

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LYNN C HERIFORD
Claimant

APPEAL NO. 07A-UI-11321-S2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

QUIKTRON
Employer

**OC: 11/04/07 R: 03
Claimant: Respondent (2)**

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Quiktron (employer) appealed a representative's December 7, 2007 decision (reference 01) that concluded Lynn Heriford (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 20, 2007. The claimant participated personally. The employer participated by Christopher Yarkosky, Purchasing Inventory Logistics Manager, and Terry Martin, Human Resources Generalist. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

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 hired on November 21, 2005, as a full-time shipping clerk. She has an eight-year-old son. The claimant signed for receipt of the employer's handbook/attendance policy and updates on November 21, 2005, and October 1, 2007. The claimant was absent eighteen times between November 22, 2006, and June 4, 2007. She was absent five times for illness, twice because her son was ill, once to meet his teacher, twice for car issues, once for bus issues, once for a school delay, once because her grandmother was ill, three times for unknown personal reasons and twice for childcare issues.

The employer issued the claimant a verbal warning on July 11, 2007, for attendance. She told the employer she would be absent on July 9 and 10, 2007, because she was "not feeling so hot." She took time off the morning of July 11, 2007, to take her son to the dentist. Later she told the employer that she was not really sick, she just needed to take time off. On August 27, 2007, the employer gave the claimant another verbal warning for attendance. The claimant did not attend work on August 24, 2007, because school was canceled. The employer issued the claimant a written warning on September 14, 2007, for absenteeism. The claimant stayed home

with her son who had a fever on September 11, 2007. The employer notified the claimant that further infractions could result in termination from employment.

On November 2, 2007, the claimant notified the employer that she could not come to work in the morning because she did not have care for her sick son. The claimant arrived at work at noon. The employer terminated the claimant for excessive unexcused absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was discharged for misconduct.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). In light of good faith effort, absences due to inability to obtain childcare for a sick infant, although excessive, did not constitute misconduct. McCourtney v. Imprimis Technology, Inc., 465 N.W.2d 721 (Minn. App. 1991). Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Absenteeism arising out of matters of purely personal responsibilities such as childcare and transportation are not excusable. Higgins v. Iowa Department of Job Service, 275 N.W.2d 187 (Iowa 1984).

The claimant's final absence was due to her lack of childcare, a personal issue. The childcare was for a sick eight-year-old, not an infant. The claimant's absence due to lack of childcare for her sick eight-year old arises from a purely personal responsibility. The claimant made no attempt to seek alternative childcare even though she was informed that her job was in jeopardy. Therefore, the claimant's absence is not excusable. The employer has met its burden of proof to show misconduct. The claimant is not eligible to receive unemployment insurance benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received benefits since filing the claim herein. Pursuant to this decision, those benefits now constitute an overpayment which must be repaid.

DECISION:

The representative's December 7, 2007 decision (reference 01) is reversed. The claimant is not eligible to receive unemployment insurance benefits because the claimant was discharged from work for misconduct. Benefits are withheld until the claimant has worked in and has been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible. The claimant is overpaid benefits in the amount of \$1,278.00.

Beth A. Scheetz
Administrative Law Judge

Decision Dated and Mailed

bas/css