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: 06A-UI-05540-S2T
OC: 04/30/6 R: 02
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party request the Appeals Section to reopen the record at the address listed at the top of this decision or 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

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed a representative's May 22, 2006 decision (reference 01) that concluded Jamie Paul (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 14, 2006. The claimant was represented by Steven Lawyer, Attorney at Law, and participated personally. The employer was represented by Jessica Meyer, Employer Representative, and participated by Muriel Steffen, Administrator; Tammy Kappel, Director of Nursing; and Lisa Reed, Licensed Practical Nurse. The claimant offered two exhibits which were marked for identification as Exhibits A and B. Exhibits A & B were received 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 claimant was hired on June 14, 2003, as a full-time restorative aid. The claimant understood the company's policy with regard to absenteeism. An employee would be terminated after ten absences for any reason. An employee could subtract points by working extra hours. The employer was aware the claimant had chronic asthma but it did not offer Family Medical Leave to the claimant for that condition. On April 5 and 26, 2006, the employer issued the claimant a written warning for absences due to properly reported illness.

The claimant was on Family Medical Leave from March 1 until April 18, 2006, due to cysts. The claimant understood she would have to have surgery in the future for the cysts but wanted to accumulate leave time so she would not be penalized by her absence for the surgery. At the time she was released to return to work the employer did not have the claimant posted on the schedule. The claimant called the employer and the employer informed the claimant when she was next scheduled. The claimant worked from April 18 to 24, 2006, under this system.

On April 26, 2006, the claimant called the employer to discover her working hours for the weekend. The employer told the claimant there was no work for her. The claimant saw a copy of the schedule for April 27 to May 10, 2006. She was not listed on the schedule and the shifts were fully staffed. The claimant left for the weekend.

On or about April 29, 2006, a co-worker reported she could not work that day. The employer thought she had asked the claimant to work. The claimant was unaware she was supposed to work. The employer telephoned the claimant but the claimant was not near her telephone. Again on April 30, 2006, the employer thought the claimant was going to work but the claimant was under the impression she was not needed. The employer again tried to reach the claimant and left messages. On April 30, 2006, the claimant returned the call and said she did not know she was on the schedule.

On May 1, 2006, the claimant spoke with the employer about the situation that occurred on April 29 and 30, 2006. The claimant told the employer she did not know she was supposed to work. The employer thought this was different behavior for the claimant because the claimant always properly reported her absences. The employer told the claimant she would call her back after discussing the situation with another person. The employer called the claimant back and told the claimant she could either receive a written warning for failure to appear or notify the employer and make up the hours or she could be terminated. The employer expected the claimant to call her back with her choice. The claimant did not call the employer back because she did not understand she was supposed to do so. The employer terminated the claimant for failure to telephone the employer on May 1, 2006.

The testimony of the employer and claimant was inconsistent. The pertinent facts were agreed upon by the parties. The claimant's only warnings had been for absences due to properly reported illness. She was terminated for failure to return a telephone call on May 1, 2006.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant was discharged for misconduct. For the following reasons, the administrative law judge concludes she was not.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Negligence does not constitute misconduct unless recurrent in nature; a single act is not disqualifying unless indicative of a deliberate disregard of the employer's interests. Henry v. Iowa Department of Job Service, 391 N.W.2d 731 (Iowa App. 1986). The employer discharged the claimant and has the burden of proof to show misconduct. The employer did not provide sufficient evidence of misconduct at the hearing. The claimant was terminated for failure to return the employer's telephone call. She had never been warned regarding her failure to perform a task. Assuming the claimant knew she was supposed to return the call, the claimant's single act of failing to return a telephone call does not rise to the level of misconduct. Consequently, the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's May 22, 2006 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

bas/kkf