

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CARISSA A GERICKE
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 13A-UI-12897-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 10/27/13
Claimant: Appellant (1-R)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism/Tardiness
871 IAC 24.32(8) – Current Act
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated November 18, 2013 reference 01 that held the claimant was discharged for misconduct on October 30, 2013 and benefits are denied. A hearing was held on December 10, 2013. The claimant participated. Treve Lumsden, Representative, Dick Ford, Administrator, and Maureena Prakash, DON, participated for the employer.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge having heard the witness testimony and having considered the evidence in the record finds that: The claimant worked as a full-time LPN for the employer at Lantern Park from July 21, 2009 to October 30, 2013. She received the employer attendance policy that does provide for discipline. She became pregnant in the early part of 2013 and began to experience complications.

The employer did discipline claimant prior to her pregnancy with a verbal warning and written warning. The December 28, 2012 verbal warning lists a number of tardiness and the February 13, 2013 warning lists two absences and one tardy. After claimant became pregnant, she was issued a written warning on June 21, 2013 for tardiness. She was advised she could be terminated.

Claimant did discuss her morning sickness issue with the DON. The DON gave claimant some measure of tolerance for being late due to this problem but she was not given an open-ended, indefinite excuse for being late for this reason.

The employer issued claimant a final warning for tardiness on October 11, 2013. Claimant was late August 11, and September 24, 25. The warning states any further 2 late(s) will mean termination.

Claimant was late on October 20, 25 and 28. She was to report at 6:00 am on October 28 and she clocked-in at 6:12 am. The DON recalls she offered having to stop for gas as a reason for being late on October 25. Claimant attributes being late due to morning pregnancy sickness. She thought she had a ten-minute leeway for reporting to work but the employer denies it.

As of the date of this hearing, claimant is overdue her delivery date by two days.

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(7) provides:

(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.

The administrative law judge concludes employer established misconduct in the discharge of the claimant on October 30, 2013, for excessive "unexcused" tardiness.

The employer established claimant was habitually late for work and disciplined before her pregnancy. While there might have been some tardiness issues due to morning sickness, the DON did not give claimant a blanket excuse for being late for this reason as evidence by the June and October final warning.

Claimant did not refute she told the DON she was late on October 25 to stop for gas on the way to work. Job disqualifying misconduct is established due to excessive unexcused tardiness.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements

of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge further concludes the issue whether claimant s able and available for work due to pregnancy is remanded to claims for a decision. Claimant is two days beyond her delivery date as of the date of this hearing. The general medical practice restricts an individual for up to six weeks from delivery.

DECISION:

The decision of the representative dated November 18, 2013, reference 01, is affirmed. The claimant was discharged for misconduct in connection with employment on October 30, 2013. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times her weekly benefit amount, provided the claimant is otherwise eligible. The able and available issue is remanded.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs