

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

NICOLE C PHILLIPS
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DES MOINES IA 50310-4217

FOUR OAKS INC OF IOWA
C/o TALX EMPLOYER SERVICES
PO BOX 1160
COLUMBUS OH 4316

AMENDED

Appeal Number: 06A-UI-05296-JTT
OC: 04/02/06 R: 02
Claimant: Respondent (4)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party 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
Section 96.4(3) – Able and Available
Section 96.3(7) – Recovery of Overpayment

STATEMENT OF THE CASE:

Four Oaks filed a timely appeal from the May 12, 2006, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on June 7, 2006. Claimant Nicole Phillips participated. Vice President Karen Bruess represented the employer and presented additional testimony through Program Manager Jane Payor. Exhibits A and C through G were received into evidence. The parties waived formal notice on the able and available issue so that the administrative law judge could rule on the issue. The administrative law judge took official notice of Agency administrative records regarding benefits disbursed to the claimant.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Nicole Phillips was employed by Four Oaks as a full-time therapist from July 26, 2005 until March 30, 2006, when the employer terminated the employment pursuant to its three-day “no-call, no-show” policy.

In January, Ms. Phillips was diagnosed with a significant medical condition. Ms. Phillips subsequently underwent two surgical procedures. Ms. Phillips maintained appropriate contact with the employer in connection with these absences. Ms. Phillips last appeared and performed her duties on March 17. Ms. Phillips then notified her supervisor, Program Manager Jane Payor, that she would need to commence a leave of absence due to her medical condition.

On March 23, Ms. Phillips spoke with Vice President for Human Resources Karen Bruess with regard to commencing a leave of absence. Due to an insufficient period of employment, Ms. Phillips was not eligible for a leave under the Family and Medical Leave Act.

On Friday, March 24, Ms. Phillips again spoke with Ms. Bruess, at which time the two women discussed other leave options. Later that day, Ms. Bruess sent Ms. Phillips an e-mail message regarding the need for a written request for leave and medical documentation supporting the request. Attached to the e-mail message was a copy of the applicable policies and materials Ms. Phillips would need to have completed by her doctor(s) and return to the employer. Ms. Bruess indicated in the e-mail message that the employer would need to receive the requested materials no later than March 29, 2006.

Ms. Phillips did not see and open Ms. Bruess’ e-mail message until Monday, March 27, and then set about contacting her doctor(s) in order to respond to the employer’s request for information. On March 28, Ms. Phillips spoke with Ms. Payor by telephone, at which time Ms. Payor told Ms. Phillips that she would handle Ms. Phillips’ client caseload until Ms. Phillips returned. The two women did not discuss the March 29 deadline for the leave of absence materials. Ms. Phillips erroneously concluded that the deadline was not hard and fast. Ms. Phillips did not provide medical documentation to the employer by the March 29 deadline. Ms. Phillips met with her doctors on March 30.

On March 31, Ms. Bruess sent a letter to Ms. Phillips notifying Ms. Phillips that her employment was terminated effective March 31, pursuant to the employer’s three-day “no-call, no-show” policy. The employer has such a policy in its employee handbook and Ms. Phillips had received a copy of the policy. Ms. Phillips took no further steps to supply medical documentation to the employer after she received the notice that her employment had been terminated.

During the week of April 3, Ms. Phillips’ doctor(s) discovered she had ulcers. Once this diagnosis was made and the condition treated, Ms. Phillips’ condition greatly improved and she would have been able to return to her duties as a therapist the next week.

REASONING AND CONCLUSIONS OF LAW:

The first question before the administrative law judge is the nature of the separation.

All separations from or terminations of employment are generally classifiable as layoffs, quits, discharges, or “other separations.” See 871 IAC 24.1(113). A discharge is a separation

initiated by the employer for reasons that may include attendance. See 871 IAC 24.1(113)(c). A quit is a separation initiated by an employment. See 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992).

871 IAC 24.25(4) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

The greater weight of the evidence indicates that Ms. Phillips never formed an intent to separate from the employment and had, in fact, been in contact with Ms. Payor on March 28, one of the days the employer included in the three days of alleged "no-call, no-show" absence. The evidence in the record otherwise indicates that Ms. Phillips had put the employer on notice that she would need to be absent for an extended period due to illness. The evidence does not support a quit, or more specifically, a quit based on three-days "no-call, no-show." The administrative law judge concludes that Ms. Phillips did not quit the employment, but was discharged.

Ms. Phillips established a claim for benefits that was effective April 2, 2006 and has received benefits. The evidence further indicates that Ms. Phillips received benefits of \$75.00 for the benefit week that ended April 8, 2006, the week during which she was diagnosed and received treatment for ulcers.

REASONING AND CONCLUSIONS OF LAW:

The next question is whether the evidence in the record establishes that Ms. Phillips was discharged for misconduct in connection with the employment. It does 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 this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

In order for Ms. Phillips' absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On

the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The testimony of Ms. Payor, cross-examination of Ms. Payor by Ms. Phillips, and Ms. Phillips' testimony indicate that Ms. Phillips' testimony is more reliable and, therefore, more credible. Under cross-examination, Ms. Payor admitted that Ms. Phillips had worked until March 17, whereas the employer had previously asserted that Ms. Phillips had ceased performing services at the beginning of March. The greater weight of the evidence indicates that Ms. Phillips was in contact with Ms. Payor on March 28 to discuss her leave status. The evidence indicates that Ms. Phillips had appropriately advised the employer of her need to be absent for an extended period due to significant illness. The evidence further indicates that Ms. Phillips was discharged failing to comply with an arbitrary and unreasonable deadline for submission of requested documentation.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Phillips was discharged for no disqualifying reason. Accordingly, Ms. Phillips is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Phillips.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The evidence in the record establishes that Ms. Phillips was not able and available for work during at least the majority, if not all, of the benefit week that ended April 8. Accordingly, Ms. Phillips was overpaid \$324.00 for benefits she received during that week and must repay that amount. The evidence indicates that Ms. Phillips was thereafter able and available for work.

DECISION:

The Agency representative's decision dated May 12, 2006, reference 02, is affirmed, but modified as follows. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged. The claimant was not able and available for employment during the benefit week that ended April 8, 2006 and is overpaid \$324.00. The claimant was thereafter able and available for employment.

jt/pjs/pjs