

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

GLADIS AGUIRRE
Claimant

APPEAL NO: 08A-UI-07062-B

**ADMINISTRATIVE LAW JUDGE
DECISION**

MERCY HOSPITAL
Employer

OC: 06/23/08 R: 02
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Mercy Hospital (employer) appealed an unemployment insurance decision dated July 23, 2008, reference 01, which held that Gladis Aguirre (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a hearing was held in Des Moines, Iowa on October 16, 2008. The claimant participated in the hearing with Attorney Alfredo Alvarez. Her son Pedro Parada and her friend, Maria Socarras were in attendance. The employer participated through Monica Reed-Tremmel, General Diagnostic Manager; Eddie Brown, Employee Relations/Compliance Coordinator; and Attorney Patricia Shoff. Employer's Exhibits One through Six and Claimant's A through D 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 full-time in food nutrition on November 11, 1996. She transferred to the gift shop on January 31, 2000 and then moved to the radiology department as a radiology attendant on May 11, 2008. She continued in this position until her last day of employment on June 25, 2008. The claimant was suspended for one day without pay on June 26, 2008 due to 13 unexcused absences. The employer contends the absences were unexcused but has no detailed information as to why the claimant was absent except that it was unscheduled. The claimant argues the absences were due to workers' compensation issues but has no medical documentation supporting this claim. What is not disputed is the fact that the claimant had never received any formal disciplinary warnings for attendance prior to her one-day suspension on June 26, 2008.

The one-day suspension contained a warning that the claimant was required to submit a written Action Plan upon her return from the one-day suspension or it would be considered as a

voluntary resignation. Eddie Brown, the Employee Relations/Compliance Coordinator, discussed the issue with the claimant and directly advised her she needed to provide the Action Plan when she returned the next day. The claimant did not provide a written Action Plan and the employer accepted her resignation as of June 27, 2008. The claimant denied that she voluntarily quit her employment but the employer had already accepted her resignation.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the reasons for the claimant's separation from employment qualify her to receive unemployment insurance benefits. The claimant is not qualified to receive unemployment insurance benefits if she voluntarily quit without good cause attributable to the employer or if the employer discharged her for work-connected misconduct. Iowa Code sections 96.5-1 and 96.5-2-a.

The employer contends the claimant voluntarily quit in accordance with its policy and one-day suspension warning notice. Rule 871 IAC 24.25 provides that, 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 claimant was consistent in expressing her wish to return to work with the employer. In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980) and Peck v. Employment Appeal Bd., 492 N.W.2d 438 (Iowa Ct. App. 1992). The claimant did not exhibit the intent to quit and did not act to carry it out. Since the claimant did not have the requisite intent necessary to sever the employment relationship so as to treat the separation as a "voluntary quit" for unemployment insurance purposes, it must be treated as a discharge.

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.

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 claimant was effectively discharged when she failed to comply with company policy by providing a written Action Plan after returning from her one-day suspension for attendance. The claimant's testimony was not credible as she had to be prodded by her attorney to provide the correct answer. He would show her a document she gave to him and asked her if it was hers and she would repeatedly say no and when he reminded her that she gave it to him, she laughed and claimed she forgot. It was apparent she was only providing answers she believed would help her case and sometimes she did not know what those answers were supposed to be.

However, the employer discharged the claimant for failing to comply with company policy when the claimant's attorney clearly established the employer repeatedly failed to comply with its own policies. Sometimes the employer was not even aware of what its policies actually are. Essentially the claimant's discharge is due to excessive unexcused absenteeism. Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Id. The claimant may have had problems with excessive unexcused absenteeism but never received any warnings prior to her discharge. When misconduct is alleged as the reason for the discharge and subsequent disqualification of benefits, it is incumbent upon the employer to present evidence in support of its allegations. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. 871 IAC 24.32(4). The employer failed to provide documented and detailed evidence concerning the claimant's absences and general allegations that they were unexcused is not sufficient to disqualify her. The employer failed to meet its burden. Work-connected misconduct as defined by the unemployment insurance law has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated July 23, 2008, 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