IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MANDY S BERGMEIER
Claimant

THE CBE GROUP INC
Employer

APPEAL NO. 12A-UI-00570-VST

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/04/11
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated January 4, 2012, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on February 13, 2012. Claimant participated. The employer participated by Mary Phillips, senior vice president, and Misty Reinard, vice president. The record consists of the testimony of Misty Reinard; the testimony of Mandy Bergmeier; and Employer's Exhibits 1-12. Mary Phillips did not testify at the hearing.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

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

The employer is a collection agency that provides collection services for third parties. The claimant was hired on July 6, 2011, as a full-time collector. The claimant's last day of actual work was November 26, 2011. She was terminated on December 5, 2011.

The incident that led to the claimant's termination occurred on December 2, 2011. The claimant was required to be at work at 7:00 a.m. The employer's attendance policy required an employee to personally speak with a member of management 30 minutes prior to the start of a shift if a scheduled shift would be missed. The claimant did not call until 9:02 a.m. She said she overslept.

The claimant had had two written warnings for attendance on September 19, 2011, and September 21, 2011. (Exhibit 4 and Exhibit 5) A third written warning leads to termination. The claimant's absences were due to extended breaks; dock time; and missed punches. The claimant knew her job was in jeopardy. The employer called the claimant to find out if she was

coming to work on December 6, 2011. The claimant asked if she still had her job and the employer told her no.

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.

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 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). The employer has the burden of proof to show misconduct.

The evidence showed that the claimant had excessive and unexcused absenteeism. The claimant worked for the employer for approximately five months. As of September 20, 2011, which was approximately two and one half months after she started her employment, the claimant had 32.75 attendance points and was in danger of losing her job. The final incident that led to her losing her job was that she called in late on December 2, 2011. She overslept and did not report her absence until approximately two hours after the start of her shift. The claimant blamed her oversleeping on medication for her pregnancy. She provided no medical evidence to support this testimony. Even an otherwise excused absence for illness becomes unexcused if the absence is not properly reported.

Since the employer showed that the claimant had excessive and unexcused absenteeism, the claimant was discharged for misconduct. She is not eligible for unemployment insurance benefits. Benefits are denied.

DECISION:

The decision of the representative dated January 4, 2012, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs