

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUDITH S MAHONEY
Claimant

APPEAL NO. 10A-UI-14809-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OPTIMAE LIFESERVICES INC
Employer

**OC: 09/19/10
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.4-3 – Able and Available for Work

STATEMENT OF THE CASE:

Judith Mahoney (claimant) appealed a representative's October 25, 2010, decision (reference 02) that concluded she was not eligible to receive unemployment insurance benefits because he had voluntarily quit employment with Optimae Lifeservices (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 16, 2010. The claimant participated personally. The employer participated by Connie Dusek, Administrative Assistant.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

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 March 9, 2009, as a part-time community support staff. The claimant had surgery for a non-work-related injury on July 27, 2010. The claimant properly reported her medical issues and absences. The employer granted the claimant leave through September 20, 2010. On September 20, 2010, the claimant reported to the employer that her doctor did not release her to return to work and her next appointment was on October 18, 2010. The employer issued the claimant a termination letter for her absence due to illness.

On September 24, 2010, the physician, at the claimant's request, issued a release for the claimant to return to work without restrictions as of September 20, 2010.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code § 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 a properly reported illness which occurred from May 21 through September 20, 2010. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

871 IAC 24.23(1) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(1) An individual who is ill and presently not able to perform work due to illness.

When an employee is ill and unable to perform work due to that illness she is considered to be unavailable for work. The claimant was released to return to work with/out restrictions by her physician. She is considered to be available for work because her physician stated she was able and available for work. The claimant is not disqualified from receiving unemployment insurance benefits.

DECISION:

The representative's October 25, 2010 decision (reference 02) is reversed. The employer has not met its proof to establish job related misconduct. Benefits are allowed. The claimant is able and available for work.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs