IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LUCINDA V KINDER
Claimant

HCM INC
Employer

APPEAL NO. 11A-UI-06387-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/10/11
Claimant: Appellant (5)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Lucinda V. Kinder (claimant) appealed a representative's May 2, 2011 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from HCM, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 9, 2011. The claimant participated in the hearing. Casey Kann appeared on the employer's behalf. 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:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on August 3, 2010. She worked part-time (about 26 hours per week) as a cook in the employer's Iowa City, Iowa, long-term care nursing facility. She usually worked a 2:00 p.m.-to-8:00 p.m. shift. Her last day of work was April 4, 2011. She was next scheduled to work on April 7, 2011.

Prior to April 7, the claimant had four attendance occurrences for which she had received warnings. These included a 30-minute tardy on March 1, leaving work early on March 21 because her daughter was at the hospital due to a sports injury, and being three hours late on March 29. After the March 29 incident, the employer gave the claimant a warning with a 90 day probation, under which there were to be no further incidents or discharge would occur. The reason for the three-hour tardy on March 29 was that the claimant had gone out of state to pick up her boyfriend's children for a visit, and the return had taken longer than expected.

On April 7 the claimant was a no-call, no-show for work. Ms. Kann, the facility administrator, determined that the claimant would be discharged for the additional attendance violation. Further, she believed the claimant had abandoned her position under the employer's one

no-call, no-show quit policy and because she was not aware that the claimant had contacted her supervisor on April 8. The claimant was a no-call, no-show for work on April 7 because she and her boyfriend were returning his children to their mothers' homes out of state on April 6 when the car was stopped by law enforcement and the claimant's boyfriend was arrested. The claimant and the children stayed in the car overnight. On April 7 the claimant was able to make arrangements for the children to be returned home and to get bail money for her boyfriend, but she was unable to return back to Iowa City until April 8. She was unable to call the employer because her cell phone battery was dead; she did not attempt to reach the employer by using directory assistance from another phone. She returned to Iowa City shortly before her normal scheduled shift would have begun at 2:00 p.m. on April 8 and called her supervisor. She was then informed that she had been discharged.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

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. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993); Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant quit by job abandonment but that if she had returned, she would have been told she was discharged. A three-day no-call, no-show in violation of company rule can be considered to be a voluntary quit. 871 IAC 24.25(4). A one-day no-call, no-show does not satisfy this provision. Further, the claimant did seek to return to work on April 8 and was informed that she was discharged. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code §96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits, an employer must establish the employee was responsible for a deliberate act or omission that was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct

must show a willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior that 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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. 871 IAC 24.32(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer effectively discharged the claimant was her absence on April 7 after the prior incidents and while being on the resulting 90-day probation for attendance. Excessive and unexcused absenteeism, including tardies, can constitute misconduct. 871 IAC 24.32(7); Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The claimant's final absence was not excused and was not due to illness or other reasonable grounds; particularly given the difficulties returning in time for work she had encountered when picking up the children on March 29 and the resulting disciplinary action, the claimant should have known that additional difficulties that could arise when returning the children could result in her being delayed in reporting back to work and would result in her discharge. The claimant had previously been warned that future occurrences could result in termination. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's May 2, 2011 decision (reference 01) is affirmed as modified with no effect on the parties. The claimant did not voluntarily quit but the employer did discharge the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of April 8, 2011. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/kjw