IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ASHLEY K GORMAN
Claimant

WHIRLPOOL CORPORATION
Employer

APPEAL NO. 12A-UI-09571-S2T

ADMINISTRATIVE LAW JUDGE
NUNC PRO TUNC DECISION

OC: 06/03/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Ashley Gorman (claimant) appealed a representative's July 18, 2012 decision (reference 04) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Whirlpool Corporation (employer) for failure to follow instructions in the performance of her job. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 30, 2012. The claimant participated personally. The employer participated by Jeff Andersen, human resources generalist. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on January 4, 2012, as a full-time assembler. The employer's collective bargaining agreement states that a worker cannot be absent five consecutive working days without authorization. The employer issued the claimant a warning for her absence due to medical issues that were properly reported.

May 29, 2012, was the claimant's last day of work. In June 2012, the claimant was pregnant and had gall stones. She properly reported her absences except when she was hospitalized. On June 5, 2012, the claimant watched while her doctor faxed information to the employer. The employer did not receive the information. It terminated the claimant on June 6, 2012, for absence for more than five days without authorization from the employer.

A decision was mailed to the claimant's address of record on July 18, 2012. The claimant did receive the decision. She took the decision to the Cedar Rapids, Iowa, Workforce Office. A worker named Bob told the claimant she did not have to appeal the decision because it was wrong.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code section 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs “a” through “h”. Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant did not have an opportunity to appeal the fact-finder's decision because the department told her not to appeal. Without notice of a disqualification, no meaningful opportunity for appeal exists. See *Smith v. Iowa Employment Security Commission*, 212 N.W.2d 471, 472 (Iowa 1973). Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant was discharged for misconduct. 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.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct, but that there was a final incident of misconduct that precipitated the discharge. The last incidents of absence were illnesses that occurred in June 2012. The claimant's absences do not amount to job misconduct, because they were properly reported when she was able.

Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. Roberts v. Iowa Department of Job Service, 356 N.W.2d 218 (Iowa 1984). Some of the medical absences may have been improperly reported. The claimant's absences do not amount to job misconduct, because the claimant could not properly report her absences due to her hospitalization. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a final incident leading to the discharge. The employer decided whether the absence was medically necessary rather than relying on the doctor's assessment. The claimant was discharged, but there was no misconduct.

DECISION:

The July 18, 2012, reference 04, decision is reversed. The appeal in this case was timely. The employer has not met its burden of proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw