

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DEBORA K SHADY
Claimant

APPEAL NO. 09A-UI-06427-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

FAMILY DOLLAR SERVICES INC
Employer

**Original Claim: 03/29/09
Claimant: Appellant (1)**

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant, Debora K. Shady, filed an appeal from a decision of a representative dated April 17, 2009, reference 01, which held that the claimant was ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on May 20, 2009. The claimant participated personally. The employer participated by Leah Douglas, human resources director. The record consists of the testimony of Leah Douglas, the testimony of Debora Shady, Employer's Exhibits 1 through 8, and Claimant's Exhibits A through C.

ISSUE:

The issue in this case is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

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

The claimant began working for the employer on March 11, 2002, as a forklift operator. She worked the third shift, which runs from 9:00 p.m. to 5:30 a.m. The claimant was terminated on March 31, 2007, for violation of the employer's attendance policy. The event that led to the claimant's termination was her failure to call in prior to the beginning of her shift on March 24, 2009. She had fallen asleep at home and did not wake up in time to call her employer.

The employer had a written attendance policy and the claimant was aware of this policy. This attendance policy was based on points; and when eight points were accumulated, an employee was terminated. The claimant accumulated eight points with her failure to call on March 24, 2009. Her prior points were assessed for being late, unexcused absences, and no-call, no-shows. Written warnings were given to the claimant on June 23, 2008; June 11, 2008; July 30, 2008; September 22, 2008; and March 19, 2009.

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(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.

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 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.

The evidence in this case established that the claimant violated the employer's attendance policy with numerous unexcused absences, no-calls, no-shows, and tardies. The incidents that led to the claimant's termination are both excessive and unexcused. An employer can reasonably expect that employees will report to work as scheduled in a timely manner. The claimant knew that the employer had an attendance policy and, in view of the written warnings received, knew that she was violating that policy and could ultimately be terminated. Benefits are denied.

DECISION:

The decision of the representative dated April 17, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times the claimant's weekly benefit amount, provided the claimant is otherwise eligible.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/kjw