

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**AMY D HASKIN
110 W GARFIELD
ZEARING IA 50278**

**BURKE MARKETING CORPORATION
PO BOX 209
NEVADA IA 50201**

**Appeal Number: 05A-UI-01700-JTT
OC: 01/23/05-04 R: 02
Claimant: Appellant (2)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5(2)(a) – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Amy Haskin filed a timely appeal from the February 15, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 4, 2005. Ms. Haskin participated in the hearing. Burke Marketing participated through Melissa Asr, Human Resources Generalist, and Robert Gray, Production Supervisor.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Amy Haskin was employed by Burke Marketing as a full-time cooler recorder from October 6, 2003

until January 7, 2005, when Production Supervisor Robert Gray discharged her for excessive absenteeism.

The last absence that prompted the Mr. Grey to discharge Ms. Haskin occurred over the period of January 4-6, 2005. Ms. Haskin was absent on these days because her two-year-old son's body was covered with hives. On January 4, Ms. Haskin telephoned the employer prior to the scheduled start of her shift and left a message on Mr. Gray's voice mail that her son was sick and she needed to take him to the doctor. Later that morning, Ms. Haskin went to the workplace and met with Pat Waltermeyer in Human Resources. At that time, Ms. Haskin requested Family and Medical Leave Act (FMLA) paperwork. Ms. Haskin then took her son to the doctor. The doctor indicated that Ms. Haskin's son would need to stay out of day care for at least three days. The doctor also completed the FMLA paperwork. On January 5, Ms. Haskin telephoned the employer prior to the scheduled start of her shift and left a message on Mr. Gray's voice mail that she needed to be away from work due to her son's illness, but would return on Friday, January 7, and would bring the completed FMLA paperwork. Mr. Gray had been on vacation and had not been available to take Ms. Haskin's calls on January 4 and 5.

On January 7, Ms. Haskin reported to work at the scheduled start of her shift. As Ms. Haskin was changing into her work gear, a co-worker advised her that Mr. Gray wanted to see her. Ms. Haskin went to Mr. Gray's office. Mr. Gray asked, "What's going on?" Ms. Haskin explained that her son had been ill and that she had stayed home with him pursuant to the doctor's instructions. Mr. Gray advised Ms. Haskin, "You pointed out. Today is your last day." Ms. Haskin explained that she had been away from work on FMLA leave, but Mr. Gray's position did not change.

During the course of Ms. Haskin's employment, she had been absent on the following days: December 3, 2003, February 6 and 17, 2004, March 15, 2004, July 23, 2004, and December 21. Ms. Haskin had been tardy on the following days: November 18, 2003, July 21, 2004, and November 8, 2004. The employer was aware that Ms. Haskin had been absent on December 21, 2004, because her other child had been ill. The employer did not record the reason for any particular absence or tardy. The employer was not aware of any instance where Ms. Haskin had failed to notify the employer of an absence pursuant to the employer's attendance policy.

The employer has a no-fault attendance policy that is set forth in the employee handbook. On January 6, 2004, Ms. Haskin acknowledged in writing her receipt of a copy of the employee handbook. Under the attendance policy, employees are allowed four "personal days." After the employee has exhausted the personal days, the next absence results in a verbal warning. The next two absences each result in a written warning. The next absence results in termination. The attendance policy makes no distinction between absences due to illness properly reported and absences due to matters of personal responsibility such as transportation or oversleeping.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Haskin was discharged for misconduct in connection with her employment based on excessive unexcused absences. It does not.

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(7)(8) provide:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

(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.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The administrative law judge's reasoning and conclusions are governed by the appropriate law, rather than the employer's no-fault attendance policy. In order for Ms. Haskin's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the employer must show that the absences were excessive and that the absences were unexcused. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32-8. Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes as follows: Ms. Haskin's absence for the period of January 4-6, 2005, was due to the illness of a child that was properly reported to the employer and was, therefore, an excused absence. The employer has, therefore, failed to provide proof of a "current act" that would justify disqualification from benefits. See 871 IAC 24.32(8). Accordingly, no disqualification will enter. In addition, the employer has offered no proof that Ms. Haskin's prior absences were unexcused. See 871 IAC 24.32(7).

DECISION:

The representative's decision dated February 15, 2005, reference 01, is reversed. The claimant was discharged from her employment for no disqualifying reason. The claimant is eligible for benefits, provided she meets all other eligibility requirements.

jt/sc