

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

ASHLEY L LEFTWICH
842 18TH AVE
MOLINE IL 61265-3839

SCHNUCK MARKETS INC
#745 BETTENDORF
C/O TALX UCM SVCS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 06A-UI-02878-JTT
OC: 02/12/06 R: 04
Claimant: Respondent (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

STATEMENT OF THE CASE:

Schnuck Markets filed a timely appeal from the February 28, 2006, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on March 30, 2006. Claimant Ashley Leftwich failed to respond to the hearing notice instructions to provide a telephone number for the hearing and did not participate. Employment Manager Dezzie Houston represented the employer and presented additional testimony through Co-Manager Ammar Mahmood and Assistant Grocery Manager Rodney Carlson. Exhibits One through Ten were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Ashley Leftwich was employed by Schnuck Markets as a part-time Service Center Clerk from May 11, 2005 until February 12, 2006, when Store Manager John Carr discharged her.

The final incident that prompted the discharge occurred on February 11, 2006. Ms. Leftwich was scheduled to work until 10:00 p.m. and was the only person working in the customer service center. At approximately 8:30 p.m., Ms. Leftwich asked Assistant Grocery Manager Rodney Carlson whether she could go home early. Ms. Leftwich provided no reason as to why she wished to leave early. Prior to speaking with Mr. Carlson, Ms. Leftwich had contacted Customer Service Manager Angela Heydeman and made the same request to leave early. Ms. Heydeman denied the request and instructed Ms. Leftwich to speak with Mr. Carlson, who was the manager on duty. Mr. Carlson denied the request to leave early and reminded Ms. Leftwich that she was scheduled to work until 10:00 p.m. At approximately 9:00 p.m., Mr. Carlson was called to the customer service area to assist a customer who desired a refund. The customer had telephoned the store approximately 30 minutes earlier and spoken with Ms. Leftwich. Ms. Leftwich had assured the customer that someone would be at the store to assist her with her refund. Mr. Carlson was not trained in operating the customer service area and sought Ms. Leftwich so that she could assist the customer. Mr. Carlson discovered that Ms. Leftwich had left work early without permission and despite Mr. Carlson's earlier instructions to stay until 10:00 p.m. In addition to leaving work early without authorization, Ms. Leftwich had left without properly securing cash register drawers and lottery tickets.

Prior to the incident on February 11, 2006, Ms. Leftwich had established a consistent pattern of tardiness. On July 8, September 21, October 23, 2005; and February 1, 2006, the employer issued reprimands to Ms. Leftwich regarding her attendance. The October reprimand involved a three-day suspension. The February 1 reprimand involved a five-day suspension. At the time of the February 1 reprimand, the employer advised Ms. Leftwich that further attendance issues would result in her termination from the employment.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Leftwich was discharged for misconduct in connection with the employment. It does.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has 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).

Though past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct must be based on a current act. See 871 IAC 24.32(8).

In order for Ms. Leftwich's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the final 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).

Continued failure to follow reasonable instructions constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). An employee's failure to perform a specific task may not constitute misconduct if such failure is in good faith or for good cause. See Woods v. Iowa Department of Job Service, 327 N.W.2d 768, 771 (Iowa 1982). The administrative law judge must analyze situations involving alleged insubordination by

evaluating the reasonableness of the employer's request in light of the circumstances, along with the worker's reason for non-compliance. See Endicott v. Iowa Department of Job Service, 367 N.W.2d 300 (Iowa Ct. App. 1985).

The evidence in the record establishes that Ms. Leftwich's unauthorized early departure from the workplace on February 11, 2006 was an unexcused absence. The evidence further establishes that this absence and Ms. Leftwich's consistent pattern of tardiness in light of repeated reprimands constituted excessive unexcused absences. In addition, the evidence in the record establishes that on February 11, 2006, Ms. Leftwich unreasonably and intentionally disregarded the employer's reasonable directive to work until the end of her scheduled shift.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Leftwich was discharged for misconduct. Accordingly, Ms. Leftwich is disqualified for unemployment insurance benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account will not be charged for benefits paid to Ms. Leftwich.

DECISION:

The Agency representative's decision dated February 28, 2006, reference 01, is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

jt/s