

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**PEGGY A LLENICKA**  
Claimant

**APPEAL NO. 09A-UI-08712-JTT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**KWIK SHOP INC**  
Employer

**OC: 05/10/09**  
**Claimant: Respondent (1)**

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

**STATEMENT OF THE CASE:**

The employer filed a timely appeal from the June 12, 2009, reference 01, decision that allowed benefits. After due notice was issued, a hearing was held on July 17, 2009. Claimant Peggy Lnenicka participated. Liz Sillars of TALX represented the employer and presented testimony through Judy Jakel, Store Manager. Exhibits One through Six were received into evidence.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Peggy Lnenicka was employed by Kwik Shop as a full-time clerk from August 2008 until May 11, 2009, when Store Manager Judy Jakel discharged her for attendance.

The employer's written attendance policy required that Ms. Lnenicka notify the employer at least four hours prior to the scheduled start of her shift if she needed to be absent. The policy required that Ms. Lnenicka make the call in to the employer, but provided an exception in cases of emergency. The employer's attendance policy also required that Ms. Lnenicka notify the employer if she was going to be late. The policy was reviewed with Ms. Lnenicka as part of her initial training and appeared in an employee handbook.

The final absence that triggered the discharge occurred on May 11, 2009. On that date, Ms. Lnenicka was supposed to work at noon. Ms. Lnenicka had agreed to work the shift in exchange for another employee's agreement to work the balance of Ms. Lnenicka's evening shift on May 10, 2009. On the evening of May 10, 2009, Ms. Lnenicka was at work when she learned that her daughter had gone into labor. Ms. Lnenicka contacted the acting assistant manager and asked that person if she could leave early. The acting assistant manager agreed to come in and work the remainder of the shift in exchange for Ms. Lnenicka's agreement to work a shift at noon on May 11.

On the evening of May 10, Ms. Lnenicka went to the hospital to be with her daughter. Ms. Lnenicka intended to report for her shift at noon on May 11. At 11:30 a.m. on May 11, as Ms. Lnenicka was preparing to leave the hospital so that she could report her shift, Ms. Lnenicka learned that the doctors were going to perform an emergency caesarian operation. Ms. Lnenicka went into the operating room with her daughter, where she remained until the operation was completed, two hours later. Ms. Lnenicka had another daughter notify the employer that she would be absent from her shift. The daughter telephoned the employer at 11:40 a.m. and spoke with Ms. Jakel. Ms. Jakel notified the daughter that Ms. Lnenicka needed to make the call to the employer. When Ms. Lnenicka was done at the hospital, she called the workplace, but Ms. Jakel had already left for the day. Ms. Lnenicka had a cell phone number for Ms. Jakel, but did not attempt to reach Ms. Jakel at the cell phone number.

On the evening of May 10, Ms. Lnenicka had arrived 20 minutes late for her 4:30 p.m. shift because she had overslept. On November 18, 2008, Ms. Lnenicka had appeared approximately half an hour late for her shift for personal reasons. On November 5, 2008, Ms. Lnenicka had been absent for personal reasons.

#### **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.

The employer has 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 a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish 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 and oversleeping 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. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The weight of the evidence indicates that the notice Ms. Lnenicka gave to the employer regarding her absence from the May 11 shift was reasonable and appropriate under the circumstances. The emergency caesarian procedure constituted a bona fide emergency that justified Ms. Lnenicka having her daughter notify the employer of the absence. Ms. Lnenicka had planned to report for her shift at noon on May 11. Ms. Lnenicka only learned of the emergency procedure half an hour before the scheduled start of her shift and, therefore, could not have complied with the employer's four-hour notice requirement. The administrative law judge concludes that the May 11 absence was an excused absence under the applicable law. Because the final absence was an excused absence, the administrative law judge need not further consider the prior absences.

Because the final absence that triggered the discharge was an excused absence, the administrative law judge concludes that Ms. Lnenicka was discharged for no disqualifying reason. Accordingly, Ms. Lnenicka is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Lnenicka.

**DECISION:**

The Agency representative's June 12, 2009, reference 01, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

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James E. Timberland  
Administrative Law Judge

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Decision Dated and Mailed

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