

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BRIANNA N WALSHBOSTWICK
Claimant

APPEAL NO. 12A-UI-09295-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

SLB OF IOWA LC
Employer

**OC: 07/01/12
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a decision of a representative dated July 26, 2012, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on August 27, 2012. The claimant participated personally. The employer participated by Tom Reavis, human resources generalist; Dawn Stika, general manager; and Matt Breitbach, assistant manager. The record consists of the testimony of Tom Reavis; the testimony of Dawn Stika; the testimony of Matt Breitbach; the testimony of Brianna Walshbostwick; Claimant's Exhibit A; and Employer's Exhibits 1-4.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

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

The employer is Panera Bread of Iowa. The claimant worked at a store in Cedar Rapids, Iowa. The claimant was hired on December 13, 2011, as a part-time customer service representative. The claimant was terminated on July 6, 2012.

The incident that led to the claimant's termination was a no call/no show on July 5, 2012. The claimant had had three previous incidents of no call/no show on March 22, 2012; May 20, 2012; and May 31, 2012. The reason the claimant was absent was due to a child's illness on July 5, 2012. The employer had excused the claimant for July 3, 2012, and July 4, 2012, but the employer had no information that the claimant was going to be absent on July 5, 2012. The claimant did not call in and report an absence for July 5, 2012, and did not show up for her scheduled shift.

The claimant had been given a final written warning on May 31, 2012. She was told that failure to correct her behavior would result in possible termination. (Exhibit 4)

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). 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). 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 proving misconduct.

In this case, the claimant was terminated after four incidents of no call/no show. The final incident occurred on July 5, 2012. Although the claimant testified that she had been given permission to be off work by Mike Breitbach, Mr. Breitbach testified that she had never asked for that day off and was on the schedule. The fact that the claimant had a doctor's excuse does not change the result. The claimant was off work for a child's illness. Childcare is a personal responsibility. Even if the claimant's absence was due to an emergency she still was obligated to call in and report her absence. She did not. Her final absence is therefore considered unexcused. Four instances of no call/no show in a five-month period is misconduct. Benefits are denied.

DECISION:

The decision of the representative dated July 26, 2012, 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