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

ANITA I MCKEOWN
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SUNRISE FARMS INC
2060 WHITE AVE
HARRIS IA 51345

Appeal Number: 04A-UI-05040-RT
OC: 04-04-04 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 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Anita I. McKeown, filed a timely appeal from an unemployment insurance decision dated April 23, 2004, reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on May 26, 2004 with the claimant participating. Steve Woelber, Live Production Manager, participated in the hearing for the employer, Sunrise Farms, Inc. At the end of the hearing, Karen Luinstra, was available to testify for the employer but not called because her testimony would have been repetitive and unnecessary. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time layer barn laborer from July 25, 2003 until she separated from her employment on February 3, 2004. The claimant was absent from and after February 1, 2004 without notifying the employer of her absences and never returned to work thereafter. The employer treated the claimant as a voluntary quit on February 3, 2004 when the claimant failed to show up for work for three days, February 1, February 2, and February 3, 2004. The last time the claimant worked was January 29, 2004. The claimant was absent on January 31, 2004 but she properly reported this absence. The claimant was tardy on January 30, 2004 because she stayed with her boyfriend that night and was too far away from work to get there because of bad roads. The claimant was also tardy on December 3, 2003 and December 27, 2003 either because of bad roads or because she overslept. The claimant was also absent on December 14, 2003 but she informed the employer of her absence. The claimant was also absent three times in November 2003 because of morning sickness. The claimant received a verbal warning for her attendance on December 1, 2003 and two written warnings for different occurrences on December 30, 2003.

The claimant became pregnant at the end of 2003 and although the claimant never expressed any concerns to the employer, her supervisor and the employer's witness, Steve Woelber, Live Production Manager, expressed concerns about the claimant continuing to work. However, there were no other positions available to the claimant. The claimant's physician did not say the claimant had to quit because of her pregnancy.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was.

Iowa Code Section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.26(6)b, (6)a provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (6) Separation because of illness, injury or pregnancy.
>
> b. Employment related separation. The claimant was compelled to leave employment because of an illness, injury, or allergy condition that was attributable to the employment. Factors and circumstances directly connected with employment which caused or aggravated the illness, injury, allergy, or disease to the employee which made it impossible for the employee to continue in employment because of serious danger to the employee's health may be held to be an involuntary termination of employment and

constitute good cause attributable to the employer. The claimant will be eligible for benefits if compelled to leave employment as a result of an injury suffered on the job.

In order to be eligible under this paragraph "b" an individual must present competent evidence showing adequate health reasons to justify termination; before quitting have informed the employer of the work-related health problem and inform the employer that the individual intends to quit unless the problem is corrected or the individual is reasonably accommodated. Reasonable accommodation includes other comparable work which is not injurious to the claimant's health and for which the claimant must remain available.

a. Nonemployment related separation. The claimant left because of illness, injury or pregnancy upon the advice of a licensed and practicing physician. Upon recovery, when recovery was certified by a licensed and practicing physician, the claimant returned and offered to perform services to the employer, but no suitable, comparable work was available. Recovery is defined as the ability of the claimant to perform all of the duties of the previous employment.

871 IAC 24.25(21), (28) 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.

(21) The claimant left because of dissatisfaction with the work environment.

(28) The claimant left after being reprimanded.

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, (7) 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).

> (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 first issue to be resolved is the character of the separation. The claimant maintains that she was discharged. The employer maintains that the claimant voluntarily quit. The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant left her employment voluntarily. The employer's witness, Steve Woelber, Live Production Manager, credibly testified that the claimant was absent on February 1, 2004 and thereafter without notifying the employer and the employer treated this as a quit. The claimant concedes that she did not go to work on and after February 1, 2004. The claimant testified that she was not scheduled to work on February 1 and February 2 and that she tried to get to work on February 3 but could not do so because of bad road conditions and so she went back home but she did not call the employer. Thereafter the claimant testified that she did not go to work because she thought she had been discharged. At one point the claimant testified that she was not on the schedule and therefore she thought she had been discharged but this is not credible. The administrative law judge cannot understand why the claimant would attempt to get to work on February 3, 2004 but not on the following days of the week if she truly believed she was not on the schedule. Further, the claimant could not say who had specifically told her that she was discharged. No one from the employer in a position of authority told the claimant that she was discharged. Rather, the claimant was informed by coworkers that they believed she would be discharged. The claimant's testimony is simply not credible enough to establish that she was discharged. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code Section 96.6-2. The administrative law judge concludes that the claimant has failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. It

appears to the administrative law judge that the claimant left her employment because she believed that she was going to be reprimanded for attendance but this is not good cause attributable to the employer. There was some evidence that the claimant was pregnant and did not think that she should continue to work in the barn area where she was working. However, the claimant testified that her physician did not tell her that she needed to quit. There is not a preponderance of the evidence that the claimant was compelled to leave her employment because of her pregnancy nor is there any real evidence that the claimant informed the employer of the work related health problem and further informed the employer that she intended to quit unless the problem was corrected or accommodated. Mr. Woelber did express concerns to the employer about the claimant's pregnancy but there were no other positions available. There is no evidence that the claimant herself actually expressed such concerns and no evidence that she ever indicated or announced an intention to quit. There is some evidence that the claimant was dissatisfied with her working conditions but this is not good cause attributable to the employer. There is also no evidence that the claimant ever returned to the employer and offered to go back to work. Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant left her employment voluntarily without good cause attributable to the employer, and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless she requalifies for such benefits.

The claimant maintains that she was discharged even though she could not state who had discharged her. Even if the claimant's separation would be characterized as a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely excessive unexcused absenteeism, and she would still be disqualified to receive unemployment insurance benefits. The claimant had three tardies as set out in the findings of fact because the claimant stayed with her boyfriend and was too far away to make it to work because of bad roads and because she may have overslept or because of bad roads. There is not enough evidence here to establish that the claimant's tardies were for reasonable cause or personal illness. Further, the evidence establishes that the claimant was absent on January 31, 2004 as well as December 14, 2003 and three times in November 2003. The claimant testified that these were because of illness but in November, in particular, they were for morning sickness but the claimant was absent the entire day. The claimant got three warnings for her attendance, a verbal warning on December 1, 2003, and two written warnings for separate occurrences on December 30, 2003. Based upon the evidence here, and the claimant's lack of credibility as noted above and the claimant's own concessions about some of the absences and tardies, the administrative law judge is constrained to conclude that claimant's absences and tardies were not for reasonable cause or not properly reported and were excessive unexcused absenteeism and disqualifying misconduct. Therefore, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct and would still be disqualified to receive unemployment insurance benefits.

DECISION:

The representative's decision of April 23, 2004, reference 02, is affirmed. The claimant, Anita I. McKeown, is not entitled to receive unemployment insurance benefits until or unless she requalifies for such benefits.

tjc/b