

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**GENE R BAUCOM**  
Claimant

**APPEAL NO. 12A-UI-00146-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ERJ DINING IV LLC**  
Employer

**OC: 11/27/11**  
**Claimant: Appellant (2)**

Section 96.5-2-a – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The claimant filed an appeal from a decision of a representative dated December 28, 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 31, 2012. Claimant participated. The employer failed to respond to the hearing notice and did not participate. The record consists of the testimony of Gene Baucom.

**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 operates a Chili's restaurant in Sioux City, Iowa. The claimant was hired on October 8, 2004. His last day of work was November 26, 2011. He was terminated on November 27, 2011. At the time of his termination he was a part-time cook.

The incident that led to the claimant's termination occurred on November 26, 2011. The claimant overslept and was late to work. He had had two other instances of tardiness: on or about October 26, 2011; and either September or August 2011. The claimant does not know if the employer has a written attendance policy. He did receive a written warning for one of his previous instances of tardiness. He was shocked that he was terminated as he did not think his job was in jeopardy. Other employees would be late and no adverse action was taken against them.

## 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 establish misconduct.

The employer did not participate in this hearing and therefore there is insufficient evidence to establish misconduct. The claimant did not know if the employer had a written attendance policy. He admitted that he was terminated for tardiness on November 26, 2011. He cited two other times he was tardy. There was no testimony from the employer on why three instances of tardiness would be the basis for termination. The claimant testified that he was shocked that he was terminated because other employees were just as tardy as he was and they were not terminated. Again, absent evidence from the employer on its attendance policy and enforcement, no misconduct can be found. Benefits are allowed if the claimant is otherwise eligible.

**DECISION:**

The decision of the representative dated December 28, 2011, reference 01, is reversed. Unemployment insurance benefits are allowed, 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