

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARITY M BOYKINS
Claimant

APPEAL NO. 09A-UI-08443-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CCB PACKAGING INC
Employer

OC: 04/26/09
Claimant: Appellant (2)

Section 96.5-2-A -- Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated June 2, 2009, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 30, 2009. Claimant participated. Employer participated by Michelle Pearson, Human Resources Manager. The record consists of the testimony of Michelle Pearson; the testimony of Charity Boykins; Claimant's Exhibits A-B; and Employer's Exhibits 1-2.

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 claimant began working for the employer on June 12, 2007. During her tenure with the company she held a variety of positions. On the day of her termination, April 22, 2009, she was a machine operator.

The employer has an attendance policy that requires termination if an employee accumulates ten points. An employee was also required to call 24 hours prior to the beginning of a shift to report any absence. On April 20, 2009, the claimant had 7½ points accumulated. She did not call in to report her absence until 45 minutes after her shift began. She was regarded as a no-call/no-show and given three points. She then exceeded the ten-point limit and was terminated on April 22, 2009. The reason that the claimant did come to work on April 20, 2009, was that she was suffering from a migraine headache.

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.

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 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.

Excessive unexcused absenteeism is one form of misconduct. If, however, the final incident is an excused absence, such as illness, then an employee is not disqualified. Although the employer's policy specified that illness was not an unexcused absence, unemployment insurance law states that personal illness is an excused absence. The key then becomes whether the claimant properly notified the employer that she would be absent.

In this case, the employer required an individual to report any absence 24 hours before the start of the shift. This notice provision is unreasonable when applied to personal illness. It is not always possible for an employee to know 24 hours ahead of time that illness will prevent them from working an assigned shift. The claimant had a migraine headache and while she did not call before her shift, she did notify her employer shortly after the shift began. Given the circumstances in this case, the claimant's final absence, which led to the accumulation of three points, is deemed excused and therefore benefits will be allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 2, 2009, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css