

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JESSICA M SMITH
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 14A-UI-09114-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 08/18/14
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 28, 2014, reference 04, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on September 23, 2014. Claimant participated personally. Employer participated by Lesley Buhler, with witnesses Brandon Kranovich and Linda Grinstead. Employer's Exhibits 1-6 were admitted into evidence.

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 last worked for employer on August 13, 2014. Employer discharged claimant on August 15, 2014 because of excessive absenteeism and tardiness.

Company has a progressive disciplinary policy. Claimant received an employee handbook upon her hire detailing the company's attendance policy. Claimant accrued points such that she was on the verge of being terminated. Claimant was given a final written warning. Claimant was terminated because of a final no call/no show on August 15th.

On August 13th, claimant explained that she couldn't do her job any more because of her back. Claimant had a history of back problems that caused her to miss much work. On or before the date of August 13, claimant had received a full release from her doctor to return to full duty at work. Claimant was told by her manager on August 13th that she could either resign or be terminated because of points that she had accumulated. Employer had to check with another administrator to see if claimant was to be terminated. Claimant received a call from employer later that day saying she had not in fact been terminated. Claimant called into work the next day, saying she would not be coming into work because of her back. Claimant did not call or come into work on the 15th. Claimant stated that although cleared for general duty that she did not know if she could do the job. Claimant was in fact terminated on August 15 when she did not call or show up for work.

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).

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 not warned concerning this policy. Claimant's attendance problems were documented as caused by myriad problems from no babysitter, to car troubles, to illnesses – they were not just linked to her back issues.

The last incident, which brought about the discharge, constitutes misconduct because claimant knew she was not fired on the 13th of August as she called in sick for work on the 14th. 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 28, 2014, reference 04, 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/pjs