

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CYNTHIA HEWITT
Claimant

APPEAL NO: 07A-UI-06752-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

CENTRAL IOWA HOSPITAL CORP
Employer

OC: 06/03/07 R: 02
Claimant: Appellant (2R)

Iowa Code § 96.5(2)a – Suspension/Misconduct – Involuntary Leave of Absence

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 6, 2007, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on July 26, 2007. Claimant participated. Employer participated through Cindy Fullerton and Jane Coy. Employer's Exhibit 1 was received.

ISSUE:

The issue is whether claimant was suspended for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant remains employed as a part time RN. Her employment began on July 5, 2000 and she worked until she was told she was involuntarily placed on a leave of absence on June 1, 2007 when she reported to employer that she was named in a federal indictment primarily involving her husband regarding alleged possession of drugs and weapons and she was pulled into that investigation and was charged with conspiracy and possession. She entered a plea of not guilty on June 8. Both parties acknowledge the charges are not related to her employment. Employer does not have a policy with respect to removal of employees from work pending resolution of criminal charges. Claimant's nursing license is still in effect without restriction. Employer made no request for claimant to submit to a drug screen or a search of her vehicle and/or personal possessions at work. She has undergone voluntary and independent drug screens since June 1 and all are negative with no recommendation for treatment.

Claimant raised the issue of the timeliness of employer's protest. The notice of claim was mailed to employer on June 8, 2007. Employer faxed its protest on June 21, 2007. That time period does not include the weekend when the receiving fax machine was not operational from June 29 through July 2, 2007 and the morning of July 3, 2007. The issue of whether employer's protest is timely has not been investigated or determined at the claims level and is remanded for that purpose.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was suspended from employment for no disqualifying reason.

Iowa Code § 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(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

The employer has the burden of proving disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982).

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). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

Although the parties describe the separation as an involuntary leave of absence rather than a disciplinary suspension, it is, in effect, a removal from work because of alleged behavior employer is unwilling to tolerate of an employee. Thus, the separation is treated as a disciplinary suspension, which may be semantically equivalent to a disciplinary leave of absence. An employer may remove an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as employer does not have a policy governing involuntary leaves of absence for employees with pending criminal charges, the charges are not related to work, and claimant pleaded not guilty, employer has not met the burden of proof to establish that claimant

acted deliberately or negligently in violation of company policy, procedure, or prior warning. Benefits are allowed.

DECISION:

The July 6, 2007, reference 01, decision is reversed. Claimant was suspended from employment without establishment of misconduct. Benefits are allowed, provided claimant is otherwise eligible.

REMAND:

The timeliness of protest issue delineated in the findings of fact is remanded to the claims section of Iowa Workforce Development for an initial investigation and determination.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

dml/pjs