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

MARGUERITE M CLINKENBEARD
414 W BAKER # 3
KNOXVILLE IA 50138

GOODWILL INDUSTRIES OF CENTRAL IOWA INC
4900 NE 22ND ST
DES MOINES IA 50313

Appeal Number: 04A-UI-11594-RT
OC: 10/03/04 R: 02
Claimant: Appellant (2)

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 96.5-2-a – Discharge for Misconduct
Section 96.5-1 – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant, Marguerite M. Clinkenbeard, filed a timely appeal from an unemployment insurance decision dated October 27, 2004, reference 03, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on November 18, 2004, with the claimant participating. Larry Hollingworth, Human Resources Director, and Jon Gordon, Store Manager at the employer's Knoxville, Iowa store, participated in the hearing for the employer, Goodwill Industries of Central Iowa, Inc. Claimant's Exhibits A and B were admitted into evidence. 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 part-time store clerk from February 6, 2004 until she was separated from her employment on August 26, 2004. The claimant averaged between 11 and 23 hours per week. The claimant was absent for three days, Friday, August 20, 2004; Saturday, August 21, 2004; and Sunday, August 22, 2004. The claimant contracted spinal meningitis and went to the emergency room on August 21, 2004. She stayed there and was admitted to the hospital on August 22, 2004. The claimant was then discharged from the hospital on August 26, 2004. The claimant's medical records verifying her illness and the dates of hospitalization are shown at Claimant's Exhibit A. The claimant was quite ill. When the claimant was sick at home before she went to the emergency room, she was so ill that she could not get out of bed. She had no phone at home and could not notify the employer. Her neighbors had no phone either. The claimant was too sick to try to get up and try to seek a phone. A friend of the claimant's came by to see the claimant on August 21, 2004 and the claimant asked her friend to inform the employer of her illness and her absences. Her friend went to the employer on August 21, 2004 and spoke to Debbie Swayne, a coworker as shown at Claimant's Exhibit B. The claimant then went to the emergency room later on August 21, 2004 and was hospitalized the next day as set out above. The claimant called the employer on August 25, 2004 while still in the hospital and asked her daughter to pick up her check. Response by the employer was equivocal. The claimant then called the employer again on August 26, 2004. At that time, she was informed by the employer's witness, Jon Gordon, Store Manager in the employer's store at Knoxville, Iowa, where the claimant was employed, that she had been discharged or terminated for not showing up to work and not notifying the employer. The claimant's daughter also informed the employer of the claimant's hospitalization on August 24, 2004. When the claimant was told that she was discharged or terminated, as soon as she was discharged from the hospital she went to the employer's location. The claimant asked Mr. Gordon if she still had a job and he explained that she did not because she was considered a quit having been absent for three days as a no-call/no-show. Mr. Gordon did tell the claimant that under extenuating circumstances that might change and asked the claimant to bring in some doctor's excuses. The claimant went back to the hospital and asked that the various hospital records as shown at Claimant's Exhibit A be prepared and given to the claimant. The claimant did not receive the hospital records for approximately two weeks. The claimant does not know why there was a delay. Nevertheless, when the claimant received the records she took those records to Mr. Gordon, but Mr. Gordon told the claimant that it was too late and that he needed the documents earlier and that the documents would be no good at that time.

The claimant did have a previous attendance problem having received three oral warnings for tardies on May 8, 9, and 11, 2004 which were consolidated into a written disciplinary action on May 25, 2004. She was then given another written warning on June 18, 2004 and finally a three-day suspension on July 9, 2004. The three-day suspension occurred because she left work while on the clock to cash a paycheck. The claimant did not clock out and in, but merely went and cashed her check. The claimant had permission to do so from someone at the employer. The claimant did notify the employer of her tardies or absences during that period of time, but lost her phone later before her absences in August 2004. Some of the claimant's absences in the period covered by the warnings were for personal illness and properly reported. The employer has a policy that if an employee is going to be absent or tardy they must notify the employer within 30 minutes after the start of the shift. This policy is in a handbook, a copy of which the claimant received and for which he signed an acknowledgement. The employer

also has a policy that three absences in a row without notifying the employer is considered a voluntary quit.

The claimant was not scheduled to work on August 23, 24, and 25, 2004 and although she was scheduled on August 26, 2004, the employer removed the claimant from the schedule. In any event, the claimant was still ill on August 26, 2004 and was hospitalized for at least part of that day.

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 not.

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 24.25 (4) provide:

> 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:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

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) provide:

> 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 employer maintains that the claimant voluntarily quit when she was absent three days in a row without notifying the employer. The claimant maintains that she was discharged when she went to the employer's location on August 26, 2004 and was told that she had been discharged or terminated. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant left her employment voluntarily. The evidence establishes that the claimant was in fact absent for three days, August 20, 21, 22, 2004. The claimant testified that she was absent also on August 19, 2004, but does not recall exactly and it appears from the evidence that the claimant was not scheduled to work on that day. The employer maintains that the claimant did not notify the employer of these absences. However, the claimant credibly testified that she had no phone, nor did her neighbors and she was too sick to get out of bed and search for a phone. The administrative law judge believes the claimant's testimony here because her illness is confirmed at Claimant's Exhibit A. The claimant also credibly testified that on August 21, 2004, the claimant's second day of absence, a friend came by and the claimant had the friend inform the employer of the claimant's absences. The friend did so. This is confirmed by a statement by a coworker of the claimant's at Claimant's Exhibit B indicating that on that day she was informed by the claimant's friend that the claimant was very ill. In fact the words were, "deathly ill." Accordingly, the administrative law judge concludes that the claimant's failure to notify the employer promptly was justified by the claimant's illness and lack of a phone and that the employer was in fact notified during the claimant's second day of absence and therefore the claimant did not really have three consecutive days of absences where the employer was not notified. It may well be that in other circumstances the claimant could have and should have notified the employer herself, but under the circumstances here the administrative law judge concludes that the claimant was justified in failing to call the employer and further justified in having a friend inform the employer of her illness instead of the claimant herself. The administrative law judge notes that after the claimant spoke to her friend before she went to the

emergency room and was then admitted into the hospital the next day. The claimant was not scheduled to work on August 23, 24, and 25, 2004 and although scheduled for August 26, 2004, the claimant was still in the hospital at least for part of that day and the employer had removed the claimant from the schedule. Further, the claimant's daughter notified the employer of the claimant's hospitalization on August 24, 2004. This is even confirmed by the employer's witness, Jon Gordon, Store Manager of the Knoxville, Iowa, store where the claimant was employed. In any event, the claimant came to work on August 26, 2004 and was informed then that she was discharged or terminated. Under the evidence here, the administrative law judge concludes that the claimant did not voluntarily quit but was discharged on August 26, 2004.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. IDJS, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The only possible reason for the claimant's discharge was her attendance. There is no evidence beyond the claimant's attendance of any deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interest and/or in carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

The claimant was absent for four days in August 2004; August 20, 21, 22, and 26, 2004. However, the evidence is clear, including Claimant's Exhibit A, that these absences were for personal illness. The issue really is whether the claimant properly reported these absences. The administrative law judge concludes that the claimant reported the absences first by a friend on August 21, 2004 and then by her daughter on August 24, 2004. The administrative law judge further concludes based upon the evidence and the extent of the claimant's serious illness that she was justified in failing to report the absences herself or on the other days that she was absent as discussed above. Accordingly, the administrative law judge concludes that these absences were for personal illness and properly reported and not excessive unexcused absenteeism. It is true that the claimant had other absences as well as warnings and other disciplines as set out in the Findings of Fact; the last occurring as a three day suspension on July 9, 2004. However, the claimant was appropriately disciplined for those absences. To be discharged now for the absences occurring prior to August 20, 2004 and after being disciplined for those absences, would be past acts of misconduct. A discharge for misconduct cannot be based on past acts. See 871 IAC 24.32(8). It is true that past acts and warnings can be used to determine the magnitude of a current act of misconduct but the administrative law judge concludes, as noted above, that there is no current act of misconduct on the part of the claimant. The claimant was appropriately disciplined already for the attendance problems she had had in the past and her absences in August were not misconduct.

In summary, the administrative law judge concludes that the claimant's absences were for personal illness and properly reported or the claimant was justified in failing to properly report the absences and therefore are not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the

discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence of substantial misconduct to warrant the claimant's disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision dated October 27, 2004, reference 03, is reversed. The claimant, Marguerite M. Clinkenbeard, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

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