

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ALMA L LIZARRAGA
Claimant

APPEAL NO. 09A-UI-06217-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS DAIRY INC
Employer

OC: 03/22/09
Claimant: Appellant (2)

Section 95.5-2-a - Misconduct

STATEMENT OF THE CASE:

The claimant, Alma L. Lizarraga, filed an appeal from a decision of a representative dated April 10, 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 18, 2009. Claimant participated personally. She was represented by attorney Bryan J. Arnseson. The employer participated by Korey Behr, production supervisor, and Mona Boylan, administrative assistant in charge of scheduling. The employer was represented by Josh Burrows. The record consists of the testimony of Korey Behr; the testimony of Mona Boylan; and the testimony of Alma L. Lizarraga.

ISSUE:

Whether the 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, makes the following findings of fact:

The claimant was employed as a full time category C production worker. She started working for the employer on February 18, 2002. The claimant's work hours varied, depending on the machine to which she was assigned.

The employer had a written policy that required workers to call in before their shift or after their shift if they were going to be absent. On July 7, 2008, the claimant was assigned to work a shift beginning at 6:00 p.m. She did not call in her absence nor did she work her shift. As a result of this no-call/no-show, the claimant was given a three-day suspension without pay and was informed on the consequences of further no-calls, no-shows.

Employees were required to check the written schedule that was posted on Thursdays in a locked cabinet to find out when they were scheduled to work. If any changes are made to the schedule after it is initially posted, those changes were made by the administrative assistant in charge of scheduling and the changes are then highlighted in yellow.

The claimant was scheduled to work on October 25, 2008 from 6:00 a.m. to 4:00 p.m. She did not show up at work nor did she call in her absence. The employer had a written policy that stated that if an employee had two no-call/no-shows within a 12-month period that this meant termination. Since the claimant had had a previous no-call no show on July 7, 2008, she was terminated by the employer. The claimant did not report to work because she did not believe that she had been scheduled for that particular day.

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 failed to establish misconduct. Although the claimant knew about the employer's no-call/no-show policy, she had had only one previous violation to the violation that led to her termination. The claimant credibly testified that she was mistaken about her work schedule and did not know that she had been scheduled to work on October 25, 2008. The evidence does not show that the claimant willfully violated the employer's policy. Benefits will be awarded.

DECISION:

The decision of the representative dated April 10, 2009, reference 01, is reversed. Claimant is eligible to receive unemployment insurance benefits, provided claimant meets all other eligibility requirements.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/pjs