

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**MICHELLE KIMBLE**

Claimant

**APPEAL NO: 12A-UI-12413-BT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**BURKE MARKETING CORPORATION**

Employer

**OC: 09/23/12**

**Claimant: Appellant (2)**

Iowa Code § 96.5-2-a - Discharge for Misconduct  
871 IAC 24.32(7) - Excessive Unexcused Absenteeism

**STATEMENT OF THE CASE:**

Michelle Kimble (claimant) appealed an unemployment insurance decision dated October 11, 2012, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Burke Marketing Corporation (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 13, 2012. The claimant participated in the hearing with Attorney Ryan Beattie. The employer participated through Shelli Seibert, Human Resources Generalist; Terry Ubben, Human Resources Manager; and Kaelen Randall, Second Shift Superintendent. Employer's Exhibits One through Six were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

**ISSUE:**

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

**FINDINGS OF FACT:**

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time sanitation laborer from July 7, 2008 through September 24, 2012 when she was discharged for violation of the employer's attendance policy. The attendance policy allows four credits or personal days per year and credits can be taken in half shift increments. Employees who have attendance points as of December 31 are not eligible for four days but are eligible for two days. After exhausting personal days, employees are assessed one attendance point for an absence and a half point for tardiness. Employees are discharged if they accumulate four attendance points. Points are deleted from the employee's record one year from the date the point was assessed or accrued.

Prior to September 20, 2011, the sanitation employees were not assessed attendance points for tardiness but Production Superintendent Kaelen Randall met with them on that date to notify the employees that the attendance policy would be enforced thereafter. He specifically advised

them that they would now receive points if they clocked in after 11:00 p.m. but offered to discuss schedule changes.

The claimant was late on September 21, 22, 26 and 27 but did not accumulate attendance points since she had two credits. Mr. Randall personally met or spoke with the claimant on September 21 and again on September 28. The claimant subsequently received a verbal warning on October 4 for a half point, a written warning on October 11 for 2.5 points, and a final written warning on October 27 for 3.5 points. An additional warning was issued on November 30 for 3.5 points. The half point from October 20 was removed and a half point was assessed for being late on November 9.

Two credits or personal days were given to her on January 1, 2012 and she used one of those days on January 1. The other credit was used when she was late on January 4 and March 1. The employer discharged her on September 24, 2012 after she was late for work on September 16, 2012. The claimant was scheduled to report to work at 12:00 a.m. and she reported to work at 12:22 a.m. She testified that she was intentionally late to work because she wanted to make sure she did not go over 40 hours since she had a 40-hour work restriction but she had only worked four days that week.

#### **REASONING AND CONCLUSIONS OF LAW:**

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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,

*<http://www.iowaworkforce.org/ui/appeals/index.html>*

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.

The employer has the burden to prove the discharged employee is disqualified for benefits for misconduct. *Sallis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). The claimant was discharged on September 24, 2012 for excessive unexcused absenteeism. Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Although the claimant clearly violated the employer's attendance policy, she was discharged for three unexcused absences in a ten-month period, which is not excessive. Work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

**DECISION:**

The unemployment insurance decision dated October 11, 2012, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Susan D. Ackerman  
Administrative Law Judge

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Decision Dated and Mailed

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