

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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**KRISTINE L MYERS**  
Claimant

**DM SERVICES INC**  
Employer

**APPEAL 19A-UI-05671-S1-T**  
**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 06/16/19**  
**Claimant: Appellant (2)**

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Iowa Code § 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Kristine Myers (claimant) appealed a representative's July 10, 2019, decision (reference 01) that concluded ineligibility to receive unemployment insurance benefits after the claimant's separation from work with DM Services (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 8, 2019. The claimant participated personally. The employer provided a telephone number but could not be reached at the time of the hearing. The administrative law judge left a message for the employer.

**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 August 15, 2017, as a full-time seasonal credit specialist. She worked twenty to sixty hours per week. Her hours were dependent on the time of the year. The employer did not give the claimant a handbook or any warnings.

The claimant was tardy for work twice during her employment. She was delayed by a train once and delayed at her daughter's doctor's office once. The claimant notified the employer of both situations.

The claimant requested and was granted Family Medical Leave (FMLA). For each FMLA absence, she properly reported her nonattendance and provided a doctor's note to the employer. Her last absence was on June 14, 2019. All of the claimant's absences were due to her medical condition, properly reported, supported by a doctor's note, and covered by FMLA. The employer terminated the claimant on June 18, 2019, for having too high of a percentage of absences.

## REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(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 on June 14, 2019. The claimant's absence does not amount to job misconduct because it was properly reported. The employer did not participate in the appeal hearing and no evidence of misconduct was presented at the hearing. 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.

**DECISION:**

The representative's July 10, 2019, decision (reference 01) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed provided the claimant is otherwise eligible.

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Beth A. Scheetz  
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs