

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

CHALLANE C MANAHAN
30767 IRONBRIDGE RD
SPRAUGEVILLE IA 52074

CRESTRIDGE INC
1015 WESLEY DR
MAQUOKETA IA 52060

Appeal Number: 05A-UI-11766-JT
OC: 10/23/05 R: 01
Claimant: Appellant (1)

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
871 IAC 24.32(7) – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Claimant Challane Manahan filed a timely appeal from the November 9, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on December 9, 2005. Ms. Manahan participated. Administrator Holly Wold represented the employer. Exhibits One through Five and A through F were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Challane Manahan was employed by Crestridge retirement home as a full-time licensed practical nurse (L.P.N.) from August 12, 2005 until October 26, 2005, when Administrator Holly Wold discharged her for being absent for two consecutive shifts without notifying the employer.

Ms. Manahan was absent for a nurses meeting and for her shift on Friday, October 21. At 1:00 p.m. on October 21, Ms. Manahan contacted Director of Nursing Juanita Bielenberg, R.N., to advise that a man was installing a lock at her home and that she was not comfortable leaving home until the lock was installed. Ms. Manahan requested that she be excused from the nurses' meeting at 1:30 p.m. Ms. Bielenberg advised Ms. Manahan that she would discuss the matter with Ms. Manahan when Ms. Manahan arrived for her 2:00 p.m. shift. Ms. Manahan did not report for her shift or further contact the employer with regard to a need to be absent for the shift. Ms. Manahan had been to the workplace earlier in the day on October 21. When Ms. Manahan did not appear for her shift, the director of nursing attempted to call Ms. Manahan at home, but received no answer. When the director of nursing left for the evening, she went to Ms. Manahan's home, where she observed tools that indicated someone had, in fact, been working to install a lock. Ms. Manahan and her vehicle were not present. The director of nursing left a note for Ms. Manahan to indicate she had stopped by and to indicate that she wondered why Ms. Manahan had neither reported for work nor notified the employer she would be absent. In addition, the assistant director of nursing left messages on Ms. Manahan's cell phone, advising that the employer was concerned for Ms. Manahan's well being. Ms. Manahan was not scheduled to work on Saturday or Sunday, October 22-23 and the employer did not hear from Ms. Manahan over the weekend.

On Monday morning, October 24, Administrator Holly Wold was concerned for Ms. Manahan when she learned that that no one had heard from Ms. Manahan since before her shift on October 21. Ms. Wold telephoned Ms. Manahan's mother, who advised she had last spoken with Ms. Manahan on October 21. Ms. Manahan's mother did not seem concerned for Ms. Manahan. Ms. Wold then telephoned the county sheriff to request that a deputy be sent to Ms. Manahan's home to check on her. A deputy went to the home and Ms. Manahan was not there. The deputy telephoned Ms. Manahan on her cell phone. Ms. Manahan did not answer. The deputy left a message advising Ms. Manahan that her employer was concerned for her well being and requesting a return phone call. Shortly thereafter, Ms. Manahan telephoned the deputy to advise that she was okay. Ms. Manahan was scheduled to work a shift on October 24, but was again absent without notifying the employer. Even after the conversation with the deputy, Ms. Manahan did not contact the employer regarding the need to be absent for her shift.

At 9:00 p.m. on October 24, Ms. Manahan telephoned the director of nursing at her home. At that time, Ms. Manahan advised Ms. Bielenberg for the first time that she was being stalked by Vern Goddard, the son of one of the nursing home residents. Ms. Manahan advised Ms. Bielenberg that staff at Crestridge had exacerbated the situation by encouraging the man's efforts and by providing the man with her telephone number. Ms. Manahan advised that she had been afraid to come to work. Ms. Manahan requested to change the shift to which she was assigned and to change from full-time to part-time status. Ms. Manahan referenced stress related to the job as a basis for the request to go part-time. The telephone call concluded with an agreement that Ms. Bielenberg would discuss the matter with Administrator Holly Wold and would get back to Ms. Manahan. Ms. Wold decided to discharge Ms. Manahan from the employment, based on the two consecutive instances of "no call, no show" and Ms. Manahan's failure to timely respond to the employer's attempts to get in contact with her. On October 25, Ms. Bielenberg attempted to contact Ms. Manahan, but was unsuccessful. That evening, Ms. Manahan left messages for Ms. Bielenberg at her home. On October 26, Ms. Bielenberg advised Ms. Manahan that she was being discharged from the employment.

The employer has a written attendance policy set forth in an employee handbook. On December 17, 2003, Ms. Manahan acknowledged receipt of a copy of the handbook. Neither Ms. Manahan nor the employer explained why Ms. Manahan's acknowledged receipt of the employee handbook appears to significantly predate her employment and neither testified to a prior period of employment. Pursuant to the attendance policy, Ms. Manahan was expected to notify her supervisor prior to the scheduled start of a shift if she needed to be absent. Pursuant to the policy, the employer deemed a single absence without notifying the employer to be misconduct that subjected Ms. Manahan to possible discharge.

Though Ms. Manahan asserted to the director of nursing that she was being stalked by Vern Goddard, the son of a nursing home resident for whom Ms. Manahan provided care, Mr. Goddard was not, in fact, stalking Ms. Manahan. Mr. Goddard was a frequent visitor to the nursing home. At some point, Mr. Goddard commenced communicating to Ms. Manahan his appreciation for the quality of care Ms. Manahan provided to his mother. Mr. Goddard brought Ms. Manahan a mum, which Ms. Manahan declined. Mr. Goddard brought Ms. Manahan a pan of lasagna and left a note expressing his appreciation for the care she provided to his mother. Ms. Manahan was unnerved that Mr. Goddard's presence at the facility at the time he delivered the lasagna went undetected. Ms. Manahan provided the note from Mr. Goddard to the employer, but insists the note provided is different from the note the employer produced for the hearing. That assertion is erroneous, as the note produced by the employer specifically references that Mr. Goddard had cooked for Ms. Manahan and the lasagna was the only instance in which Mr. Goddard had, in fact, cooked for Ms. Manahan. Ms. Manahan was unsettled by what she perceived to be expressions of more than mere appreciation. Ms. Manahan went shopping at a store where Mr. Goddard happened to work and Mr. Goddard followed her throughout the store, insisting on providing her assistance when she indicated she did not need or desire any. After Ms. Manahan made it clear to Mr. Goddard that she did not appreciate his overtures, Ms. Manahan received a message at work that items she had placed on lay-away at the store where Mr. Goddard worked would be returned to stock. Ms. Manahan later learned that Mr. Goddard had no authority to send the message and that he had done so in retaliation to Ms. Manahan's rebuff. Ms. Manahan thought she had brought her concerns to the attention of bookkeeper Donita McCloy, but never spoke directly with the director of nursing or the administrative about her concerns regarding Mr. Goddard.

On October 21, the day of the first missed shift, Ms. Manahan had just picked up a handyman who was going to winterize her home, when she encountered Mr. Goddard. Some sort of confrontation took place, during which Mr. Goddard advised Ms. Manahan that he had "bent over backward to accommodate" her. Ms. Manahan was greatly disturbed by the encounter and decided to have the handyman fix the lock on her front door instead of winterizing the home. Ms. Manahan had no reason to believe that Mr. Goddard knew where she lived. However, a nursing assistant at Crestridge had provided Mr. Goddard with Ms. Manahan's telephone number, in violation of Crestridge policy. During Ms. Manahan's encounter with Mr. Goddard, the unauthorized disclosure of the telephone number was discussed and Mr. Goddard indicated that he would delete the number from his cell phone out of respect for Ms. Manahan. Ms. Manahan decided she was too upset to go to work, but did not notify the employer. Ms. Manahan then went to a local bank to get money to pay the handyman. Ms. Manahan again encountered Mr. Goddard. During this second encounter, Ms. Manahan bluntly advised Mr. Goddard that he had interfered with her job and to stay away from her. Ms. Manahan decided to spend the weekend with her sister in another town. Ms. Manahan asserts that her mother was with her a significant portion of the time and knew how upset she was. However, Ms. Manahan's mother did not seem concerned for Ms. Manahan when Ms. Wold spoke with the mother on October 24. Ms. Manahan did not receive the employer's

telephone calls to her home because she was not there. Ms. Manahan received the employer's telephone calls to her cell phone, but elected not to respond. Ms. Manahan's assertion that her cell phone signal was weak and that she did not receive the employer's telephone calls to her cell phone is false. This is indicated by Ms. Manahan's ability to receive the telephone message from the sheriff's deputy. Ms. Manahan was screening her telephone calls. This is why she did not speak with the deputy at the time he called, but called him back shortly after he left a message for her. Ms. Manahan took no steps to advise the employer that she would be absent on October 24. Instead, Ms. Manahan waited until the evening to contact the director of nursing at home to inquire about the status of her employment.

REASONING AND CONCLUSIONS OF LAW:

The employer asserts Ms. Manahan should be disqualified for benefits based on the two consecutive absences without notifying the employer, her failure to respond to the employer's attempts to contact her, and the employer's written policy that warned of discharge for a single "no-call, no-show." Ms. Manahan asserts she was in fear for her safety if she came to work, that she was too upset to notify the employer of the need to miss the shifts, and that the director of nursing appeared to be willing to continue her in the employment.

The question for the administrative law judge is whether the evidence in the record establishes that Ms. Manahan was discharged for excessive unexcused absences and is, therefore, disqualified for unemployment insurance benefits. It does.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer bears 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).

In order for Ms. Manahan's 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 evidence indicates that Ms. Manahan was absent without notifying the employer on October 21 and 24. In addition, Ms. Manahan was absent from a required meeting on October 21. Ms. Manahan had only been in the employment for a short period before these unexcused absences. Ms. Manahan's testimony about why she was absent and why she failed to notify the employer of the need to miss her shifts on October 21 and 24 was internally inconsistent and inconsistent with the weight of the evidence. The administrative law judge finds not credible Ms. Manahan's assertion that fear of Mr. Goddard was the basis for her absences. Ms. Manahan appears to have had no difficulty in telling Mr. Goddard that his attention was unwanted. Ms. Manahan's testimony of her encounters with Mr. Goddard on or prior to October 21 fails to reveal circumstances under which a reasonable person would have felt threatened and the administrative law judge concludes Ms. Manahan belatedly overstated her concerns regarding Mr. Goddard in an attempt to keep her employment. Though Ms. Manahan had received no prior warnings or reprimands for poor attendance, her three unexcused absences in the course of two workdays were excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Manahan was discharged for misconduct. Accordingly, Ms. Manahan is disqualified for benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer's account shall not be charged for benefits paid to Ms. Manahan.

DECISION:

The Agency representative's decision dated November 9, 2005, reference 01, is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements.

jt/kjf