

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

WENDE J MEYER
Claimant

APPEAL NO. 07A-UI-08245-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HCM INC
Employer

**OC: 03/04/07 R: 01
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.26(19) – Temporary Job

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated August 20, 2007, reference 04, which held the claimant eligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on October 2, 2007. Although duly notified, the claimant did not participate. The employer participated by Dawn Berrier, director of nursing, Steve Fitzgerald, administrator, and Ms. Kim Ahart.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct in connection with her employment.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all the evidence in the record, finds: The claimant worked for this employer from May 17, 2006, until April 28, 2007, when the employer made a management decision to no longer schedule the claimant. Ms. Meyer initially worked as a full-time certified nursing assistant. Subsequently, the claimant was reduced to a part-time worker. At the time of separation, the claimant was classified as a "on call" worker, who was called to work only when needed to replace other staff members. The claimant was paid by the hour and was under the supervision of Dawn Berrier.

Ms. Meyer was reduced to a part-time employee based upon her ongoing excessive absenteeism. During the course of her employment, Ms. Meyer called in on numerous occasions prior to the beginning of work shifts, indicating that she could not report due to illness. Although the employer did not request medical documentation from the claimant, the employer reasonably believed that the claimant's ongoing absenteeism was affecting staffing ratios and therefore began to assign the claimant only to part-time work. When the claimant's dependability as a part-time employee did not improve and the claimant continued to call in, properly reporting that she could not report due to illness, the employer made a management decision to no longer regularly schedule the claimant but, instead, to place her in the status of an "on call" worker who would only be called intermittently when needed to replace absent staff members. Prior to being placed in the status of a temporary worker, the claimant had received numerous warnings from the company regarding her excessive absenteeism.

After being placed in the position of a temporary or “on call” worker in February of 2007, the claimant was utilized only on a temporary basis to fill spot assignments. Upon reviewing the claimant’s employment record, the employer made a decision on April 28, 2007, to no longer employ the claimant on a temporary basis for spot jobs, as the employer believed that her absence due to illness continued to be unacceptable.

REASONING AND CONCLUSIONS OF LAW:

The administrative law judge concludes, based upon the evidence in the record, that on April 28, 2007, the employer made a management decision to no longer employ the claimant for temporary or spot jobs as an “on call” worker, based upon past attendance problems related to illness. The employer had worked with Ms. Meyer extensively during the course of her employment to encourage the claimant to be more dependable; however, the claimant continued to call in, properly reporting absences in advance, indicating that she was unable to report due to the illness of herself or family members. Although the employer suspected that the claimant’s absences were not valid, the employer did not require doctor’s statements nor discharged the claimant from employment. The employer elected to continue the employment relationship until some time in February 2007, when the employer placed the claimant in an “on call” status only and utilized the claimant, thereafter, as a spot or temporary worker.

The supreme court of the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is a form of misconduct. The court further held that the absenteeism must be both excessive and unexcused to be disqualifying. Absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. The evidence in this case clearly establishes that Ms. Meyer properly notified the employer of each impending absence and cited the excusable reason of illness.

The administrative law judge concludes that after the employer changed the claimant’s job position to an “on call,” temporary, or spot worker, that the claimant was thereafter employed on a temporary basis for spot jobs or assignments and fulfilled the contract of hire when each of the jobs was completed. The claimant completion of the most recent assignment and the election of the employer not to re-employ the claimant resulted in the claimant’s separation taking place under non-disqualifying conditions.

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.

871 IAC 24.26(19) provides:

Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:

(19) The claimant was employed on a temporary basis for assignment to spot jobs or casual labor work and fulfilled the contract of hire when each of the jobs was completed. An election not to report for a new assignment to work shall not be construed as a voluntary leaving of employment. The issue of a refusal of an offer of suitable work shall be adjudicated when an offer of work is made by the former employer. The provisions of Iowa Code section 96.5(3) and rule 24.24(96) are controlling in the determination of suitability of work. However, this subrule shall not apply to substitute school employees who are subject to the provisions of Iowa Code section 96.4(5) which denies benefits that are based on service in an educational institution when the individual declines or refuses to accept a new contract or reasonable assurance of continued employment status. Under this circumstance, the substitute school employee shall be considered to have voluntarily quit employment.

871 IAC 24.26(19) provides when a claimant is employed on a temporary basis for assignment to spot jobs or casual labor, he or she fulfills the contract of hire when each of the jobs is completed.

For the reasons stated herein, the administrative law judge finds that the claimant's separation from employment on or about April 28, 2007, took place under non-disqualifying conditions when the employer chose not to offer the employer additional work assignments.

Although the question of the claimant's availability is not properly before the administrative law judge in the hearing of this matter, the administrative law judge finds that the employer has raised substantial issues with respect to the claimant's availability for work based upon her re-employment with another employer in July of 2007, the claimant's incarceration, and the claimant's failure to possess a valid motor vehicle driver's license, which would allow her to seek and accept employment in the general labor market. This may be a subject of inquiry for Iowa Workforce Development.

DECISION:

The representative's decision dated August 20, 2007, reference 04, finding the claimant's separation from employment was non-disqualifying, is affirmed. The claimant is qualified to receive unemployment insurance benefits only if she meets all other requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw