

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RENÉE J MASON
Claimant

APPEAL NO. 10A-UI-00521-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GRANDVIEW HEIGHTS INC
GRANDVIEW HEIGHTS
Employer

OC: 11/29/09
Claimant: Respondent (2-R)

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the January 5, 2010, reference and 01, decision that allowed benefits. After due notice was issued, a hearing was held on February 18, 2010. Claimant Renée Mason participated. Tom Hoskins, Administrator, represented the employer and presented additional testimony through Amanda Bruce and Marcia Kelly.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Renée Mason was employed by Grandview Heights nursing home as a full-time cook from June 2006 until December 3, 2009, when Tom Hoskins, Administrator, discharged her from the employment for recurrent tardiness and for assaulting a coworker and damaging employer property on November 26, 2009.

Between November 3 and December 1, 2009, Ms. Mason was late getting to work 18 times. The most recent such late arrival occurred on December 1. Under the employer's attendance policy, employer did not deem a late arrival tardiness unless the employee was late by five or more minutes. Ms. Mason was aware of this policy. In connection with 12 of the 18 late arrivals just mentioned, Ms. Mason was late by five or more minutes, with eight most recent set instance of tardiness occurring on November 20, 2009. The employer had not issued any reprimands to Ms. Mason for her tardiness prior to discharging her on December 3, 2009.

On November 26, 2009, Ms. Mason was working in the employer's kitchen with two coworkers, Amanda Bruce and Marcia Kelly. On this evening, Ms. Mason was upset because she suspected her husband was having an affair with another woman. Ms. Mason brought her cell phone and her husband's cell phone to the workplace. Ms. Mason was reviewing messages

and sending messages on both phones. Ms. Mason was upset by seeing a photo on her husband's cell phone of the other woman scantily clad and standing in Ms. Mason's kitchen. Ms. Bruce and Ms. Kelly were both aware that Ms. Mason was upset over the suspected affair. Ms. Mason was also upset because instead of assisting with cleaning the kitchen, Ms. Bruce was washing dishes that Ms. Mason believed should be left for the dietary aides.

Ms. Mason's mother was caring for Ms. Bruce's young child. Ms. Mason's brother is the father of Ms. Bruce's child. At approximately 7:00 p.m., Ms. Mason received a message from her sister indicating that Ms. Bruce's baby had fallen down some stairs, was upset, and was holding his arm. Ms. Mason yelled Ms. Bruce's name. Ms. Mason continued to yell Ms. Bruce's name until Ms. Bruce came out of the dish room. Ms. Mason told Ms. Bruce that her son had fallen down some stairs. Ms. Bruce was at that moment more concerned with how agitated Ms. Mason was. Ms. Bruce told Ms. Mason it was past Ms. Mason's 7:00 p.m. clock out time and that Ms. Mason should leave. Ms. Mason ran up to Ms. Bruce until their faces were almost touching and continued to yell at Ms. Bruce. Ms. Bruce, in self-defense, pushed Ms. Mason with little force to get her to back away. Ms. Mason then threw a bottle of industrial cleaner toward Ms. Bruce and the bottle hit the door jamb next to where Ms. Bruce was standing. The contents spilled onto Ms. Bruce's coat nearby and onto the floor of the pantry. Ms. Mason stormed out of the kitchen, flinging a door wide open with such force that the door knob slammed into the adjoining wall and caused damage to the wall. Ms. Mason re-entered the kitchen the same way and then exited again. Marcia Kelly was working in the kitchen and observed Ms. Mason's agitated state and aggressive behavior.

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.

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 benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

An employee who engages in a physical altercation in the workplace, regardless of whether the employee struck the first blow, engages in misconduct where the employee's actions are not in self-defense or the employee failed to retreat from the physical altercation. See Savage v. Employment Appeal Board, 529 N.W.2d 640 (Iowa App. 1995).

The weight of the evidence in the record establishes that Ms. Mason engaged in aggressive and assaultive behavior directed at Ms. Bruce on November 26, 2009. The assaultive behavior included aggressively approaching Ms. Bruce until the two women's faces were almost touching and Ms. Bruce was compelled to push Ms. Mason away in self-defense. The weight of the evidence indicates that Ms. Mason then launched a bottle of chemical cleaner toward Ms. Bruce, causing the container to spill and causing damage to Ms. Bruce's coat and employer's floor. Ms. Mason continued to engage in aggressive as she departed, slamming the door and causing damage to the adjoining wall. Ms. Mason's violent behavior was in willful and wanton disregard of the employer's interest in maintaining a safe work environment. Ms. Mason's marital problems did not excuse or justify the conduct. Ms. Mason's conduct November 26, 2009 was by itself misconduct in connection with the employment that would disqualify Ms. Mason for unemployment insurance benefits.

In order for a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence establishes 18 instances of unexcused tardiness during the last month of the employment. Ms. Mason's unexcused tardiness was excessive and amounted to misconduct in connection with the employment.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Mason was discharged for misconduct. Accordingly, Ms. Mason is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Mason.

Iowa Code section 96.3(7) provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. The overpayment recovery law was updated in 2008. See Iowa Code section 96.3(7)(b). Under the revised law, a claimant will not be required to repay an overpayment of benefits if all of the following factors are met. First, the prior award of benefits must have been made in connection with a decision regarding the claimant's separation from a particular employment. Second, the claimant must not have engaged in fraud or willful misrepresentation to obtain the benefits or in connection with the Agency's initial decision to award benefits. Third, the employer must not have participated at the initial fact-finding proceeding that resulted in the initial decision to award benefits. If Workforce Development determines there has been an overpayment of benefits, the employer will not be charged for the benefits, regardless of whether the claimant is required to repay the benefits.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received would constitute an overpayment. Accordingly, the administrative law judge will remand the matter to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

DECISION:

The Agency representative's January 5, 2010, reference and 01, decision is reversed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

This matter is remanded to the Claims Division for determination of whether there has been an overpayment, the amount of the overpayment, and whether the claimant will have to repay the benefits.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

jet/pjs