

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**ELIZABETH M CLEMMENSEN**  
Claimant

**APPEAL NO. 10A-UI-03305-VST**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**J & M PARTNERSHIP**  
Employer

**OC: 02/07/10**  
**Claimant: Appellant (1)**

Section 96.5-2-a - Misconduct

**STATEMENT OF THE CASE:**

Claimant filed an appeal from a decision of a representative dated February 25, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on April 14, 2010. Employer participated by Liz Fischer, restaurant manager. Although the claimant did provide a telephone number at which she could be reached, she did not answer her phone when she was called. A message was left for her on how to participate in the hearing. She did not call in prior to the closing of the record. The record consists of the testimony of Liz Fischer.

At 9:06 a.m. the claimant did call. The hearing had been over and the record closed since 8:44 a.m. The claimant said she missed the call because she was changing her daughter's diaper. She said she called as soon as she got the message. The administrative law judge explained that the message had been left at 8:35 a.m. and that had she called during the hearing, she would have been able to participate in the hearing. The claimant could not explain why she waited until 9:06 a.m. to return the call. The administrative law judge declined to reopen the record.

**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 is a McDonalds restaurant located in Evansdale, Iowa. The claimant was hired as a part-time crew person on September 28, 2009. She was terminated on February 6, 2010, for excessive absenteeism and a failure to call in to report her absences.

The incident that immediately preceded the claimant's termination took place on February 6, 2010. The claimant was a no call/no show for her shift, which was to have started at 7:00 a.m. The claimant did not call until after her shift began to say that she would be unable to come to

work due to transportation problems. The assistant manager who took the call informed the claimant that she would have to talk to Ms. Fischer, the manager. Ms. Fischer told the claimant she no longer had a job due to her failures to come to work and properly report any absence.

The claimant was a no call/no show on January 11, 2010; December 31, 2009; December 30, 2009; December 29, 2009; and August 30, 2009. The absences in December were due to lack of transportation. She was also a late call/no show on January 2, 2010, due to her daughter being in the hospital. The employer required employees to call in three hours prior to the start of their shift if they were going to be absent. The claimant was given six written warnings for attendance prior to her termination. The handbook and the warnings stated that termination could result from excessive absenteeism.

### **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.

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 duty owed by the worker to the employer. Excessive unexcused absenteeism is one form is misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The concept includes tardiness. Absence due to matters of personal responsibility", e.g. transportation problems and oversleeping is considered unexcused. See Harlan v. IDJS, 350 N.W.2d 192 (Iowa 1984). The employer has the burden of proof to show misconduct.

The evidence in this case established excessive unexcused absenteeism. The claimant had received six written warnings concerning her termination prior to her no call/no show on February 6, 2010. With one exception, her absences were due to transportation problems. Transportation to work is a matter of personal responsibility and the inability to come to work because of transportation problems is unexcused. In addition, the claimant did not properly notify her employer that she was going to be absent. She was required to call in three hours prior to the beginning of her shift and if she did call her employer, it was after her shift began. Misconduct has been shown. Benefits are denied.

**DECISION:**

The decision of the representative dated February 25, 2010, 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.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

vls/pjs