

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BENJAMIN A WASHINGTON
Claimant

APPEAL NO. 13A-UI-00893-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

NOODLES & COMPANY
Employer

OC: 12/23/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from the representative's decision dated January 18, 2013, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice was issued, a hearing was held by telephone conference call on March 27, 2013. The claimant participated personally. The employer participated by Eric Rorabacher, general manager. The employer was represented by Philip Gatewood. The record consists of the testimony of Eric Rorabacher and the testimony of Benjamin Washington.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge makes the following findings of fact:

The employer is a restaurant located in Coralville, Iowa. The claimant was hired on March 7, 2012, as a part-time culinary team member. His last day of work was November 28, 2012. He was terminated after a no-call/no-show on November 29, 2012.

The claimant's attendance record showed the following:

August 7, 2012	Tardy
October 5, 2012	No-call/no-show Later came in for work -- tardy
November 7, 2012	Tardy
November 28, 2012	Tardy first shift – No-call/no-show for second shift of day
November 29, 2012	No-call/no-show

The claimant received verbal and written counseling from the employer concerning his tardiness.

REASONING AND CONCLUSIONS OF LAW:

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.

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 transportation problems and oversleeping, is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). The employer has the burden of proof to show misconduct.

The claimant is not eligible for unemployment insurance benefits. The employer showed that within a period of August 7, 2012, through November 29, 2012, the claimant had four instances of tardiness and two instances of no-call/no-show. The claimant admits to some absence and some tardiness but disputes that he was absent or tardy on the days listed by the employer. The employer provides the more credible evidence as it appears that each absence or tardiness was recorded by the employer and that the employer actually spoke to the claimant about his ongoing attendance problem. The claimant's absences are all unexcused with the possible exception of October 5, 2012, when he claims he was sick. Whether the employer's dates are used or the claimant's dates are used, the conclusion is the same: the claimant was discharged for excessive unexcused absenteeism after being warned. This is misconduct. Benefits are denied.

DECISION:

The unemployment insurance decision dated January 18, 2013, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until claimant has worked in and been paid wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs