

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RAMONA VERA
Claimant

APPEAL NO: 07A-UI-04122-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

BURKE MARKETING CORPORATION
Employer

**OC: 03-25-07 R: 02
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 16, 2007, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on May 9, 2007. The claimant participated in the hearing with Attorney Jennifer Donovan. Liz Collazo, Senior Human Resources Assistant; Shelly Seivert, Human Resources Generalist; and Amy Heldt, Human Resources Manager; participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time pack room laborer for Burke Marketing Corporation from November 16, 2004 to March 27, 2007. The employer has a no-fault attendance policy and employees are discharged after accumulating four attendance points in one year. The claimant either called and reported she would not be in or completed a time off request form October 30, 2006, November 9, 2006, March 3, 2007 and March 26, 2007. She sustained a work-related injury in October 2006 and testified with the exception of March 3, 2007, those absences were due to pain or problems with her shoulder/arm/hand. The March 3, 2007, absence was due to working on a Saturday after they were off for snow days and the claimant did not have a babysitter. The employer testified she arrived for work March 26, 2006, at 4:20 p.m. ready to work but left after completing a time off request form and telling the human resources generalist she wanted the day off because she was upset another employee was spreading rumors about her. She did not tell the employer she was leaving because of pain in her shoulder/arm/hand. The human resources generalist told her she did not have the authority to grant time off and directed the claimant to speak to her supervisor but she left without doing so and the employer terminated her employment for exceeding the allowed number of attendance points.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). While the administrative law judge did not find the claimant's testimony particularly credible, the fact remains that she had four unexcused absences between October 30, 2006 and March 26, 2007, and it seems likely that at least two absences were due to pain from her work-related injury but one other was due to having to work a Saturday because of a snowstorm earlier that week when she did not have a babysitter. Although the claimant maintains she told the employer she wanted to leave

before the start of her shift March 26, 2007, because her hand/shoulder were bothering her, she had been to the doctor that day and was allowed to return to work on that day. The employer credibly testified the claimant came in around 4:20 p.m., full dressed for the job, to meet with the employer about her complaint about the rumor spread by another employee and did not mention she did not feel well and failed to speak to her supervisor about her complaint regarding the other employee or that she was leaving because of pain in her hand before doing so. Regardless of the reason for the final absence, however, the claimant was discharged for four unexcused absences, as defined by the employer's policy, in a five-month period. Despite the employer's policy, the administrative law judge must conclude the claimant was discharged for accumulating four unexcused absences in five months and that does not rise to the level of disqualifying job misconduct as defined by Iowa law. Therefore, benefits must be allowed.

DECISION:

The April 16, 2007, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs