

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

KATHLEEN GRIES
Claimant

CROSSROADS OF WESTERN IOWA
Employer

APPEAL 20A-UI-10693-HP-T
ADMINISTRATIVE LAW JUDGE
DECISION

OC: 06/21/20
Claimant: Appellant (2)

Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.5(2) – Discharge due to Misconduct

STATEMENT OF THE CASE:

Claimant Kathleen Gries filed an appeal from an August 27, 2020 (reference 02) unemployment insurance decision that denied benefits based upon her voluntarily quitting work without good cause attributable to her employer, Crossroads of Western Iowa (“Crossroads”) for a nonwork-related illness or injury. Notices of hearing were mailed to the parties’ last known addresses of record for a telephone hearing scheduled for October 16, 2020. Gries appeared and testified. Marsha Gerlach appeared and testified on behalf of Crossroads. Exhibits 1 and 2 were admitted into the record. I also took administrative notice of the claimant’s unemployment insurance benefits records maintained by Iowa Workforce Development.

ISSUE:

Did the claimant voluntarily quit the employment with good cause attributable to the employer?

FINDINGS OF FACT:

Gries commenced full-time employment as a residential coach with Crossroads on August 13, 2014. Gries assisted individuals with disabilities living in group homes with activities of daily living. At the end of her employment, Melanie Black was her immediate supervisor. Gries loved her job and Crossroads considered her to be a good employee.

Unfortunately, in August 2019, Gries was diagnosed with lung cancer and she needed surgery. Gries reported her lung cancer was not caused or aggravated by her employment with Crossroads.

Gries contacted Black. Gries met with Black and Black’s manager, Laura Jensen. During the meeting, Gries informed Black and Jensen of her diagnosis and need for treatment. Gries requested twelve weeks of leave under the Family Medical Leave Act (“FMLA”) for her personal health condition. Gries used five days of paid leave at the start of her leave and she received two checks for short-term disability benefits. Crossroads approved Gries’s request for FMLA leave. Gries was away from work and received FMLA leave from October 3, 2019 through January 2, 2020.

In December 2019, Brittany Smith from human resources, contacted Gries and told her that her FMLA leave was ending and she needed to work. Gries had additional vacation hours and asked Smith if she could use her vacation leave. Gries testified Smith responded that was not how FMLA leave works and she would need to report to work. Gries told Smith she was too ill to return to work because she was vomiting all day due to receiving chemotherapy. After the call Gries provided Smith with a doctor's note excusing Gries from work due to her medical condition from January 2, 2020 through February 2, 2020. Crossroads granted her additional leave through February 2, 2020.

On January 28, 2020, Smith called Gries and told her she needed to return to work and if she did not return to work or resign she would be terminated. Gries told Smith she had just gotten out of the hospital for treatment for kidney failure and that she was vomiting and could not return to work. Smith asked Gries to send in a resignation. Later that week Gries called Smith and told her she could not return to work.

Crossroads has a policy that if an employee does not resign when the employee cannot return to work from an illness, the employee will be terminated and will not be eligible for rehire. On February 18, 2020, Black called Gries if she could return to work. Gries told her she could not and Black told her she either needed to resign or she would be terminated and if she was terminated she would not be eligible for rehire. Gries wanted to return to work and elected to sign a resignation letter.

On February 18, 2020, Black sent Gries a written resignation later she typed, which provided "I am writing to inform you that I am resigning from my position at Crossroads as a Residential Coach. My last day of employment is Feb 18, 2020. (Ex. 1) Gries wrote below the statement "[d]ue to poor health, I am unable to work my job and my employer will not/cannot hold my position open for me. I would not be resigning otherwise." (Ex. 1) Gries returned the letter on February 21, 2020.

REASONING AND CONCLUSIONS OF LAW:

Gries testified she resigned on February 21, 2020 because she believed she was going to be discharged if she did not resign and if she were discharged she would not be eligible for rehire with Crossroads. Gerlach confirmed Gries was given the choice of resigning or being terminated and if she were terminated she would not be eligible for rehire. In *Flesher v. Iowa Department of Job Service*, 372 N.W.2d 230 (Iowa 1985), the claimant resigned when given the choice to resign or be discharged. The employer protested as a voluntary quit. The agency disqualified the claimant based on misconduct. The Employment Appeal Board has taken the position that a resignation in lieu of discharge should be analyzed as a discharged and that if misconduct appears, a disqualification can be imposed. *Wearda v. Securitas Security SVCS USA*, 19A-UI-04287-EAB. I find Gries felt compelled to resign or she would be discharged.

Iowa Code Section 96.5(2)(a) provides:

Discharge for Misconduct. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:

The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 Iowa Administrative Code 24.32(1)(a) defines misconduct 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 the 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 Iowa Supreme Court has held this definition "accurately reflects the intent of the legislature." *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d, 445, 448 (Iowa 1979).

The employer bears the burden of proving the employee engaged in disqualifying misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6, 11 (Iowa 1982) The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262, 264 (Iowa Ct. App. 1984)

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See *Greene v. Emp't Appeal Bd*, 426 N.W.2d 659, 662 (Iowa App. 1988).

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. See 871 IAC 24.32(4).

871 Iowa Administrative Code 24.32(7), provides, "[e]xcessive 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." The Supreme Court has held 871 Iowa Administrative Code 24.32(7) accurately states the law. *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984)

Excessive absences are not considered misconduct unless unexcused. *Cosper*, 321 N.W.2d at 10. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to and including discharge for the absence under its attendance policy. *Gaborit v. Emp't Appeal Bd.*, 743 N.W.2d 554, 558 (Iowa Ct. App. 2007).

The determination of whether unexcused absenteeism is excessive requires consideration of past acts and warnings. *Higgins*, 350 N.W.2d at 192. The absences must also be unexcused. *Cosper*,

321 N.W.2d at 10. An absence can be unexcused if it did not constitute reasonable grounds or if it was not properly reported. *Id.*; *Higgins*, 350 N.W.2d at 191. Excused absences are those with “appropriate notice.” *Cosper*, 321 N.W.2d at 10. Absences in good faith, for good cause, and with appropriate notice are not misconduct. *Id.* Such absences may be grounds for discharge, but not for disqualification of benefits because substantial disregard for the employer’s interest has not be shown and this is essential for a finding of misconduct. *Id.*

There was no evidence Gries had been disciplined during her employment with Crossroads. Gries was absent from work due a personal health condition, lung cancer. Gries testified she believes she is capable of working today. I do not find Crossroads presented any evidence Gries engaged in disqualifying misconduct. Benefits are allowed, provided Gries is otherwise eligible.

DECISION:

The August 27, 2020 (reference 02) unemployment insurance decision denying unemployment insurance benefits is reversed in favor of the claimant/appellant. Benefits are allowed, provided the claimant is otherwise eligible.



Heather L. Palmer
Administrative Law Judge
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October 19, 2020
Decision Dated and Mailed

hlp/scn