

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

JERRY E MOSER
Claimant

WEST LIBERTY FOODS LLC
Employer

APPEAL NO. 14A-UI-04363-B2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 03/30/14
Claimant: Appellant (2)

Iowa Code § 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated April 21, 2014, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on June 9, 2014. Claimant participated personally. Employer participated by David Rodriguez. Employer's Exhibits A-I 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 last worked for employer on March 27, 2014. Employer discharged claimant on April 1, 2014 because of excessive unexcused absences and tardiness. From late December 2013 through March 27, 2014, claimant worked a total of 44.48 hours, although he was listed as a full-time employee.

Employer has a no-fault attendance policy where tardiness, early leaving, and absences accumulate points. Once an employee gets over eight points they are terminated. The great majority of claimant's absences were covered under FMLA and did not count against this policy, but claimant did have many additional personal leave absences, tardiness and early leaves that created points in excess of the allowable amount.

Employer has a policy that employees will be notified as they accumulate points and approach the attendance limits, but claimant wasn't notified. This was because claimant worked so infrequently while accumulating the points (a total of less than six days in over three months) that human resources people could not give claimant his warnings. Additionally, the accumulated amount of points is always available to all employees online, and whenever they punch in to the time clock. Claimant did not access this information until he'd accumulated too many points. Claimant had come by the office on many occasions to pick up paychecks and was never notified of where he stood regarding his points. Additionally, when claimant was let

go, he was told of the job separation by phone, but was never told by phone, in person or by document where he stood in regards to his point accumulation.

Claimant also believes that some of his points should not have been accumulated as they were for personal time or days when he had not clocked in properly but was actually at work on time. As he was told he'd accumulated too many points, claimant didn't have the opportunity to explain/dispute his point total as it approached a level that put his job in danger.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(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.

Iowa Admin. Code r. 871-24.32(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.

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and the employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

The gravity of the incident, number of policy violations and prior warnings are factors considered when analyzing misconduct. 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 Ct. 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.

In this matter, the evidence established that claimant was not discharged for an act of misconduct when claimant violated employer's policy concerning attendance. Claimant was given information concerning this policy in the company handbook, and through his current attendance standing being available at any time when he punched into work, but was never told by his superiors that he was in danger of losing his job until it was too late.

The last incident, which brought about the discharge, does not constitute misconduct because claimant had no specific knowledge of where he stood with regards to his points accumulation. Warnings could have been given to claimant at the time he picked up his checks, or through phone calls, but neither was done, in contravention of employers own attendance policies. The administrative law judge holds that claimant was not discharged for an act of misconduct and, as such, is not disqualified from the receipt of unemployment insurance benefits.

DECISION:

The decision of the representative dated April 21, 2014, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Blair A. Bennett
Administrative Law Judge

Decision Dated and Mailed

bab/css