

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GABRIELA G GARCIA
Claimant

APPEAL NO. 12A-UI-03843-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

**BODEANS BAKING
HOLDING COMPANY LLC**
Employer

**OC: 05/15/11
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated March 28, 2012, reference 03, which held that the claimant was not eligible to receive unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 30, 2012. The claimant participated. The employer participated by Jason Jauron, human resources manager. The record consists of the testimony of Jason Jauron; the testimony of Gabriela Garcia; Claimant's Exhibit A; and Employer's Exhibits 1 through 5.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer manufactures ice cream cones at its facility located in Le Mars, Iowa. The claimant was hired on February 9, 2010, as a full-time packer. Her last day of work was February 16, 2012. She was terminated on February 21, 2012, for violation of the employer's attendance policy.

The incident that led to the claimant's termination occurred on February 20, 2012. The claimant reported to the employer that she would not be coming to work that day due to car troubles. This absence put the claimant at eight points under the employer's attendance policy. This written policy states that if an employee reaches eight points, the employee is terminated. The claimant's prior absences occurred on February 18, 2012; February 17, 2012; January 30, 2012; January 23, 2012; January 9, 2012; November 16, 2011; October 3, 2011; and March 16, 2011. All of these absences, with one possible exception, were due to personal illness properly reported.

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(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.

Misconduct that disqualifies an individual from receiving unemployment insurance benefits occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). Absence due to matters of personal responsibility, such transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). The employer has the burden of proof to establish misconduct.

The evidence in this case established that the claimant was terminated because she accumulated eight points under the employer's attendance policy. An employer is entitled to

establish and enforce an attendance policy. Not every violation of an employer's attendance policy leads to a disqualification from receiving unemployment insurance benefits. The employer must show that a claimant was discharged for excessive unexcused absenteeism.

Although the claimant had excessive absenteeism, all but one or two of these absences is considered excused under unemployment insurance law. Personal illness, properly reported, is an excused absence even if this absence leads to a point under an attendance policy. One or possibly two unexcused absences is not excessive unexcused absenteeism. The claimant may have exceeded the allowable points under the attendance policy, but she is not disqualified from receiving unemployment insurance benefits. Benefits are allowed if the claimant is otherwise eligible.

DECISION:

The representative's decision dated March 28, 2012, reference 03, is reversed. Unemployment insurance benefits are allowed, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw