

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NICOLE A BARBER
Claimant

APPEAL NO. 07A-UI-09675-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

CENTRAL IOWA KFC INC
Employer

**OC: 09/09/07 R: 02
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Central Iowa KFC (employer) appealed a representative's October 5, 2007 decision (reference 01) that concluded Nicole Barber (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 30, 2007. The claimant was represented Cynthia Rybolt, Attorney at Law, and participated personally. The claimant also participated by Ashley Routh, claimant's sister, and Steve Tingwald, claimant's boyfriend. The employer participated by Glen Johnson, Area Supervisor, and Reyna Ramirez, Assistant Manager.

ISSUE:

The issue is whether the 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 that: The claimant was hired on June 7, 2006, as a part-time customer service team member.

On August 24, 2007, between 5:30 and 6:00 p.m. the claimant noticed she had started her menstrual period. She bled through her underwear and had smudges of blood on her inner thighs. The claimant asked her manager if she could go to K-Mart across the street from the restaurant. The employer told the claimant to wait because they were busy. The claimant continued to work making tacos. The menstrual blood flowed onto the claimant's socks and was on the stainless steel panel in front of the claimant's work station.

The claimant asked again at approximately 7:00 p.m. The manager told the claimant to wait. The claimant asked the manager for another pair of uniform pants. The manager said she could not open the closet where the clothing items were kept. The claimant could not use the sanitary pads that were available because she is allergic to the items. She telephoned her father and her sister asking them to bring her tampons and new underwear. They were unable to bring the items at that time. At 7:30 p.m. the claimant told the manager she was going to the K-Mart to

buy supplies and would return in 15 minutes. The manager told the claimant if she left she would be terminated.

The claimant went to K-Mart, purchased items and returned at 7:45 p.m. The manager told the claimant she was terminated. The claimant waited in the K-Mart parking lot for her father to drive her home. Later she telephoned the employer and the employer confirmed the claimant was no longer employed.

The claimant's and the employer's testimony is inconsistent. The administrative law judge finds the claimant's testimony to be more credible because the employer's statements did not carry as much weight as the claimant's eye witness testimony.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported medical issue which occurred on August 24, 2007. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's October 5, 2007 decision (reference 01) is affirmed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/pjs