

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUELLA ABNER
Claimant

APPEAL NO. 10A-UI-06642-MT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ABM JANITORIAL SERVICES NORTH
CENTRAL INC**
Employer

OC: 03/21/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated April 30, 2010, reference 02, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 24, 2010. Claimant participated personally. Employer participated by Sandy Linsin, Hearing Representative Employer's Edge with witness Sawn Conrad, Human Resource Manager. Exhibits One through Eleven were admitted into evidence.

ISSUE:

The issue in this matter is whether 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: Claimant last worked for employer on March 8, 2010.

Claimant was discharged on March 25, 2010 by employer because claimant went off work due to her brother's death and missed too many days. Claimant was granted leave until March 17, 2010. Claimant did not return to work but instead called in absent. Claimant called in for the next three days. Claimant called the supervisor to report the absences. Employer warned claimant on March 19, 2010 that if she did not come to work that night she would face discharge. Claimant agreed to come in on March 19, 2010. Claimant later called Lonnie, a supervisor, and told him that she was not coming to work because she was sick. Claimant was then suspended three days pending investigation. Claimant was discharged for missing three days of work without excuse or calling in. Employer's absenteeism policy deems three absences as a dischargeable offense.

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.

871 IAC 24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

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. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this matter, the evidence fails to establish that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning absenteeism. Claimant was warned concerning this policy.

The last incident, which brought about the discharge, fails to constitute misconduct because the last and final incident was due to illness and properly reported. The final missed day was March 19, 2010. Claimant did call her supervisor to report her absence. Claimant was absent due to illness. Absenteeism due to illness is excusable if properly reported. Claimant's testimony was under oath. Employer relied on hearsay to disprove claimant's version of the events. Where conflicts exist in the testimony the sworn testimony is found more credible. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated April 30, 2010, reference 02, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Marlon Mormann
Administrative Law Judge

Decision Dated and Mailed

mdm/pjs