

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

BONITA N DUNCAN
Claimant

APPEAL NO. 11A-UI-13266-N

**ADMINISTRATIVE LAW JUDGE
DECISION**

THOMAS L CARDELLA & ASSOCIATES INC
Employer

**OC: 08/28/11
Claimant: Appellant (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated September 30, 2011, reference 01, which denied unemployment insurance benefits. After due notice, a hearing was held in Burlington, Iowa on November 7, 2011. Claimant participated personally. Participating as a witness was Ms. Tina Reid, the claimant's mother. The employer participated by Mr. Corey Nemmers, Operations Manager.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Bonita Duncan was employed by Thomas Cardella & Associates from June 25, 2008 until August 11, 2011 when she was discharged from employment. Ms. Duncan held the position of full-time telesales representative and was paid by the hour.

Ms. Duncan was discharged from her employment after she exceeded the permissible number of attendance infractions allowed under company policy because she had been incarcerated. Because company policy provided that consecutive absences for the same reason would only be assessed one attendance point, the claimant received one point for the days that she was incarcerated. Based upon the number of previous attendance infractions on the final infraction when Ms. Duncan was incarcerated, the claimant exceeded the permissible number of attendance infractions that were allowed under company policy and was discharged from employment.

It is the claimant's position that she should not have been discharged as her mother provided notice of the claimant's incarceration and that the employer was regularly kept informed of the reasons for the claimant's non-attendance at work.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes that Bonita Duncan was discharged for misconduct in connection with the employment. It does.

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.

Since the claimant was discharged 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 insurance benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000).

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct

that is more accurately referred to as tardiness or leaving early. An absence related to issues of personal responsibility such as transportation, lack of childcare or oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. A failure to report to work without notification to the employer is generally considered an unexcused absence. One unexcused absence without a demonstrable history of other unexcused absences or warning is not disqualifying as it does not meet the excessiveness standard.

In this case the claimant had been absent on a number of occasions or had left early prior to being absent for an extended period due to incarceration. Because the absences were consecutive the employer assigned only one attendance infraction point. Ms. Duncan did not report on August 22, 2011 because she was in court again and chose not to report late because she understood that she was to be discharged as exceeding the permissible number of attendance infractions. The administrative law judge concludes thus that the claimant had more than one unexcused absence and at that point the claimant's absences became excessive as well as unexcused. Unemployment insurance benefits are withheld.

DECISION:

The representative's decision dated September 30, 2011, reference 01, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, and is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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