

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

SHARI A BECKER
310 S 11TH ST LOT 20
ADEL IA 50003

DEE ZEE INC
C/O ADP UNEMPLOYMENT GROUP
TALX UC EXPRESS
P O BOX 66744
ST LOUIS MO 63166-6744

Appeal Number: 05A-UI-05273-RT
OC: 04/03/05 R: 02
Claimant: Respondent (1-R)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Dee Zee, Inc., filed a timely appeal from an unemployment insurance decision dated May 6, 2005, reference 04, amending reference 02, allowing unemployment insurance benefits to the claimant, Shari A. Becker. After due notice was issued, a telephone hearing was held on June 3, 2005, with the claimant participating. Cindee Moyer, Human Resources Manager, and Goran Surlan, Payroll Administrator, participated in the hearing for the employer. Employer's Exhibit One was admitted into evidence. The administrative law judge takes official

notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, including Employer's Exhibit One, the administrative law judge finds: The claimant was employed by the employer as a full-time welder from August 21, 2003, until she was separated from that employment during the week of March 27, 2005. The claimant's last day of work for the employer was January 14, 2005. The claimant developed Crohn's Disease. This was unrelated to her employment. The claimant was placed on a medical leave of absence and received disability through February 24, 2005, as shown at Employer's Exhibit One. The disability insurance carrier requested additional information from the claimant to continue disability payments, but none was provided, and the claimant's disability stopped. The employer had provided the entire premium for the disability insurance. The claimant received a letter from her physician on March 27, 2005, indicating that she was still under a physician's care, and that she was taking chronic medicine, and asked for the employer's understanding. Nothing was said in the letter about a release to return to work, either part-time or full-time, or whether under restrictions or no restrictions. The claimant believed that she was released to work part-time, and called the employer the week of March 27, 2005, and was told by Goran Surlan, Payroll Administrator, that the claimant no longer worked there, or was no longer employed there. The claimant believed that she was discharged and filed for unemployment insurance benefits. The employer still shows the claimant as on a medical leave without pay. The claimant has never returned to the employer and offered to return to work at her regular position full-time, and has not certified that she has recovered from her illness or injury, or that she is able to return to work full-time as she had been working prior to her leave of absence.

Pursuant to her claim for unemployment insurance benefits filed effective April 3, 2005, the claimant has received unemployment insurance benefits in the amount of \$2,376.00 as follows: \$297.00 per week for eight weeks from benefit week ending April 9, 2005 to benefit week ending May 28, 2005. The claimant was also paid an additional \$297.00 per week for two weeks, benefit weeks ending April 9 and 16, 2005, as a special unemployment insurance payment by mistake, and these payments were then offset by other benefits to which the claimant was entitled.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is not, at least insofar as her separation from the employer herein is involved.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.22(2)j(1)(2)(3) provides:

Benefit eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.

j. Leave of absence. A leave of absence negotiated with the consent of both parties, employer and employee, is deemed a period of voluntary unemployment for the employee-individual, and the individual is considered ineligible for benefits for the period.

(1) If at the end of a period or term of negotiated leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits.

(2) If the employee-individual fails to return at the end of the leave of absence and subsequently becomes unemployed the individual is considered as having voluntarily quit and therefore is ineligible for benefits.

(3) The period or term of a leave of absence may be extended, but only if there is evidence that both parties have voluntarily agreed.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive 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 first issue to be resolved is the character of the separation, or really, whether the claimant is actually separated from her employment. The employer's witness, Cindee Moyer, Human Resources Manager, credibly testified that the employer's records still show that the claimant is presently on medical leave, and remains job-attached, and has not been permanently separated. The claimant seemed to equivocate initially about her job status, but testified that, during the week of March 27, 2005, she called the employer and was informed by Goran Surlan, Payroll Administrator, that she was no longer employed there, and no longer worked there. Mr. Surlan could not remember the exact words that he spoke to the claimant, but seemed to imply, at least, that he had said something to the effect that the claimant was no longer employed. Under the evidence here, the administrative law judge is constrained to conclude that the claimant was discharged, or at least was justified in believing that she had been discharged, during the week of March 27, 2005. There was no more specific data available concerning the separation. Although the situation seems close to a voluntary quit, there is no real evidence that the claimant did actually quit. The employer does not maintain that the claimant quit. Rather, it is the employer's position that the claimant has not separated, and is on medical leave. It is true that the claimant was on medical leave, and if one fails to return at the end of the leave, such a failure to return to work is considered a voluntary quit. However, the claimant called the employer and, at least, apparently, attempted to go back to work part-time, or at least inquired about her status. It does not appear that the claimant did not deliberately fail to return from a leave of absence. This is an unusual case, but under the evidence and circumstances here, the administrative law judge is constrained to conclude that the claimant was effectively discharged during the week of March 27, 2005.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct, and includes tardies, and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. The claimant's absences, or her time away from work, were related to an illness, Crohn's Disease, and the employer was, at all material times hereto, fully aware of these reasons. There is no evidence that the claimant has recovered from this illness. Accordingly, the administrative law judge concludes that the claimant's absences were for personal illness and properly reported,

or proper reporting was not necessary because of the employer's full knowledge, and, therefore, the absences are not excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct to warrant the claimant's disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

The administrative law judge notes that the conclusion reached herein would be the same if the claimant had never separated from her employment, but was on a leave of absence, and had requested to come back to work. The issue, in that case, would be whether she was able, available, and earnestly and actively seeking work, which is addressed below. Even if the claimant had quit, the conclusion might be the same once the able, available, and earnestly and actively seeking work issues were resolved, because the claimant would be entitled to benefits if she returns to the employer and certifies that she has recovered from her illness, at least to the extent that she is able to return to her regular job full-time and offers to perform services and the claimant's work, or comparable work, was not available. See Iowa Code section 96.5(1)(d?).

During the hearing, a substantial, and serious, issue was raised as to whether the claimant might be ineligible to receive unemployment insurance benefits because she is, and was, at relevant times, not able, available, and earnestly and actively seeking work. This issue was not set out on the notice of appeal and the telephone hearing, and the administrative law judge does not now have jurisdiction to decide that issue. This matter should be remanded to Claims for an investigation and determination as to whether the claimant would be ineligible to receive unemployment insurance benefits because she is, and was, at relevant times, not able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,376.00 since filing for such benefits effective April 17, 2005. The administrative law judge concludes that the claimant is entitled to these benefits, at

least insofar as her separation from, or employment with, the employer is concerned. The administrative law judge reaches no conclusion as to whether the claimant might be overpaid these benefits for other reasons, including whether she was not able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3.

DECISION:

The representative's decision of May 6, 2005, reference 04, amending reference 02, is affirmed. The claimant, Shari A. Becker, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged, but not for disqualifying misconduct. As a result of this decision, the claimant is not overpaid any unemployment insurance benefits arising out her separation from the employer herein. In order to determine whether the claimant is otherwise eligible to receive unemployment insurance benefits, this matter must be remanded to Claims for an investigation and determination as to whether the claimant is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3, and therefore is otherwise eligible for benefits.

REMAND:

This matter is remanded to Claims for an investigation and determination as to whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, she was not able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3, and if ineligible for such benefits, whether the claimant is overpaid any unemployment insurance benefits.

kjw/pjs