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

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Appeal Number: 04A-UI-02985-B
OC: 02/08/04 R: 03
Claimant: Appellant (1)

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 96.5-1 – Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Mary Slavin (claimant) appealed an unemployment insurance decision dated March 4, 2004, reference 01, which held that she was not eligible for unemployment insurance benefits because she was discharged from Genesis Development (employer) for work-connected misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held in Des Moines, Iowa on May 19, 2004. The claimant participated in the hearing with Attorney Jeffrey Lipman. The employer participated through Terry Johnson, Chief Executive Officer, and Janet Strange, Site Administrator. Employer's Exhibits A through P and Claimant's Exhibits One through Eight were admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The employer is a private, not for profit, corporation that provides residential and community support for individuals with disabilities. The claimant was employed as a full-time community support specialist from September 18, 1998 through February 5, 2004. The claimant was discharged for a repeated failure to meet client needs and a failure to follow the employer's directives. She previously had a problem with attendance but the incidents leading to her discharge began in May 2003, with her first warning issued on June 15, 2003. That warning was issued because she failed to take a client to the circus on May 5, 2003 and failed to attend a meeting scheduled with another client on May 30, 2003. She received a second warning on June 20, 2003 for failing to take clients to a CIRHA meeting after she had been scheduled to do so.

The claimant was given a handout on the Employee Assistance Program (EAP) to provide her assistance with any problems that might have been interfering with her job performance. A monthly coaching meeting was held on September 11, 2003 in which the claimant's failure to meet her clients' needs was addressed. The claimant missed another scheduled client visit on October 2, 2003, for which she received her first written warning. On October 9, 2003, the employer received a letter of complaint about the claimant from a client's mother. The complaint was that the claimant was rude to a client's family member, was late most of the time if she showed up at all, and failed to provide a telephone call to let the client know if she was not coming. The mother saw her daughter in tears several times as a result of the claimant's actions. The employer discussed the problem with the claimant. Initially it was only recommended the claimant check into the EAP, but when she failed to do so and her work performance did not improve, she was mandated to contact the EAP. The claimant missed her first scheduled meeting and was directed to reschedule it, which she did. She reportedly agreed to follow the EAP's recommendations.

On January 22, 2004, the claimant was late for work and failed to notify her team leader in a timely manner. One of her clients was incontinent that morning and it was believed the client had the problem because she could not wait any longer for assistance. The client was very embarrassed and repeatedly apologized while she was being cleaned. Had the claimant contacted her team leader the night before or earlier that morning, alternate arrangements could have been made to provide appropriate care for the client when the claimant could not be there. The employer met with the claimant later that day to discuss the problems with her performance. Three clients no longer wanted the claimant to work with them, either due to a personality conflict or that she was undependable. As a result of the claimant's continued absences and unreliability, the employer made the decision to move her from community support to home staff, which has a more structured environment. The home teams have more staff to cover when employees are gone. The employer valued the claimant as a good employee and wanted to keep her with the company. This was an alternative to a suspension and the employer hoped it would provide an answer to the attendance problems. The claimant indicated she did not want to change work assignments and was told she did not have a choice. Although the EAP had provided recommendations to the claimant, she admitted she was not following its guidance.

There were no more problems until January 27, 2004 when the claimant called work at 8:30 a.m. and said that she would be in after her driveway was cleared of snow. The claimant called again at 11:15 a.m. and stated that her car had been stuck and she had just gotten finished "scooping out" her driveway. The claimant asked for a personal day and her supervisor

asked the claimant what needed to be covered. The supervisor then contacted the administrator, who suspended the claimant for one day with pay, since a personal day has to be scheduled in advance. When the claimant did not answer phone calls or her pager that morning, the administrator drove to her home. The driveway had not been cleared, yet the administrator had no difficulty driving into it and turning around, which refuted the claimant's excuse for not reporting to work that morning. The administrator advised the claimant of her suspension due to the unscheduled absence and instructed the claimant to report to work the next morning. Later that day, the administrator called the claimant in response to a telephone call from the claimant's boyfriend. During that conversation, the claimant said she was not going to work in a home and that she talked to her lawyer and she did not have to do that. She also indicated that it was discrimination. The administrator informed the claimant she would work in a home and would be expected to report to work at 6:00 a.m. the following day. If she failed to report, she would be "self-terminating." The employer asked the claimant if she understood and the claimant indicated that she did but again stated she would not work in a home.

On January 28, 2004, the claimant called the employer at 5:25 a.m. stating that her car would not start. The employer tried to return a call to the claimant but she did not answer her phone and she also did not answer her pager, which was provided to her by the employer so she could be reached at all times. The administrator left a message on the claimant's answering machine that she would be out to help start her car or to take her to work. The employer took another person with her to help jump-start the claimant's car. When the administrator arrived, a man answered the door and would not allow the administrator to talk to the claimant, stating he would get the claimant to work. The administrator asked for the claimant's keys, pager and client books so that others could do the claimant's work and the man brought these to her at the door. The claimant arrived at work at 10:45 a.m. and told the employer that she could not work the February 2:00 p.m. to 10:00 p.m. shifts. The employer advised the claimant there was no other option at that time and she was given a short tour of the home. The claimant's supervisor issued the claimant a written warning on January 29, 2004 for continued attendance problems.

The next and final incident occurred on February 5, 2004 when the claimant called work and stated that she could not work the 2:00 p.m. to 10:00 p.m. shift because her truck would not start. The claimant's supervisor was not available and the staff member contacted Kim Johnson. Ms. Johnson called the claimant and offered to help jumpstart her car and the claimant stated that she believed her car starter was going out. Ms. Johnson stated that she would come out to get her this once and could take her home if needed. The claimant stated that she would have her kids with her. Ms. Johnson then contacted the administrator who directed her not to transport the claimant and her kids. The administrator notified her supervisor of the situation and then called the claimant at 12:04 p.m. The administrator advised the claimant she was expected to be at work and advised her that it was not the employer's responsibility to transport the claimant and her children. The employer stated to the claimant, "MaryAnn you need to be at work on time and work your shift. If you do not come you will be self-terminating as you know the process." The employer asked the claimant if she understood and the claimant responded that she did and would try to make it.

The claimant arrived at work at 3:05 p.m. and Darci, another employee who was working, mistakenly thought another individual had been called to work. Darci told the claimant another employee was going to come in but then directed the claimant to either call Kim Johnson or the office to find out for sure. The claimant left without contacting anyone. When the administrator was advised, the employees were directed to call the claimant to tell her to report to work but they were not successful. At 4:46 p.m., the team leader reached the claimant and told her she

needed to fulfill her shift and the claimant stated that she felt her life was at risk due to the bad winter weather. The claimant stated the roads were hazardous due to the snow, but no other employees had called in due to the weather and the administrator had driven twice as far as the claimant without problem. The team leader referred the claimant back to the administrator and advised her she would be "self-terminating" if she did not work her shift that day. At 4:50 p.m., the claimant called the administrator and the administrator told her she needed to be at work. The claimant explained that Darci told her someone else was coming in to work. The administrator told the claimant Darci was not her supervisor and had no authority to issue orders, particularly when the administrator had personally directed the claimant to report to work. However, even if the claimant relied on what Darci told her, she only relied on part of it because Darci told her to contact the office or Kim Johnson to find out for sure if she needed to work. The employer again advised the claimant if she did not work her shift that day, she would be "self-terminating." The claimant did not return to work as directed and her employment was concluded.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be determined is the credibility of the witnesses. The findings of fact reflect a resolution of the disputed factual issues in this case based on a careful assessment of the credibility of the witnesses and reliability of the evidence. The claimant was not a credible witness due to inconsistent and false statements. One example of a false statement was when the claimant testified the employer refused to accommodate her light duty restriction after being taken off work for two days in September 2003 due to a non-work-related injury. An employer has no duty to accommodate non-work-related restrictions, but in this case, there were none. The claimant was specifically questioned as to whether she was taken off work or placed on restrictions or both. She answered both, that she was taken off work for two days and then placed on light duty for a week. The employer subsequently introduced impeachment evidence showing that the claimant was never placed on light duty restrictions.

On a different issue, but one that must be addressed, the claimant contends she was discriminated against but failed to provide any evidence supporting that contention. Therefore, the Administrative Law Judge concludes the actions taken by the employer do not constitute discrimination.

The next issue to be determined is whether the reasons for the claimant's separation from employment qualify her to receive unemployment insurance benefits. The claimant is not qualified to receive unemployment insurance benefits if she voluntarily quit without good cause attributable to the employer or if the employer discharged her for work-connected misconduct. Iowa Code Sections 96.5-1 and 96.5-2-a.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The claimant effectively demonstrated her intent to quit and acted to carry it out when she failed to work her scheduled shift on February 5, 2004, as directed. The administrator was very clear when advising the claimant she would be "self-terminating" if she did not work her entire shift. The claimant did make it to work even though she claims the roads were bad. She should not have left based on a co-worker's statement, particularly since she did not rely on the co-worker's complete statement when she ignored her advice to call the office. The evidence provided confirms the claimant was directed to return to work that day and she refused to do so. The law presumes it is a quit without good cause attributable to the employer when an employee leaves rather than perform

the work as instructed. 871 IAC 24.25(27). Consequently, if the claimant's separation were to be classified as a voluntary quit, it would be one without good cause attributable to the employer.

The separation could also be characterized as a discharge, in which case, 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 substantial and 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).

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).

The claimant was discharged for a repeated failure to meet client needs and a failure to follow the employer's directives. The claimant had developed a pattern of missing appointments with

clients and although the employer tried to provide assistance through the EAP, the claimant failed to follow its recommendations. In addition to the disservice placed on the clients when the claimant failed to failed to follow the employer's directives, her behavior was starting to have a detrimental affect on the employer's business since clients started refusing care by the claimant. It became such a problem that the employer assigned the claimant to group care in an effort to retain her as an employee while reducing the negative effect of her unreliability. The claimant did not like her new assignment and had repeatedly told the employer she would not work in a group home. She was advised and stated that she understood that if she failed to report to work and work her entire shift on February 5, 2004, she would be "self-terminated." Yet even with this knowledge, the claimant left work that day and then refused the employer's directive to return and complete her shift. Repeated failure to follow an employer's instructions in the performance of duties is misconduct. Gilliam v. Atlantic Bottling Company, 453 N.W.2d 230 (Iowa App. 1990). Work-connected misconduct as defined by the unemployment insurance law has been established in this case and benefits are denied.

DECISION:

The unemployment insurance decision dated March 4, 2004, reference 01, is affirmed. The claimant is not eligible to receive unemployment insurance benefits because she was discharged from work for misconduct. Benefits are withheld until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

sdb/b