

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

KRISTINA M CUNNINGHAM
1688 OTTERVILL BLVD
INDEPENDENCE IA 50644

BERTCH CABINET MFG INC
PO BOX 2280
WATERLOO IA 50704

Appeal Number: 05A-UI-02014-JTT
OC: 01/02/05 R: 03
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32-7 – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Kristina Cunningham filed a timely appeal from the February 18, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 14, 2005. Ms. Cunningham participated in the hearing. Bertch Cabinet did not respond to the notice of the hearing and did not participate. The employer had provided four documents at the time of the fact-finding interview and those four documents were received into evidence at the hearing as Exhibits One through Four.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kristina Cunningham was employed by Bertch Cabinet as a full-time Finishing Apprentice from September 7, 2000 until January 20, 2005, when Department Leader Scott Kohlmeyer and Human Resources Director Mitzi Tann discharged her for excessively “unexcused” absences under the employer’s absenteeism policy.

The last absence that prompted the employer to discharge Ms. Cunningham occurred on January 18, 2005. On that date, Ms. Cunningham notified the employer at approximately 5:30 a.m. that she needed to be absent because two of her children was sick. On January 18, Ms. Cunningham did in fact take two of her children to the doctor. Ms. Cunningham had previously been absent on the following dates: August 16, 2004; September 7, 2004, absent due to sick child; October 12, 2004, absent to due illness; January 12, 2005, tardy 61 minutes because school was cancelled due to road conditions and Ms. Cunningham needed to contact a babysitter on short notice to arrange for child care.

The employer’s absenteeism policy is set forth in the employee handbook. Ms. Cunningham received a copy of the handbook and was aware of the policy. Under the policy, one “unexcused” absence during a rolling six-month period results in a verbal warning, a second “unexcused” absence results in a written warning, and a third “unexcused absence” results in termination of the employee. Under the policy, absences due to illness are considered “unexcused” unless the employee has requested and received a leave of absence. Ms. Cunningham did not request a leave of absence for her absence on January 18, 2005. The employer’s attendance policy requires employees to notify the employer within two hours after the start of a scheduled shift if the employee needs to be absent, by calling a designated telephone line and leaving a message. In addition, employees are granted 16 hours “unpaid time” annually. Apparently, an employee may use this time for “unexcused” absences without incurring a formal warning. Ms. Cunningham was under the belief that she was awarded 16 hours “unpaid time” at the beginning of the calendar and had such time available to her on January 18, 2005.

Ms. Cunningham had received two warnings in October 2004 based on her “unexcused” absences. On October 11, Ms. Cunningham received a warning based on the two “unexcused” absences on August 16 and September 9. On October 25, Ms. Cunningham received a second warning for based on the two previous “unexcused” absences and an additional “unexcused” absence on October 12.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Cunningham was discharged for misconduct in connection with his employment based on excessive unexcused absences. It does not.

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(7), (8) provide:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

(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.

Because the claimant was discharged, the employer bears the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

In order for Ms. Cunningham's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the employer must show that the absences were excessive and that the absences were unexcused. See 871 IAC 24.32-7. The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32-8. Absences related to issues of personal responsibility such as transportation are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Based on a careful review of the evidence in the record, as set forth in the Findings of Fact, the administrative law judge concludes that Ms. Cunningham's absence of January 18, 2005 was for the illness of a child properly reported to the employer. The employer has failed to prove a final or "current act" of misconduct on the part of Ms. Cunningham. See 871 IAC 24.32(8). Ms. Cunningham was discharged for no disqualifying reason. Accordingly, no disqualification will enter.

DECISION:

The representative's decision dated February 18, 2005, reference 01, is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible to receive benefits provided she meets all other eligibility requirements.

jt/kjf