IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

SHENELL N ECHOLS
Claimant

CARE INITIATIVES
Employer

APPEAL NO: 18A-UI-07965-JE-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/24/18
Claimant: Respondent (2)

Section 96.5-2-a – Discharge/Misconduct
Section 96.3-7 – Recovery of Benefit Overpayment

STATEMENT OF THE CASE:

The employer filed a timely appeal from the July 17, 2018, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on August 16, 2018. The claimant participated in the hearing. Jayme LeJeune, Administrator; Jesse Clemen CNA/CMA; and Amanda Lange, Employer Representative; participated in the hearing on behalf of the employer. Employer's Exhibits One through Twelve were admitted into evidence.

ISSUE:

Whether the employer discharged the claimant for work-connected misconduct as defined by Iowa law.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was hired as a full-time CNA for Care Initiatives from April 3, 2018 to June 27, 2018. She was discharged for attendance issues.

The employer's attendance policy states that within an employee's first 90 days she will receive a verbal warning for her first absence or incident of tardiness; a written warning for a second absence or incident of tardiness; and is terminated if she has a third absence or incident of tardiness. If an employee picks up an extra shift it eliminates a warning.

The claimant received a verbal warning April 28, 2018, for arriving at 2:16 p.m. for her 2:00 p.m. shift. She received a written warning May 3, 2018, for arriving at 2:07 p.m. for her 2:00 p.m. shift. She picked up shifts June 7 and June 13, 2018, and eliminated her two warnings. She received a written warning June 2, 2018, after she called and stated she would not be in because she was in a car accident June 1, 2018, and arrived at 10:36 a.m. for her 10:00 a.m. shift June 2, 2018, because she did not know she was scheduled to work. She received a

written warning June 4, 2018, for arriving at 3:15 p.m. for her 2:00 p.m. shift. She said she was going to pick up a shift June 28, 2018, so one of her written warnings was eliminated.

On June 25, 2018, the claimant was scheduled to work in the A Hall. When she arrived at work she saw the employer had moved her to C Hall. The claimant was upset because she thought C Hall was more work. Another CNA was standing there when the claimant arrived and the claimant accused the employer of always moving him to the easier floor. The employer moved that CNA to A Hall because he was also a certified medication aide and it felt its staff could be better utilized with him on A Hall. The claimant went to complain to Supervisor Sherri Vance about being moved to A Hall. The claimant was pregnant but did not have any restrictions. She stated she worked the C Hall over the weekend and did not think she should have to work that hall on June 25, 2018. She indicated she was going to leave because it was too hard. Ms. Vance told her that she could leave but it would leave the employer even more short-staffed and she would be abandoning her residents. The claimant repeated that it was too hard on her. She asked Ms. Vance if she would be terminated if she left and Ms. Vance said she was not sure where the claimant was on attendance but it would count as an absence. Ms. Vance also notified the claimant she could be disciplined for unprofessionalism in walking off the job and being rude and disrespectful during their conversation. The claimant left and went to her doctor's office later that day and got a note stating she could not work B Hall and could only work C Hall if there were two CNA's in that hallway (Employer's Exhibit Three). The claimant presented the employer with the note June 27, 2018, and the employer notified the claimant her employment was terminated for violating its attendance policy June 25, 2018.

The employer participated personally in the fact-finding interview through the statements of Unemployment Claims Specialist Amanda Rivera.

The claimant has claimed and received unemployment insurance benefits in the amount of $1,635.00 for the five weeks ending August 11, 2018.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for disqualifying job misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proving disqualifying misconduct. *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).

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). The refusal to accept reasonable changes in job duties constitutes job misconduct since the employer has the right to allocate personnel in accordance with its needs and resources. *Brandl v. IDJS*, (Unpublished, Iowa App. 1986).

The claimant accumulated four incidents of tardiness and two absences in less than 90 days of employment with the employer. She received one verbal warning and three written warnings in violation of the employer's attendance policy.

The claimant's final absence occurred when she showed up for work June 25, 2018, and discovered that due to business needs, the employer moved her to a different hall that she perceived to be more difficult. After complaining about the situation she chose to leave rather than work her shift and then went to her doctor and got a note. She did not have any restrictions in place when she reported for work June 25, 2018, and testified she would have stayed if she had been allowed to remain on the hall she was originally assigned and the one she wanted to work. Because the claimant did not have any restrictions in place when she reported for work June 25, 2018, received a doctor's note after the fact, and did not provide the doctor's note to the employer until June 27, 2018, when the employer had already made the decision to terminate her employment, the administrative law judge finds the claimant's absence June 25, 2018, is not excused.

The employer has established that the claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with the claimant's history of absenteeism, is considered excessive. Therefore, benefits are denied.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
>
> (1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.
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> (2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.
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> (3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.
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> (4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

The employer participated in the fact-finding interview personally through the statements of Unemployment Claims Specialist Amanda Rivera. Consequently, the claimant's overpayment of benefits cannot be waived and she is overpaid benefits in the amount of $1,635.00 for the five weeks ending August 11, 2018.

DECISION:

The July 17, 2018, reference 01, decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The claimant has received benefits but was not eligible for those benefits. The employer personally participated in the fact-finding interview within the meaning of the law. Therefore, the claimant is overpaid benefits in the amount of $1,635.00 for the five weeks ending August 11, 2018.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/scn