

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TERRI A SOMMER
Claimant

IA DEPT OF HUMAN SVCS/WOODWARD
Employer

APPEAL NO. 11A-UI-08365-M2

**ADMINISTRATIVE LAW JUDGE
DECISION**

OC: 05/22/11
Claimant: Appellant (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed an appeal from a decision of a representative dated June 20, 2011, reference 01, which held claimant ineligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on July 28, 2011. Claimant participated. Employer participated by Clint Reynolds, and was represented by David Williams. Employer's Exhibits 1-2 were received into evidence for the record.

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 discharged on May 27, 2011 for attendance/tardiness issues. The claimant was tardy on June 25, 210, June 28, 2010, July1-2, 2010, July 6, 2010, July 9, 2010, July 12, 2010, July 26-27, 2010, July 29-30, 2010, August 2-3, 2010, August 5, 2010, August 12-13, 2010, September 28, 2010, October 12-13, 2010, December 1-2, 2010, December 10, 2010, and May 4, 2011. After two verbal warnings and a written reprimand, the claimant received written suspensions on December 3 and December 21, 2010. The last absence was not properly reported, nor was it due to personal illness or injury. The employer discovered the May 4, 2011 absence on May 16, 2011; and as soon as practicable scheduled a review committee to make a decision regarding the last instance of tardiness.

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.

In this matter, the evidence establishes that claimant was discharged for an act of misconduct when claimant was discharged for excessive unexcused absenteeism/tardiness after five warnings and disciplines. The discharge was promptly made after the employer learned of the last incident.

DECISION:

The decision of the representative dated June 20, 2011, reference 01, is affirmed. Unemployment insurance benefits are withheld until claimant has worked in and been paid

wages for insured work equal to ten times claimant's weekly benefit amount, provided claimant is otherwise eligible.

Stan McElderry
Administrative Law Judge

Decision Dated and Mailed

srm/css