

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHANTEL M BARRON
Claimant

APPEAL NO. 10A-UI-08279-VS

**ADMINISTRATIVE LAW JUDGE
DECISION**

KRAFT PIZZA CO
Employer

OC: 05/16/10
Claimant: Appellant (2)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated June 8, 2010, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on July 29, 2010. Claimant participated. Employer participated by Julie Stokes, human resources manager, and Jessica Ayala, human resources associate. The record consists of the testimony of Julie Stokes; the testimony of Jessica Ayala; the testimony of Chantel Barron; and Claimant's Exhibits A-H.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The employer owns and operates an Oscar Mayer plant located in Davenport, Iowa. The plant produces lunchables; bologna; and deli meats. The claimant was hired as a machine operator on or about May 13, 2002. She was terminated on May 17, 2010, for violation of the employer's attendance policy.

The claimant had received a final written warning concerning her attendance on May 26, 2009. The final written warning stipulated that if the claimant had two occurrences within a two-month period between May 26, 2009, and May 26, 2010, she would be terminated. The claimant had an occurrence from March 11, 2010, through March 26, 2010, as a result of the birth of a baby. The claimant's baby was born on February 18, 2010, but she had exhausted her FMLA leave on March 10, 2010, and was therefore assessed an occurrence. She was sick from May 10, 2010, through May 12, 2010, and received an occurrence. Since she had two occurrences in two different months, she was terminated. The claimant properly notified her employer of her absence from May 10, 2010, through May 12, 2010.

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Excessive unexcused absenteeism is one form of misconduct. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Absence due to illness and other excusable reasons is deemed excused if the employee properly notified the employer. See Higgins, supra, and 871 IAC 24.32(7). In order to justify disqualification, the evidence must establish that the final incident leading to the decision to discharge was a current act of misconduct. See 871 IAC 24.32(8). See also Green v. EAB, 426 N.W.2d 659 (Iowa App. 1988). The employer has the burden of proof to show misconduct.

The evidence in this case failed to establish a current act of misconduct. Although the claimant was discharged based on a violation of the employer's attendance policy, the claimant's absence from May 10, 2010, through May 12, 2010, was due to illness properly reported to the employer. This is considered an excused absence under unemployment insurance law. Since there is no showing of a current act of misconduct, benefits are allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 8, 2010, reference 01, is reversed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs