

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TREASURE L WINTHER
Claimant

APPEAL NO. 08A-UI-10177-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 09/28/08 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The employer appealed an unemployment insurance decision dated October 21, 2008, reference 01, that concluded the claimant's discharged for work-connected misconduct. A telephone hearing was held on November 17, 2008. The parties were properly notified about the hearing. The claimant participated in the hearing with her representative, Ethan Kaplan, attorney at law. Lynn Corbeil, attorney at law, participated in the hearing on behalf of the employer with witnesses, Jalissa Simmons and Debbie Warnke-Eide. Exhibits One through Twenty were admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked full time as a certified nursing assistant (CNA) from May 2000 to August 15, 2008.

The claimant injured her hand on July 28, 2008. She was treated by the employer's workers' compensation doctor on July 28, and was released to return to work with the restriction that she not use her left hand.

The claimant returned to work with these restrictions. On August 14, the claimant saw the doctor. The claimant's left hand was put in a splint and she was released to perform work with her right hand only. She worked through August 15, 2008. Starting August 18, the claimant was unable to work due to pain in her hand and the side effects of the medication she was taking. She called in each day she was absent except August 22, 2008. On that day, a supervisor called her and she said she would not be reporting to work because she needed to get her prescription for medication filled.

On September 5, 2008, the claimant was seen by her personal doctor. Her doctor diagnosed her condition as nerve damage to her left hand. Her doctor increased her restrictions to include no use of her left hand, no lifting more than five pounds with her right hand, and no

pushing/pulling/lifting over five pounds. After the new restrictions were presented to the employer, a supervisor informed the claimant that the employer had to see whether it could accommodate the new restrictions and she would call the claimant. The supervisor never called the claimant to inform her about whether the claimant could accommodate her restrictions. The claimant continued to call in absent.

After the claimant called in on September 10, the employer sent a letter to her discharging her for having 21 unscheduled absences, which exceeded the employer's attendance policy limit of 10 unscheduled absences in a 12-month period.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code § 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent, or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

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).

871 IAC 24.32(7) provides that 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.

No current act of willful and substantial misconduct has been proven in this case. The preponderance of the evidence establishes the claimant's absences were due to medical problems with her hand and that she called in each day except for August 22. Furthermore, the claimant provided a medical statement with new restrictions on September 5 and was told that she would be called as to whether the restrictions could be accommodated, but no call was made to the claimant notifying her that work within the new doctor's restrictions was available.

DECISION:

The unemployment insurance decision dated October 21, 2008, reference 01, is affirmed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/kjw