the claimant is otherwise eligible.

**DECISION:**

The representative's decision dated May 17, 2012, reference 01, is affirmed. Claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

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Terence P. Nice  
Administrative Law Judge

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Decision Dated and Mailed

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