IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ELISE K RUF
Claimant

MERCY HOSPITAL
Employer

APPEAL NO: 08A-UI-08391-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/17/08 R: 01
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
871 IAC 26.14(7) – Late Call

STATEMENT OF THE CASE:

Mercy Hospital (employer) appealed a representative's September 12, 2008 decision (reference 01) that concluded Elise K. Ruf (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 15, 2008. The claimant failed to respond to the hearing notice and provide a telephone number at which she could be reached for the hearing and did not participate in the hearing. Ron Robertson appeared on the employer's behalf and presented testimony from one other witness, Diane Stanton. The record was closed at 1:32 p.m. At 2:51 p.m., the claimant called the Appeals Section and requested that the record be reopened. Based on the evidence, the arguments of the employer, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Should the hearing record be reopened? Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant moved from her Iowa residence to Arizona approximately October 1, the date the notice of hearing in this matter was mailed to her Iowa address. She received the forwarded hearing notice late on October 10. On October 13 she attempted to call one of the numbers on the hearing notice, but was unable to get through. She spoke to her mother in Iowa, who contacted her local Agency office. The Agency advisor to whom she spoke may not have realized that the scheduled hearing was an Appeals hearing, not a Claims fact-finding interview, and advised that the claimant simply wait for the call, despite the instructions on the hearing notice which inform the parties that if the party does not contact the Appeals Section and provide the phone number at which the party can be contacted for the hearing, the party will not be called for the hearing. When the claimant did not receive a call, she redoubled her efforts to contact the Appeals Section, but was not successful in doing so until nearly two hours after the scheduled start time for the hearing and over an hour after the record had been closed.

The claimant started working for the employer on January 28, 2008. She worked full time as a clinical registered nurse on a surgery floor of the employer's Des Moines, Iowa hospital. Her regular work schedule was Monday, Tuesday, and Thursday nights from 7:00 p.m. to 7:00 a.m., although she did sign up to pick up additional shifts. Her last shift worked was the shift that ended at 7:00 a.m. on June 17, 2008. The employer discharged her by letter dated June 19, 2008. The reason stated in the letter for the discharge was her attendance; the employer had additional concerns regarding the claimant's failure to complete necessary training and competency filings.

The claimant had missed work on April 10, calling in sick, May 7, calling in with a family emergency; June 5, calling in sick, and June 9, calling in sick. The final incident which triggered the termination decision was that the claimant was scheduled for a training class at 8:00 a.m. on June 18 which she missed. When she later spoke with her supervisor, Ms. Stanton, she explained that she had overslept. Ms. Stanton told the claimant not to report for her next shift, set for June 19 at 7:00 p.m., and that she would follow up with her later. The follow up was the June 19 letter of termination.

Contributing to the employer's decision to discharge the claimant was that the claimant had missed turning in competency filings in February and May. The claimant had previously been scheduled for the training class on June 4 but the instructor had had to send her home as she was too tired, as she had added shifts to her schedule so had worked immediately prior to the training class. Ms. Stanton had verbally counseled the claimant on a few occasions, but the claimant had not been advised that her job was in jeopardy if she did not take remedial action. The claimant's probationary period was scheduled to end as of July 28; the employer concluded that given the claimant's attendance, her failure to get the necessary competencies timely filed, and her failure to complete the necessary training, she was not going to be able to satisfactorily complete the probationary period.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the claimant's request to reopen the hearing should be granted or denied. After a hearing record has been closed the administrative law judge may not take evidence from a non-participating party but can only reopen the record and issue a new notice of hearing if the non-participating party has demonstrated good cause for the party's failure to participate. 871 IAC 26.14(7)b. The record shall not be reopened if the administrative law judge does not find good cause for the party's late contact. Id. Here, the claimant has provided good cause for failing to participate. However, as the administrative law judge has concluded that based upon the evidence provided by the employer alone the claimant is not disqualified, the question of reopening the record has become moot.

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). The question is not whether the employer was right 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 matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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 which 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 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. 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 triggering reason cited by the employer for discharging the claimant is her attendance. Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. 871 IAC 24.32(7); Cosper, supra; Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). The presumption is that oversleeping is generally within an employee's control and is not excused. Higgins, supra. However, absences due to properly reported illness or valid emergency cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. While under this analysis the claimant had one unexcused absence, this does not establish excessive unexcused absences. Further, the claimant had not previously been warned that future absences could result in termination so as to establish the element of intent. Higgins, supra.

As to the other questions regarding the claimant's completion of competencies and her general ability to successfully complete her probationary period, as misconduct connotes volition, a failure in job performance is not misconduct unless it is intentional. Huntoon, supra. There is no evidence the claimant intentionally failed to complete the competencies after being advised that her failure was jeopardizing her continued employment. The mere failure to be able to successfully complete a probationary period of employment is not misconduct. 871 IAC 24.32(5). While the employer had a good business reason for discharging the claimant, it has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's September 12, 2008 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs