

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

STEPHANIE N VAN DEN BERGHE
Claimant

APPEAL NO. 12A-UI-05063-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

COMMUNITY CARE INC
Employer

**OC: 11/20/11
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 April 25, 2012, reference 07, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 23, 2012. Claimant participated. The employer participated by Sid Bolton, the human resources director, and Elaine Colclasure, HCBS supervisor. The record consists of the testimony of Sid Bolton; the testimony of Elaine Colclasure; and the testimony of Stephanie Van Den Berghe.

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 provides health care service to mentally disabled individuals. The claimant was hired as a part-time direct support professional. The claimant was terminated on April 2, 2012, for excessive absenteeism.

The incident that led to the claimant's termination occurred on March 28, 2012. The claimant was tardy because she was at a school function for her daughter. The claimant had been given her last-chance warning letter on March 5, 2012 because she had had four absences, which was defined as excessive absenteeism under the employer's written policy. The claimant was then absent on March 9, 2012, because she was ill and on March 23, 2012, because she hurt her back. The claimant's other absences were either due to her personal illness or her daughter's illness.

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 disqualifies an individual from receiving unemployment insurance benefits 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). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such as transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (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.

There is insufficient evidence in this record to conclude that the claimant was discharged for excessive unexcused absenteeism. The evidence clearly showed excessive absenteeism. Ms. Colclasure testified that the claimant was absent 15 times in the very short period of time that she worked for the employer. The employer must also show that the absences were unexcused. The claimant testified that her absences near the end of her employment were due to personal illness. Some of her earlier absences were due to her daughter's illness. Iowa law states that personal illness is an excused absence if the employer is properly notified. There was no evidence that the claimant failed to properly notify the employer with the exception of the last absence.

Since the employer has failed to show excessive unexcused absenteeism, there is no disqualification for misconduct. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated April 25, 2012, reference 07, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css