

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

CINDY J LYNCH
Claimant

HY-VEE INC
Employer

APPEAL NO. 14A-UI-04229-GT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 07/07/13
Claimant: Respondent (1)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated April 15, 2014, reference 03, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on May 12, 2014. Claimant participated personally by phone. Employer participated by representative Cindy Lynch. Claimant Exhibit One was admitted into evidence.

ISSUE:

The issue in this matter is whether 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: Claimant last worked for employer on March 7, 2014.

Employer discharged claimant on March 7, 2014 because claimant took a 33-minute break outside of the break room. The employer's policy allowed for a 20-minute break for the time the claimant worked that day. Employer also alleged that claimant left the building which was a violation of their break policy. The claimant did not leave the grounds, but she did go outside during her break.

The claimant was given a copy of the attendance and break policy during orientation. Claimant believed she had not broken the policy when she stayed on the grounds during her break. Claimant had not been warned either verbally or in writing for taking her breaks outside on previous occasions. The claimant was not told she was in jeopardy of losing her employment if she did not take shorter breaks, and that she had to take all breaks in the break room. The employer should have given the claimant warnings, and should have notified the claimant that she was in jeopardy of losing her job.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa Ct. App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning breaks. Claimant was not

warned concerning this policy, and was never told she was in jeopardy of losing her job if she did not change her behavior.

The last incident, which brought about the discharge, fails to constitute misconduct because the claimant was not given a reasonable opportunity to make changes to her conduct, and she was not warned that she could lose her job if she did not make immediate changes to her break routine. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated April 15, 2014, reference 03, is affirmed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Duane L. Golden
Administrative Law Judge

Decision Dated and Mailed

dlg/css