IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHARI THOMPSON
Claimant

CARE INITIATIVES
Employer

APPEAL NO: 11A-UI-09022-BT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/05/11
Claimant: Respondent (1)

Iowa Code § 96.5(2)(a) - Discharge for Misconduct

STATEMENT OF THE CASE:

Care Initiatives (employer) appealed an unemployment insurance decision dated June 30, 2011, reference 01, which held that Shari Thompson (claimant) was eligible for unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on August 2, 2011. The claimant participated in the hearing. The employer participated through Linda Lee, Administrator; Jennifer Hudnut, Dietary Aide/Cook; and David Williams, Employer Representative. Employer's Exhibits One through Three were admitted into evidence. 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:

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was employed as a full-time cook from June 21, 2007 through June 9, 2011. The employer discharged her due to attendance and unacceptable conduct. The claimant had verbal warning for attendance on October 4, 2010 and a written warning on December 16, 2010. The written warning states, "Shari's goal is to not miss any more days this year." The claimant did not miss any more days that year.

The employer said the claimant reported to work on May 28, 2011 "unable to work" and "unable to function." The administrator said they suspected the claimant was under the influence of alcohol and a co-employee reported she could smell alcohol but the claimant was never sent to be tested. The employer witnesses said the claimant was sent home and/or that she simply went home. The claimant said she did not feel well at work and found a replacement. She called in her absence on May 29, 2011 and was told that she was not needed on May 30, 2011 so did not call the employer to report her absence that day. The administrator testified that the claimant was a no-call/no-show on May 30, 2011.

A co-employee went into the administrator's office on June 1, 2011 and the employer conducted an investigation into the claimant's off-duty conduct. The claimant was with her boyfriend when he was driving her car. They were stopped by the police and the claimant reportedly "assaulted" the officer. She subsequently told the administrator about the incident and the administrator had her come in and fill out paperwork so the employer could conduct a background check. Evidently the claimant was named in the paper and there were derogatory statements placed on Facebook. The administrator called the claimant on June 9, 2011 and terminated her; she told the claimant that she had made the decision after she "slept on it."

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the employer discharged the claimant for work-connected misconduct. 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.

Iowa Code § 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 establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

When misconduct is alleged as the reason for the discharge and subsequent disqualification of benefits, it is incumbent upon the employer to present evidence in support of its allegations. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. 871 IAC 24.32(4). The evidence provided by the administrator in the hearing was disjointed and confusing. She first testified that the claimant “terminated herself due to attendance and not coming to work.” The administrator later testified that the claimant was discharged due to attendance. This hearing was the first time the claimant heard the allegation that she was discharged due to attendance.

Excessive unexcused absenteeism, a concept which includes tardiness, is misconduct. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984). Although the claimant received two attendance warnings in 2010, there were no warnings issued in 2011. She went home or was either sent home on May 28, 2011; she called in on May 29, 2011; and she was told her shift was covered on May 30, 2011 so did not call or report to work that day. This does not constitute excessive unexcused absenteeism.

The employer wrote in the termination report that the claimant was discharged for “unacceptable conduct.” However, there was no specific evidence provided in the hearing explaining what the conduct was that was unacceptable and how it was work-related. There was something mentioned about pending criminal charges against the claimant for conduct outside of work but it was unclear what the charges might be, when they were filed, when the actions occurred which prompted the charges, and again, why they were connected to her employment. The employer failed to meet its burden. Work-connected misconduct has not been established in this case and benefits are allowed.

DECISION:

The unemployment insurance decision dated June 30, 2011, reference 01, is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Susan D. Ackerman
Administrative Law Judge

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Decision Dated and Mailed

sda/pjs