

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ASHLEY L CLENDENEN
Claimant

APPEAL NO. 09A-UI-06212-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

WEAVER ENTERPRISES LTD
Employer

**Original Claim: 03/22/09
Claimant: Respondent (1)**

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Weaver Enterprises, filed an appeal from a decision dated April 13, 2009, reference 01. The decision allowed benefits to the claimant, Ashley Clendenen. After due notice was issued, a hearing was held by telephone conference call on May 18, 2009. The claimant did not provide a telephone number where she could be contacted and did not participate. The employer participated by Director of Operations Terry Moffitt.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Ashley Clendenen was employed by Weaver from July 17, 2008 until January 14, 2009 as a part-time crew member. She was no-call/no-show to work on January 14, 2009, and General Manager Josh Fortner discharged her by phone. The employer's witness asserted she had been no-call/no-show to work for three shifts but could not say what the other two days were other than January 14, 2009. The witness also could not verify the claimant had received the employee handbook or whether she had been issued any other warnings about her attendance. The general manager had that information but he did not testify, as it was his day off.

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.

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 employer has the burden of proof to establish the claimant was discharged for substantial, job-related misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982). In the present case, the employer could only state with any certainty the claimant had been no-call/no-show to work on one day. No testimony was provided as to the other days she missed, whether she received any warnings, or any verification she received the employee handbook, which set out the attendance and disciplinary policies. The employer has failed to give adequate information regarding the claimant's discharge, especially from the person who made the decision, Mr. Fortner. If a party has the power to produce more explicit and direct evidence than it chooses to do, it may be fairly inferred that other evidence would lay open deficiencies in that party's case. *Crosser v. Iowa Department of Public Safety*, 240 N.W.2d 682 (Iowa 1976). The employer has failed to meet its burden of proof and disqualification may not be imposed.

DECISION:

The representative's decision of April 13, 2009, reference 01, is affirmed. Ashley Clendenen is qualified for benefits, provided she is otherwise eligible.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw