IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JACQUELINE E TRIPP
Claimant

MYVERONA LLC
MYVERONA
Employer

APPEAL NO. 09A-UI-11593-JTT

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 07/12/09
Claimant: Appellant (1)

Iowa Code section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

Claimant filed a timely appeal from the August 11, 2009, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on September 8, 2009. Claimant participated. Cindy Bramlett, Manager, represented the employer and presented additional testimony through Jordan Barkow, Executive Chef. Exhibits One through Five and A were received in evidence.

ISSUE:

Whether Ms. Tripp separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Jacqueline Tripp was employed by My Verona restaurant as a full-time line cook from mid-December 2008 until March 9, 2009, when Cindy Bramlett, Manager, discharged her from the employment for attendance. Ms. Tripp's immediate supervisor was Dan Ankrum, Sous Chef. Mr. Ankrum is no longer with the employer. Jordan Barkow, lead night time line cook/supervisor, also supervised Ms. Tripp's work.

On February 20, Mr. Ankrum verbally reprimanded Ms. Tripp for arguing and sent her home early. Mr. Ankrum followed up with a written reprimand on February 23. Mr. Ankrum moved Ms. Tripp from her position in the pizza area to salad duties. There was no change in work hours or pay. February 27 was Ms. Tripp's first day in the new work assignment and also the last day that Ms. Tripp performed work for the employer.

On February 28, 2009, Ms. Tripp did not appear for a work. Ms. Tripp did not notify Mr. Ankrum or another manager that she needed to be absent. Mr. Ankrum prepared a written reprimand, which reprimand was never presented to Ms. Tripp because she did not return to the employment.

Ms. Tripp knew she was supposed to contact Mr. Ankrum or a more senior member of management before the scheduled start of her shift if she needed to be absent. The employer lacked a policy that equated multiple no-call, no-show absences with a voluntary quit.

On March 1, Ms. Tripp was absent from a mandatory meeting and failed to contact the employer. March 1 would have been the last day on the posted schedule. Mr. Ankrum prepared another written reprimand, which reprimand was never presented to Ms. Tripp because she did not return to the employment.

On March 4, Ms. Tripp was absent from work and failed to notify the employer. Mr. Ankrum prepared another written reprimand, which reprimand was never presented to Ms. Tripp because she did not return to the employment.

On March 9, Cindy Bramlett, Manager, sent Ms. Tripp a letter that stated Ms. Tripp's employment was terminated that day. Ms. Bramlett stated that on February 20 and 21, Ms. Tripp had been told to stop arguing with her supervisor and coworkers, did not stop, and was sent home early. Ms. Bramlett further stated that on February 28, March 1, and March 4, Ms. Tripp was absent and failed to notify a manager.

REASONING AND CONCLUSIONS OF LAW:

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 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 a claimant's absences to constitute misconduct that would disqualify the claimant from receiving unemployment insurance benefits, the evidence must establish that the claimant's *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 weight of the evidence establishes that Ms. Tripp was absent without notifying the employer on February 28, March 1, and March 4. Ms. Tripp's assertion that she contacted the employer on these dates is contradicted by the reprimands Mr. Ankrum prepared for her. The administrative law judge concludes that Ms. Tripp's testimony concerning reporting her absences on these three dates is not credible. Ms. Tripp submitted an exhibit that purports on its face to provide a medical excuse for February 27 through March 2. Upon close inspection, it appears as if the document may have been altered from a document intended to cover one day, March 2, 2009, to a document purporting to cover four days. The administrative law judge notes that "4" and the "2/27-3/2" is in a different handwriting than the rest of the document. The administrative law judge concludes the document is suspect and should not be given much weight. The evidence establishes three no-call, no-show unexcused absences very close in time. The administrative law judge concludes that Ms. Tripp's unexcused absences were excessive.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Tripp was discharged for misconduct. Accordingly, Ms. Tripp 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. Tripp.

DECISION:

The Agency representative's August 11, 2009, reference 01, decision is affirmed. The claimant was discharged for misconduct. The claimant is disqualified for unemployment benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit allowance, provided she meets all other eligibility requirements. The employer's account will not be charged.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

jet/kjw