

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CASSADIE ZISOFF
Claimant

APPEAL NO: 13A-UI-11676-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

STORY COUNTY
Employer

OC: 09/15/13
Claimant: Respondent (1)

Iowa Code § 96.5(2)a - Discharge

PROCEDURAL STATEMENT OF THE CASE:

The employer appealed a representative's October 10, 2013 determination (reference 01) that held the claimant qualified to receive benefits and the employer's account subject to charge because the claimant had been discharged for nondisqualifying reasons. The claimant participated in the hearing with her attorney, Claire Cumbie-Drake. Jessica Reynolds, attorney at law, represented the employer. Stephen Holmes, the Story County attorney, Theresa Smith and Laura Francisco testified on the employer's behalf. Eric Zisoff observed the hearing.

The parties stipulated that Claimant Exhibits A through F and Employer Exhibits One through Seven could be admitted as evidence and they were. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer discharge the claimant for reasons constituting work-connected misconduct?

FINDINGS OF FACT:

The claimant started working the employer in July 2011. She worked full time as a victim witness associate. During her employment, the claimant received intermittent FMLA for two conditions. (Employer Exhibit Seven). Starting in mid-August 2013, the claimant was absent numerous days for flu-like symptoms and conditions covered under her intermittent FMLA.

On September 4, the claimant informed the employer she was using FMLA in the morning to see a chiropractor. On September 5, the claimant informed the employer she still had back and chest pain and was going to her doctor. After going to the doctor on September 5, the claimant informed the employer she had bronchitis but would be at work on September 6. (Employer Exhibit One.). The claimant had doctors' notes to excuse her absences on September 4 and 5. (Employer Exhibit Six and Claimant Exhibit C.)

On September 4, the claimant's chiropractor, Dr. Jeffrey Christianson, referred the claimant to her family physician for the chest pain she reported. Dr. Christianson and Francisco, a nurse

practitioner, talked to the claimant about using massage therapy as a treatment to alleviate pain in her back and neck. (Claimant Exhibit D.) On September 5, the claimant went to her family physician. Francisco determined on September 5 that in addition to neck and back pain and increased frequency of migraines, the claimant also had bronchitis. Francisco restricted the claimant from working on September 5.

The claimant did not feel well yet, but went to work on September 6. During the early morning staff meeting, neither Holmes nor Smith observed the claimant coughing. Neither noticed anything about the claimant's physical appearance that suggested she did not feel well. When the claimant asked Smith if she could leave work early, Smith gave her permission to do so. The claimant left work early at around 1:45 p.m.

When the claimant left work on September 6 she had pain in her neck and back. After she left, she called a salon near her home to see if she could get in for a massage therapy appointment. The claimant was able to have an appointment at 2:30 p.m.

Since Smith was suspicious of the claimant leaving work early when she did not appear ill, she followed the claimant. When she saw the claimant go into a salon, she assumed the claimant had a pre-arranged hair appointment. She contacted Holmes and told him the claimant was at a salon to get her hair styled. Holmes told Smith to terminate the claimant's employment. Holmes also advised Smith to contact the local law enforcement officials so she would not have any problems obtaining the claimant's key. Law enforcement officials were contacted to be present when Smith told the claimant she was discharged. (Claimant Exhibit B.)

After a law enforcement official was contacted, Smith learned the claimant was not getting her hair done, but was instead having a massage. She relayed this information to Holmes who then decided to place the claimant on paid administrative leave. After a law enforcement official had been waiting more than 45 minutes, Smith decided to find out when the claimant would be done with her appointment. Salon employees interrupted the claimant's appointment so Smith could talk to her with the police officer present. During this conversation, when Smith told the claimant she was on administrative leave, the claimant was humiliated and upset because Smith did this in front of a police officer and the claimant only had on a robe. The claimant was so upset and humiliated that she went to an attorney's office that same afternoon. Her attorney advised her not to talk to the employer again without her attorney present. The attorney the claimant saw was not an expert in employment law and referred the claimant to Ms. Cumbie-Drake. The claimant was unable to talk to Ms. Cumbie- Drake until Wednesday, September 11 at 9 a.m.

The claimant does not remember Smith telling her to be available all day on Monday for a meeting. On September 9 at 10:24 a.m., Smith left the claimant a voice mail message that she was to report to the office that day for an 11:30 a.m. meeting. The claimant had taken medication for her pain and was sleeping when Smith called her. When the claimant did not appear for the 11:30 a.m. meeting, Smith called her again and told her she was required to report or call the office by 5 p.m. that day. The claimant did not know Smith had called either time until after 7 p.m. At 7:30 p.m. the claimant sent Smith a text message that she had received her message, but she had been sick all day. The claimant indicated she did not want a meeting until her attorney could be present. The claimant also indicated that she would have more information the next day. (Claimant Exhibit A.)

On September 10, Smith left the claimant a message at 10:30 a.m. telling the claimant a meeting had been scheduled at 2:30 p.m. that day and her failure to appear for the meeting would be considered insubordination. When the claimant did not appear for the 2:30 p.m.

meeting, the employer had the claimant served that day with a letter of pre-termination. (Employer Exhibits Three and Four.)

The September 10 pre-termination letter informed the claimant a meeting was scheduled on September 11 at 11 a.m. Holmes informed the claimant in the pre-termination letter that he would make a decision about her continued employment after the meeting. (Employer Exhibit Three.) At 10:23 a.m. on September 11, the claimant sent Smith a text that she and her attorney were unable to meet at 11 a.m. that day and the claimant's attorney would contact the employer. Smith responded by letting the claimant know that Holmes directed the claimant to appear at the 11 a.m. meeting. (Employer Exhibit 2 and Claimant Exhibit A.)

The claimant did not go to the September 11 meeting because her attorney was unable to go with her. At 11:34 a.m., Smith sent the claimant a text informing her that since she failed to report to the scheduled meeting that day at 11 a.m. she would be receiving official notice of her termination that was effective immediately. (Employer Exhibit Two and Claimant Exhibit A.)

The September 11 termination letter informed the claimant she was terminated for multiple instances of insubordination. Specifically the claimant failed to appear for the September 9 meeting at 11:30, she failed to report in-person or by phone by 5 p.m. on September 9, she failed to appear for a September 10 meeting at 2:30 p.m., she failed to communicate with the employer on September 10, and she failed to appear for a pre-termination hearing on September 11.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer discharges her for reasons constituting work-connected misconduct. Iowa Code § 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

The law defines misconduct as:

1. A deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment.
2. A deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees. Or
3. An intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion do not amount to work-connected misconduct. 871 IAC 24.32(1)(a).

Before a claimant can commit work-connected misconduct, the employer's request must be reasonable. The facts establish the claimant's treating doctors suggested she receive massage therapy in an attempt to relieve pain she experienced from migraines and from her neck and

back issues. The claimant did not make the September 6 massage therapy appointment until after she left work early that day. Even though the employer did not believe the claimant was ill on September 6, neck and back pain cannot be seen or heard like a cough. The fact Smith followed the claimant and automatically assumed the claimant was at a salon for a pre-arranged hair appointment reveals much about this case.

Smith's decision to tell the claimant in the presence of a police officer when the claimant only had on a robe that she was on a paid administrative leave upset the claimant so much she contacted an attorney that same day. If Smith told the claimant to be available all day on Monday for meeting, the claimant may have easily forgotten this comment as a result of being upset and humiliated. Since the claimant had been sick and taken medication, her testimony that she had been sleeping all day on September 10 and did not know the employer called twice on Monday until 7 p.m. is credible. The claimant's decision not to call or communicate with the employer on Tuesday, September 10 amounts to an isolated incident of poor judgment. On September 11, she informed the employer her attorney was not available for the September 11 meeting and her attorney would contact the employer to set up a time to meet. The claimant did not make an unreasonable request or statement.

The employer asserted that because the claimant was on paid administrative leave, the decision about her continued employment needed to be decided quickly. While the employer wanted to protect taxpayers' money, the employer could have changed the claimant's status to an unpaid administrative leave, but this was not done.

The employer discharged the claimant for reasons that do not constitute work-connected misconduct. The evidence shows the claimant used poor judgment when she did not contact the employer on September 10, but between September 6 and 11 and the claimant was not insubordinate to any of the employer's reasonable directives. As of September 15, 2013, the claimant is qualified to receive benefits.

DECISION:

The representative's October 10, 2013 determination (reference 01) is affirmed. The employer discharged the claimant for reasons that do not constitute work-connected misconduct. As of September 15, 2013, the claimant is qualified to receive benefits. The employer's account is subject to charge.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs