

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

ANNA SCHWEIHS
Claimant

NORDSTROM DISTRIBUTION MGMT INC
Employer

APPEAL NO. 14A-UI-09333-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 08/03/14
Claimant: Appellant (1)**

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated August 29, 2014, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on September 30, 2014. Claimant participated. Employer participated by Pixie Allan with witness Mauricio Castaneda.

ISSUE:

The issue in this matter is whether claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant had an autoimmune illness that made work for her very difficult at times. Claimant last worked for employer on July 7, 2014. Claimant had delivered a doctor's note on July 7, 2014 releasing her to return to work. Claimant did not work after July 7, 2014. Claimant called off for work every day until July 15. Claimant was off work the rest of the month in July, but did not call in to her employer again.

Employer sent an email to claimant on July 29, 2014 stating that claimant needed to be in contact or she would be considered terminated for a failure to show for work or contact the company. On July 31, 2014 claimant emailed employer responding to the email. On July 30, 2014 employer sent a certified letter stating that claimant would have to be in contact with employer by August 6, 2014 or she would be terminated. Claimant was in touch with employer by August 6. When claimant was in contact with employer, employer notified claimant that she would no longer have employment as employer had no way to accommodate for her special needs.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(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.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. *Sallis v. EAB*, 437 N.W.2d 895 (Iowa 1989). *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. *Clark v. Iowa Department of Job Service*, 317 N.W.2d 517 (Iowa Ct. App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this matter, the evidence established that claimant was discharged for an act of misconduct when claimant violated employer's policy concerning attendance. Claimant was warned

concerning this policy, and told that she needed to be in contact with her employer regarding her absences. Employer gave claimant an ultimatum that she needed to be in contact by a certain date or she would face job loss. Claimant was in contact with employer by that date. Employer knew of claimant's physical difficulties and made the decision that it could no longer provide substitute work for her. This decision was made easier by the fact that claimant had provided no further doctor's notes since the day that she brought in the note stating she was to return to full-time status with no limitations.

The last incident, which brought about the discharge, constitutes misconduct because claimant had brought in a doctor's note saying she could return to work on July 7, 2014. She only returned for one day, and did not visit the doctor's office again to have the doctor report on her worsening condition. Not only this, but claimant went over a week without ever contacting work to tell of her ongoing absences, in violation of company policy. The administrative law judge holds that claimant was discharged for an act of misconduct and, as such, is disqualified for the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated August 29, 2014, 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.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/css