

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WAYNEL R FRIESTH
Claimant

APPEAL NO. 11A-UI-14217-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

ORTHO TEK INC
Employer

**OC: 09/25/11
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

STATEMENT OF THE CASE:

The employer appealed a department representative's decision dated October 18, 2011, reference 01, that held the claimant was not discharged for misconduct on September 28, 2011 and benefits are denied. A hearing was held on November 29, 2011. The claimant participated. Mark Steenhoek, president; Danielle Allen, billing supervisor; and Joanna Moffett, billing specialist, participated for the employer. Claimant Exhibit A 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 billing specialist from March 31, 2010 to September 28, 2011. The claimant was issued an employee handbook that provides for progressive discipline from verbal to written warnings.

The employer discharged claimant for attendance issues on September 28. Claimant suffers from rheumatoid arthritis. She was off work six weeks due to a hysterectomy on May 10, 2011, and one week due to a back injury on June 6. She provided doctor notes to the employer that excused her from work. She missed work on September 26 and 27 due to properly reported illness, and she provided doctor excuses.

The employer never issued any written warning to claimant for missing work, which includes an incident in early September where it believes she was caught sleeping on the job.

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 misconduct or a current act of misconduct in the discharge of the claimant on September 28, 2011, for excessive "unexcused" absenteeism or any other reason offered by it.

The employer admitted it failed to issue any written warning to claimant for attendance or other issues, which means it failed to follow its progressive disciplinary policy. Absences due to properly reported illness are not misconduct. While it is understandable the employer let claimant go due to missing too much work, it is not based on job-disqualifying misconduct for unemployment purposes. If the employer believed claimant was caught sleeping on the job in early September, why did it not discipline her at that time rather than wait until September 28?

DECISION:

The representative's decision dated October 18, 2011, reference 01, is affirmed. The claimant was not discharged for misconduct in connection with employment on September 28, 2011. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/kjw