

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY N WAYNE
Claimant

APPEAL NO. 11A-UI-16236-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

LINDA MCFARLAND
Employer

**OC: 11/20/11
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated December 15, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on January 23, 2012. Claimant participated. The employer participated by Holly Brinning, co-director. The record consists of the testimony of Holly Brinning; the testimony of Ashley Wayne; and Claimant's Exhibit A.

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 employer is a child care facility located in Washington, Iowa. The claimant was hired on September 12, 2011, to work full time in the baby room. Her last day of work was November 16, 2011. She was terminated on November 16, 2011.

The incident that led to the claimant's termination occurred on November 16, 2011. The claimant was late to work by one half hour. She did not follow the employer's notification policy. She was required to call the employer two to three hours prior to the start of the shift and find a replacement. The claimant was one hour late the day before. She did not find a replacement on November 15, 2011, either. The claimant had two previous warnings for being late coming back from lunch. The claimant's reasons for being late were due to transportation problems and child care issues.

The employer had given the claimant an employee handbook and a handbook from the Department of Human Services at the time she was hired. The employer went over the handbooks and the claimant was informed of the notification policy.

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

The employer in this case has shown excessive unexcused absenteeism. The claimant was only employed by the employer for two months. In two months the claimant had four instances

of unexcused tardiness, which is a form of absenteeism. The claimant's final absenteeism was due to her daughter's illness. She did not, however, follow the employer's notification policy and therefore this absence cannot be considered excused. Four absences in two months is excessive and the absences themselves unexcused. Misconduct has been shown. Benefits are denied.

DECISION:

The decision of the representative dated December 15, 2011, 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.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs