

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MELISSA S BROCKETT

Claimant

APPEAL NO. 13A-UI-01393-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

LANCE PRIVATE BRANDS LLC

Employer

OC: 04/29/12

Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the representative's decision dated February 1, 2013, reference 02, which held that the claimant was not eligible for unemployment insurance benefits. After due notice was issued, a hearing was held by telephone conference call on March 6, 2013. The claimant participated personally. The employer participated by Stephanie Zimmerman, human resources generalist. The record consists of the testimony of Stephanie Zimmerman and the testimony of Melissa Brockett.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge makes the following findings of fact:

The employer is a cookie and cracker manufacturer with a facility located in Burlington, Iowa. The claimant was hired on July 28, 2011, as a part-time packer. Her last day of work was December 18, 2012. She was terminated on December 20, 2012, for violation of the employer's attendance policy.

The claimant's attendance record showed the following:

March 6, 2012	sick
April 16, 2012	left early
June 11, 2012	sick
July 12, 2012	sick
July 10, 2012	left early
July 19, 2012	left early
September 7, 2012	personal
September 14, 2012	tardy
September 21, 2012	tardy

November 11, 2012 tardy
November 16, 2012 personal
December 18, 2012 personal

The claimant received warnings on May 16, 2012; July 10, 2012; and September 7, 2012; and September 14, 2012. The parties dispute whether the claimant was given a warning on November 6, 2012. The employer's written attendance policy, of which the claimant was fully aware, provides for termination on the accumulation of eight points.

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). The concept includes tardiness and leaving early. Absence due to matters of personal responsibility, such as transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (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). In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

The claimant is not eligible for unemployment insurance benefits. The evidence showed that the claimant had excessive unexcused absenteeism and that her final eight absences were all unexcused. Child care, unless a bona fide emergency is present, is a personal responsibility of the claimant. The fact that the claimant denied having been given a final written warning does not negate the finding of misconduct. The claimant was well aware of the employer's policies on attendance and knew from four prior warnings that she was accumulating attendance points. Any ignorance on her part on exactly where she stood with attendance points was her fault. She knew that she was absent and that she would be terminated if she reached eight points. Since the employer has shown excessive unexcused absenteeism, it has proven misconduct. Benefits are denied.

DECISION:

The unemployment insurance decision dated February 1, 2013, reference 02, is affirmed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times the claimant's weekly benefits amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs