IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHIRLEY A MINTON
Claimant

MERRY MAIDS LIMITED PARTNERSHIP
Employer

APPEAL NO. 07A-UI-02421-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/21/07 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Shirley Minton (claimant) appealed a representative's February 27, 2007 decision (reference 03) that concluded she was not eligible to receive unemployment insurance benefits because she had voluntarily quit employment with Merry Maids (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 27, 2007. The claimant participated personally and through Ann Fankhauser, Former Coworker. The employer was represented by Lucie Hengen-Reed, Appellate Assistant Manager, and participated by Michael Aasheim, Branch Manger.

ISSUE:

The issue is whether the claimant was discharged for 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 June 8, 1998, as a full-time team captain. The claimant signed for receipt of the company attendance policy on October 26, 2006.

The claimant notified the employer on January 5, 2007, that she could not work due to illness. The claimant left voice messages for the employer indicating she could not work due to illness on January 8, 9, 10 and 11, 2007. The claimant provided the employer with a physician's note indicating she could not work from January 5 through 11, 2007. The claimant was supposed to return to work on January 12, 2007. On January 12, 2007, she left a voice message requesting a medical leave of absence. The employer left a message for the claimant but the claimant did not receive the message. The claimant left a voice message on January 16, 17 and 18, 2007, indicating she could not work due to illness. The employer did not receive those messages.

On January 22, 2007, the claimant called the employer and left a message saying she was ready to return to work at 8:00 a.m. The employer said the claimant's employment was in the hands of the head office and he would let the claimant know if she could return to work. The employer terminated the claimant for her absence from work.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

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).

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 which precipitated the discharge. The last incident of

absence was a properly reported illness which occurred in January 2007. The claimant's absence does not amount to job misconduct because it was properly reported. The claimant requested a leave of absence due to medical issues on January 15, 2007, and then left messages for the employer. The employer did not receive the claimant's messages and the claimant did not receive the employer's messages. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's February 27, 2007 decision (reference 03) is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css