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

NATHAN A HEAGEL
Claimant

APPEAL NO. 12A-UI-06719-ST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARLOS O'KELLY'S INC
Employer

OC: 05/13/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism/Tardiness

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated June 5, 2012, reference 01, that held the claimant was discharged for excessive unexcused absenteeism and tardiness on February 5, 2012, and benefits are denied. A hearing was held on July 2, 2012. The claimant participated. Paul Unsen, GM, participated for the employer. Employer Exhibit 1 was received as evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant worked as a full-time line cook from February 10, 2010 to February 5, 2012. The claimant received the employer attendance policy. The employer keeps a tardy log for being less than 15 minutes late to work and that issues warnings for more than 15 minutes.

The employer issued claimant a written warning on November 20, 2011 for being one-hour late to work. The employer reviewed claimant's past tardiness record and noted on the warning all tardiness issues whether 15 minutes more or less. The employer issued a further written warning on January 17, 2012 for claimant being one-hour late.

Claimant was suspended on January 28 for failing to report or call in an absence for that day. He called two hours after his work shift to say he lost his phone to call in and did not have a ride to work. The employer took him off the schedule until his return at 10:30 a.m. on February 5. When he came to work late 15 minutes on February 5, he was discharged for tardiness.

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(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.

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 administrative law judge concludes the employer established misconduct in the discharge of the claimant on February 5, 2012, for excessive "unexcused" tardiness.

The employer put claimant on notice back in November 2011 he had a tardiness problem. Being late due to oversleeping or transportation problems is not excusable. He was given two more warnings with a suspension and then returned to work late on his first day back. Job disqualifying misconduct is established for repeated unexcused tardiness.

DECISION:

The decision of the representative dated June 5, 2012, reference 01, is affirmed. The claimant was discharged for misconduct in connection with employment on February 5, 2012. Benefits are denied until the claimant requalifies by working in and being paid wages for insured work equal to ten times his weekly benefit amount, provided the claimant is otherwise eligible.

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Randy L. Stephenson
Administrative Law Judge

_____
Decision Dated and Mailed

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