

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LINDA D WERNER

Claimant

CARE INITIATIVES

Employer

APPEAL NO. 11A-UI-00770-PT

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 12/12/10

Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated January 10, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on March 14, 2011. Claimant participated personally. Employer participated by Mike Jarrell, interim administrator, Lisa Blockhus, dietary manager and Heidi Ormsby, cook. The employer was represented by Frank Eckhert. Claimant's Exhibit A and Employer's Exhibits 1-3 were admitted into evidence.

ISSUE:

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

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds: Claimant was employed from October 1, 2009 through November 15, 2010. She was a dietary aide. She was discharged from her employment for excessive unexcused absenteeism. Claimant requested and was granted family medical leave from October 29 through December 10, 2010 to care for her husband but she agreed to work weekends during this FMLA period. She missed October 30 and 31, 2010 to care for her husband and called the employer to report the absences. The next weekend, November 6 she missed work but did not call. She sent a text message to her supervisor in violation of the employer's absence reporting policy. She also missed work on November 7 and did not call the employer.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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 claimant was discharged from her employment due to absenteeism. Her last two absences were due to illness and not properly reported, thus those absences must be considered unexcused. However, the record fails to show excessive unexcused absenteeism as two unexcused absences is not excessive. The record does not show job abandonment which would be evident from three days of no call/no show in violation of an employer rule. See 871 IAC 24.25(4). No disqualification is imposed.

DECISION:

The decision of the representative dated January 10, 2011, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Ron Pohlman
Administrative Law Judge

Decision Dated and Mailed

rrp/pjs