

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ADAM J GERISCHER
Claimant

APPEAL NO. 09A-UI-03012-E2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

KRAFT PIZZA CO
Employer

**OC: 01/18/09
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from a decision of a representative dated February 16, 2009, reference 01, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 13, 2009. The claimant participated personally. The employer participated by Julie Stokes, Associate Human Resource Manager. The claimant failed to respond to the hearing notice and did not participate.

ISSUES:

The issues in this matter are whether the claimant was discharged for misconduct and is overpaid unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds: Claimant last worked for the employer January 11, 2009. He started his work for the employer August 21, 2004. He was working the second shift as a “drop room” employee at the time of his termination.

The employer discharged claimant on January 23, 2009 because he left work early on January 11, 2009 without checking with his supervisor. The claimant told Ms. Stokes on January 12, 2009 that he was not feeling well and left early. Ms. Stokes said the claimant informed a co-employee he was leaving, as he could not find a supervisor to report his leaving to. The claimant did not borrow a cell phone to call a supervisor. The employer has a progressive disciplinary policy. They have a two-day no-call/no-show termination policy. The employer considered the claimant’s leaving on January 11, 2009 to be serious enough to warrant immediate termination. The claimant was told in the past he was not to sign himself in a book when he left early. It was not a warning. He did not have any written warnings about leaving early.

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.

The gravity of the incident, number of policy violations, and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. While three is a reasonable interpretation of excessive based on current case law. The claimant leaving early is an unexcused absence. The claimant had not received prior written warnings about leaving early. He was counseled about not signing himself out in a book. The claimant's leaving early without permission, based upon the evidence presented, was not misconduct. It

was an error of judgment. While it may be reasonable grounds for termination, it is not misconduct for unemployment benefit purposes.

The administrative law judge holds that the evidence has not establish that claimant was discharged for an act of misconduct when claimant violated the employer's policy concerning leaving early.

DECISION:

The decision of the representative dated February 16, 2009, reference 01, is affirmed. The claimant is eligible to receive unemployment insurance benefits, provided the claimant meets all other eligibility requirements.

James Elliott
Administrative Law Judge

Decision Dated and Mailed

jfe/kjw