IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KIMBERLY HECK
Claimant

APPLE TREE PRESCHOOL & LEARNING
Employer

APPEAL NO: 12A-UI-02123-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/15/12
Claimant: Appellant (2)

Iowa Code § 96.5-2-a - Discharge for Misconduct
871 IAC 24.32(7) - Excessive Unexcused Absenteeism
871 IAC 26.14(7) - Late Call
Iowa Code § 17A.12-3 - Non-Appearance of Party

STATEMENT OF THE CASE:

Kimberly Heck (claimant) appealed an unemployment insurance decision dated February 22, 2012, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Apple Tree Preschool & Learning Center, Inc. (employer) for work-related misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 27, 2012. The claimant participated in the hearing. The employer did not comply with the hearing notice instructions and did not call in to provide a telephone number at which a representative could be contacted and, therefore, did not participate. Based on the evidence, the arguments of the party, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The employer received the hearing notice prior to the March 27, 2012 hearing. The instructions inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. The first time the employer witness directly contacted the Appeals Section was on March 27, 2012, 23 minutes after the scheduled start time for the hearing. The employer witness believed her boss had called in the information.

The claimant was employed as a full-time cook from January 11, 2001 through January 16, 2012. She was discharged from employment due to excessive absenteeism. The claimant denies that she was tardy; she had never received any formal written warnings for tardiness.

The employer did verbally counsel her once for being tardy and the claimant disputed that she was tardy. The claimant asked the employer why it was believed she was tardy and the employer could not provide an explanation. The employer does not use time clocks.

The claimant believes she was discharged because she complained about the care the children were receiving. She had complained previously, but there was an incident on Friday, January 13, 2012, and the claimant spoke to the owner about it. A new staff member saw another staff member grab a two-year-old by the cheek because the child was not getting in line. That third staff member then picked up the child by one arm and physically placed the child in the line. The new staff member reported it to the claimant, who advised her to report it to the owner. The new staff member then came back to the claimant and said she reported it. She said the employer asked her if she told anyone else and the new staff member admitted she told the claimant about it. The employer said she should not have told anyone else.

The claimant questioned the employer about it and the employer told the claimant to mind her own business. The claimant said since she is a mandatory reporter of child abuse, it is her business. The employer again told her to mind her own business. The claimant was discharged on the following Monday.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be determined is whether the employer provided good cause to reopen the record. For the following reasons, the administrative law judge concludes the employer did not provide good cause for its failure to participate.

The Iowa Administrative Procedures Act § 17A.12-3 provides in pertinent part:

> If a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party. If a decision is rendered against a party who failed to appear for the hearing and the presiding officer is timely requested by that party to vacate the decision for good cause, the time for initiating a further appeal is stayed pending a determination by the presiding officer to grant or deny the request. If adequate reasons are provided showing good cause for the party's failure to appear, the presiding officer shall vacate the decision and, after proper service of notice, conduct another evidentiary hearing. If adequate reasons are not provided showing good cause for the party's failure to appear, the presiding officer shall deny the motion to vacate.

The employer witness failed to follow the hearing notice instructions because she believed her boss had already done so. Failure to read and follow the hearing notice instructions does not constitute good cause.

The substantive issue to be determined is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a.

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.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

The employer discharged the claimant on January 16, 2012 for excessive unexcused absenteeism. Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Id*. The employer had not issued the claimant any formal written warnings and had only counseled her one time regarding tardiness. The claimant denies that she was tardy and the employer failed to participate. Work-connected misconduct

as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated February 22, 2012, reference 01, is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/kjw