

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JENNIFER A BICKHAM
Claimant

APPEAL NO. 13A-UI-00693-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

“O'REILLY AUTOMOTIVE INC
Employer

OC: 02/19/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Jennifer Bickham filed a timely appeal from a representative's decision dated January 16, 2013, reference 04, which denied unemployment insurance benefits finding the claimant was discharged from work on December 7, 2012 for excessive, unexcused absenteeism and tardiness after being warned. After due notice was provided, a telephone hearing was held on February 13, 2013. Claimant participated. Participating on behalf of the claimant was Mr. Nicholas Schull, Attorney at Law. The employer participated by Ms. Whitney Smith-McIntosh, Human Resource Supervisor and Ms. Cheryl Branson, Supervisor. Claimant's Exhibits One, Two and Three were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Jennifer Bickham began employment with O'Reilly Automotive, Inc. on October 31, 2012. Claimant was hired as a full-time outbound maintenance handler trainer and was being paid by the hour. Claimant was employed full time and normally began her work shift at 5:00 a.m. Ms. Bickham was discharged on December 7, 2012 when she exceeded the permissible number of attendance infractions allowed under company policy for probationary employees.

Under the company's attendance policies probationary employees are subject to discharge if they incur two or more attendance infractions within their first 84 days of employment. Ms. Bickham was discharged on December 7, 2012 when she reported to work approximately 11 minutes late after experiencing car problems en route to work. Ms. Bickham had called her employer at 4:45 a.m. prior to the beginning of the work shift to inform the employer that her car had quit and that she was obtaining supplementary transportation to work. Because the company had issued Ms. Bickham one previous warning about attendance, the employer

concluded she was in violation of the company's attendance policy and Ms. Bickham was discharged from employment.

Prior to the claimant being hired by the company it was agreed by the parties that the claimant could be off work for some specified days related to the medical needs of her children. On November 27, the claimant was approximately eight minutes late but that time was not held against the claimant. Subsequently that day the claimant was injured at work and had a doctor's appointment. Ms. Bickham was ill and had a doctor's appointment on November 28. The claimant's doctor provided a doctor's note verifying the claimant's need to be absent for medical reasons from November 27 through December 3, 2012. (See Claimant's Exhibit One).

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits. 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(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(7) provides:

(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.

The employer has the burden of proof in establishing job disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant but whether the claimant is entitled to unemployment insurance benefits. Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants the denial unemployment insurance benefits are two separate decisions. Pierce v. Iowa Department of Job Service, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not always serious enough to warrant a denial of unemployment insurance benefits. Such misconduct must be “substantial.”

The Supreme Court of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive, unexcused absenteeism is a form of job misconduct. The Court held that the absences must both be excessive and unexcused and that the concept includes tardiness, leaving early, etc. The Court further held that absence due to illness and other excusable reasons are deemed excused if the employee properly notifies the employer. In the case at hand the claimant's previous attendance infractions were related to medical issues and the claimant supplied medical documentation to the employer supporting her need to be absent for medical reasons and the absences appear to have been properly reported. Under those circumstances those absences are considered excused.

The final attendance infraction that caused the claimant's discharge took place on December 7, 2012. On that date Ms. Bickham was en route to work during early morning hours and her vehicle quit. Claimant testified under oath that she contacted the employer prior to the beginning of her work shift and reported to work at 5:11 a.m., 11 minutes after her scheduled working time. In contrast, the employer's witnesses assert that the claimant reported to work late and did not notify the employer until after the beginning of her work shift. The Supreme Court of Iowa in the case of Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989) held that a single, unexcused absence does not constitute misconduct even in a case where the worker disregarded specific instructions to call the employer and report his status.

The administrative law judge, after considering the matter at length, concludes that the evidence in the record establishes that Ms. Bickham's previous attendance infractions were due to medical reasons properly reported and verified by medical documentation. As such, they were excused under the provisions of the Iowa Employment Security Law. The claimant's final attendance infraction, even if viewed in the light most favorable to the employer, constituted a single, unexcused absence and, therefore, did not constitute job disqualifying misconduct. See Sallis v. Employment Appeal Board, 437 N.W.2d 895 (Iowa 1989).

For the reasons stated herein, the administrative law judge concludes that while the claimant's discharge may have been a good management decision, the reasons for the claimant's discharge did not constitute disqualifying misconduct within the meaning of the Employment Security Law. Benefits are allowed, providing the claimant is otherwise eligible.

DECISION:

The representative's decision dated January 16, 2013, reference 04, is reversed. Claimant was discharged under non disqualifying conditions. Unemployment insurance benefits are allowed, providing the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/pjs