

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**JOSHUA R JUDGE**  
Claimant

**APPEAL NO. 08A-UI-11578-CT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**COMMUNITY CARE INC**  
Employer

**OC: 11/02/08 R: 04  
Claimant: Appellant (2)**

Section 96.5(2)a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

Joshua Judge filed an appeal from a representative's decision dated December 4, 2008, reference 01, which denied benefits based on his separation from Community Care, Inc. After due notice was issued, a hearing was held by telephone on December 23, 2008. Mr. Judge participated personally. The employer participated by Carol Wells, Human Resources Director, and Denise Beenk, Director of ICF/MR.

**ISSUE:**

At issue in this matter is whether Mr. Judge was separated from employment for any disqualifying reason.

**FINDINGS OF FACT:**

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Judge began working for Community Care, Inc. on January 21, 2005. He was last employed full time as a direct care professional. He began a medical leave of absence on August 8, 2008. His doctor completed Family and Medical Leave Act (FMLA) forms indicating that he was suffering from non-epileptic seizures. The doctor did not indicate how long he would need to remain off work.

When he began the leave of absence, Mr. Judge was experiencing six to seven seizures each day. He was placed on Depokote and, once it reached therapeutic levels, the seizures were reduced to two to three each week. On October 29, Mr. Judge's neurologist released him to return to work without restrictions. Because he told the employer he was still experiencing seizures, he was sent for a fitness-for-duty exam by the employer's doctor. The employer's doctor felt Mr. Judge was a direct threat to the well-being of residents because he was still having seizures. The employer checked with the Iowa Department of inspections and Appeals (DIA) concerning its liability in the event a resident was injured as a result of Mr. Judge experiencing a seizure while providing care. The employer was advised that it would be liable in such a circumstance.

Mr. Judge exhausted his FMLA on October 30, 2008. He could have applied for a personal leave of absence but his full-time job would not have been held open for him. Because he was still experiencing seizures that could affect his ability to safely care for residents and because he had exhausted his FMLA, Mr. Judge was discharged on November 4, 2008.

**REASONING AND CONCLUSIONS OF LAW:**

Mr. Judge was discharged because the employer felt he could not safely perform his job and had exhausted his FMLA. He had already obtained a full release from his treating neurologist stating he could return to work without restrictions or limitations. It was the employer's decision, in consultation with its doctor and DIA, that Mr. Judge would not be allowed to return on November 3, 2008. Because the separation was initiated by the employer, it is a discharge.

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Judge was discharged due to a matter beyond his control. He was experiencing seizures, a condition the employer did not feel was compatible with the performance of his usual job of providing direct care for residents. The administrative law judge appreciates that the best interests of the residents served by the employer dictated that Mr. Judge not return to his job. However, because the condition was beyond his control, it did not constitute disqualifying misconduct.

Even if the administrative law judge were to conclude that the provisions of Iowa Code section 96.5(1)d were applicable to the facts of this case, Mr. Judge would still be entitled to benefits. He was off work on the advice of his doctor and immediately notified the employer of the need to be absent. Once his recovery was certified by his doctor, he re-offered his services but no work was made available to him. The administrative law judge appreciates that there was a difference of opinion between Mr. Judge's doctor and the employer's doctor as to whether he could perform his normal job. The fact remains that his doctor had released him to work but no work was made available. As such, he would be entitled to benefits pursuant to section 96.5(1)d.

**DECISION:**

The representative's decision dated December 4, 2008, reference 01, is hereby reversed. Mr. Judge was separated from Community Care, Inc. for no disqualifying reason. Benefits are allowed, provided he satisfies all other conditions of eligibility.

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Carolyn F. Coleman  
Administrative Law Judge

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Decision Dated and Mailed

cfc/css