

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHELLE N SILVA**  
Claimant

**APPEAL NO. 09A-UI-14615-ST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ALEGENT HEALTH**  
Employer

**OC: 08/16/09**  
**Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct  
871 IAC 24.32(7) – Excessive Unexcused Absenteeism  
871 IAC 24.32(8) – Current Act of Misconduct

**STATEMENT OF THE CASE:**

The employer appealed a department representative's decision dated September 23, 2009, reference 01, that held the claimant was not discharged for misconduct on August 14, 2009, and benefits are allowed. A telephone hearing was held on October 27, 2009. The claimant participated. Jennifer Coe, Representative; Jennifer Smith, HR; and Shannon Seydlitz, Supervisor, participated for the employer. Employer Exhibits One through Seven was received as evidence.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct.

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant worked as a full-time childcare teacher from January 9, 2006 to August 13, 2009. The claimant received the employer attendance policy that provides for progressive discipline based on a point system. Ten points may cause a termination from employment.

The claimant received a final attendance warning on June 18, 2009 for having reached nine points in violation of the attendance policy. The claimant asked her supervisor to be off work from August 13-19, and the request was taken under advisement. On August 13, the claimant asked about her request and her supervisor said that most likely she would not need to report to work on August 14. The claimant was told to call in when she got up to check about her work status.

The supervisor called claimant at 7:30 a.m. on August 14 and left a voice mail message to advise that her son should not be dropped off for daycare unless she was there. There was no message about reporting to work that day. The claimant called her supervisor about 9:15 a.m.

and was told that she had failed to call in for work by 8:30 a.m. The employer discharged the claimant for having exceeded the ten-point threshold for attendance violations.

**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(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.

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 administrative law judge concludes that the employer failed to establish a current act of misconduct in the discharge of the claimant on May 11, 2009, for excessive "unexcused" absenteeism/tardiness.

The employer could not directly refute the claimant's testimony about the failure to timely call in to check on work for August 14, as the supervisor was not available as a witness. The claimant had not received a direct answer about whether she was scheduled to work on August 14. Her supervisor could have advised the claimant when she left a message that morning whether she was excused from work as requested. At most, the claimant failed to timely call in to see if she was to work, not report for scheduled work. Given the circumstances of requesting time off and not being pre-scheduled for work on August 14, a current act of misconduct is not established.

**DECISION:**

The decision of the representative dated September 23, 2009, reference 01, is affirmed. The claimant was not discharged for misconduct in connection with employment on August 14, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

---

Randy L. Stephenson  
Administrative Law Judge

---

Decision Dated and Mailed

rls/css