

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMIE BOINSKI
Claimant

GMRI INC
Employer

APPEAL NO. 12A-UI-07022-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/20/12
Claimant: Appellant (2)

Section 96.5-2-A – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated June 6, 2012, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on August 16, 2012, in Davenport, Iowa. The claimant participated personally. The employer did not show up for the hearing and did not participate. The record includes the testimony of Jamie Boinski and Claimant's Exhibits A-D.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witness and having considered all of the evidence in the record, makes the following findings of fact:

The employer operates a Red Lobster restaurant in Davenport, Iowa. The claimant was hired on July 2, 2008. She was a full-time server. Her last day of work was May 18, 2012. She was terminated on May 20, 2012.

The incident that led to the claimant's termination occurred on May 19, 2012. The claimant was unable to come to work due to personal illness. She called her employer and reported her absence. The claimant called the next day and was told that she had been terminated.

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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

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 illness and other excusable reasons is deemed excused if the employee properly notifies the employer. See Higgins, supra, and 871 IAC 24.32(7). In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Greene v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to establish misconduct.

There is no evidence of misconduct in this record. The employer did not participate in the hearing and offered no evidence of misconduct. The claimant was terminated after she was unable to work due to personal illness. This illness was properly reported and there is an excused absence under unemployment insurance law. Since the employer did not show that the claimant was discharged for a current act of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 6, 2012, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

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