

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAURA A MESSERSCHMIDT
Claimant

APPEAL NO. 09A-UI-05876-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

BLACK HAWK COUNTY
Employer

OC: 03/22/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Black Hawk County (employer) appealed a representative's April 9, 2009 decision (reference 01) that concluded Laura Messerschmidt (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 30, 2009. The claimant participated personally. The employer participated by June Watkins, Human Resources Director; Jack Musker, Administrator; and Amanda Bentley, Assistant Director of Health Services. The employer offered and 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 January 19, 2009, as a part-time registered nurse. The claimant signed for receipt of the employer's handbook on January 21, 2009. The claimant understood she was to report her absences at least two hours in advance. The claimant was diagnosed with high blood pressure. The claimant properly reported her absences due to illness from high blood pressure on January 27, 28, 29, February 2, 7, 8, 22, March 7 and 8, 2009. For each absence she provided a doctor's note to the employer. During one of the absences she was hospitalized. On March 19, 2009, the claimant was absent because her mother-in-law suffered a heart attack and was hospitalized. The claimant properly reported her absence to the employer. The employer counseled the claimant on March 9 and 20, 2009 regarding her absences but did not issue her any formal warning.

On March 20, 2009, the claimant notified the employer she would not be at work on March 21 and 22, 2009, due to health reasons. She had a doctor's note excusing her from work on March 21 and 22, 2009, which she provided to the employer. The claimant had previously reported more than one absence in advance and never received a warning for that practice. She knew others who reported multiple day absences in advance without note. On March 23,

2009, the employer terminated the claimant for excessive absenteeism. The employer thought too many illnesses occurred on the weekends.

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:

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 on March 21 and 22, 2009. 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.

DECISION:

The representative's April 9, 2009 decision (reference 01) is affirmed. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs