

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LESLEY ELLIOTT
Claimant

APPEAL NO: 07A-UI-02258-BT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GRINNELL REGIONAL MEDICAL CENTER
Employer

**OC: 01/21/07 R: 02
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Grinnell Regional Medical Center (employer) appealed an unemployment insurance decision dated February 23, 2007, reference 01, which held that Lesley Elliott (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 21, 2007. The claimant participated in the hearing with Attorney Chris Claussen. The claimant's sister, Heidi Davidson, was in attendance but offered no testimony. The employer participated through Chris Reed, Director of Nutrition and Stacey Davis, Physician Assistant for Employee Health. Dave Ness, Cheryl Rutledge, Deb Nowachek and Vilene Savage were present for the hearing with the employer witnesses. Employer's Exhibits One through Four were admitted into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

The issue is whether the employer discharged the claimant for work-related misconduct?

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 December 20, 2004 and has worked as a full-time cook in Nutrition Services until January 11, 2007 when she was discharged due to her failure to comply with the appearance policy and action plan dated November 10, 2006. The claimant has had problems with lice since September 21, 2006. On that day, she reported to Employee Health and reported that one of her children, who sleeps in her bed, had lice earlier in the week. The claimant reported that her three children have had three episodes each of a lice infestation since the beginning of the school year. Physician Assistant Stacey Davis examined the claimant and determined she had no signs of adult lice or nits at that time. The policy was reviewed with the claimant and she was advised to notify the hospital as soon as possible if she had any further episodes of lice. Employees are treated with a medicated shampoo and not allowed to return to work for 24 hours following the treatment. The claimant reported on October 17, 2006 that her daughter had lice and the employer found three nits in the claimant's hair so she was given treatment and taken off work. The employer recommended and required

that the claimant's house be inspected by the Public Health nurse to provide assistance in resolving the problem. The employer also required that the claimant's scalp be examined on a daily basis prior to her reporting to work.

On November 1 or November 2, the claimant had been working when she had a conversation with a co-worker that she may have been re-infested. The employer examined the claimant's scalp on November 3 and found nits so the claimant was again taken off work. The Public Health nurse visited the claimant's home on November 7 but the claimant did not invite the nurse in the house and the conversation was held in the entryway. The claimant told the nurse that they had been treated "1 ½ weeks ago" and currently felt they were lice free. The employer found six to ten nits in the claimant's hair on November 9 and she was off work again. A written warning with a three day suspension was given to the claimant on November 10 for her refusal to follow policy by working when she had lice. The claimant was given an action plan which advised her she had to take ownership of the situation and get the problem under control. The action plan advised the claimant if there were further absences as a result of this problem, she would be subject to termination.

The claimant had nits in her hair on November 16 and was taken off work. She reported that her daughter had active lice on November 28 but none were found on her scalp at that time. The claimant returned to work on January 2, 2007 after taking time off for Christmas and again had an active lice infestation. Live nits were found in her hair on January 2 and January 3. Since September 21, 2006, the employer saw the claimant 26 different times in Employee Health with regard to the lice problem. Different options were recommended to the claimant but most were disregarded. The decision was made to discharge the claimant as it was felt she was not contributing to resolution of the problem and her chronic lice infestation was creating distress on the department.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code section 96.5-2-a.

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 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 issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). 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 claimant was effectively discharged for her chronic infestation of head lice during the last four months of her employment. It appears the employer is alleging the claimant was negligent in her actions to resolve the head lice. 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 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). The question thus becomes whether the claimant's actions demonstrate a deliberate disregard of the employer's interests or does her repeated negligence equate to willful misconduct in culpability. The employer cannot meet its burden in this case because the answer to the question is unknown. It can be assumed that the claimant is not taking diligent action with regard to ridding her home environment of lice since the problem was not resolved for four months. However, it could be equally as likely that she is doing everything possible in her home environment but her three children continue to bring the lice home with them. The employer made the safest decision in protecting its own interests but is unable to establish work-connected misconduct. Benefits are allowed.

DECISION:

The unemployment insurance decision dated February 23, 2007, reference 01, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

Susan D. Ackerman
Administrative Law Judge

Decision Dated and Mailed

sda/pjs