

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

TANIA HERNANDEZ SERRANO
Claimant

APPEAL 16A-UI-10843-SC-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

PACKERS SANITATION SERVICES INC
Employer

**OC: 08/28/16
Claimant: Respondent (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

Packers Sanitation Services Inc. (employer) filed an appeal from the September 30, 2016, (reference 03) unemployment insurance decision that allowed benefits based upon the determination it failed to provide sufficient evidence to show Tania Hernandez-Serrano (claimant) was discharged for disqualifying misconduct. The parties were properly notified about the hearing. A telephone hearing was held on October 19, 2016. The claimant participated personally and with the assistance of CTS Language Link Interpreter Luis (employee number 10342). The employer participated through Employment Retention Program Coordinator Andrea Ramirez. Employer's Exhibit 1 was received.

ISSUES:

Did the claimant voluntarily leave the employment with good cause attributable to the employer or did the employer discharge the claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

Has the claimant been overpaid unemployment insurance benefits?

Can the repayment of those benefits to the agency be waived?

Can charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a Laborer beginning on December 5, 2016, and her last day worked was July 5, 2016. The claimant did not have any absences prior to that day.

On June 30, 2016, the claimant's doctor gave her restrictions related to her tendinitis and pain in her arms. The claimant was not to lift over 20 pounds or raise her right arm. She notified her supervisor, Site Manager Cesar Barrios, of her restrictions. He said he would find something for her to do within her restrictions.

On July 6, 2016, the claimant reported to work and told Barrios she had pain in her arms. He told her to go to the Emergency Room. The claimant went to the Emergency Room and returned with a note excusing her from work through July 8, 2016. She gave the note to Barrios who approved her absence. On July 7, 2016, Barrios gave her paperwork to request job protected leave under the Family Medical Leave Act (FMLA). The claimant gave the paperwork to her doctor to complete and returned the completed documents to Barrios on July 11, 2016.

On July 15, 2016, the claimant presented a note to Barrios from her doctor stating she was to be off work through August 29, 2016. On August 29, 2016, the claimant reported to work and was told she had been removed from the system. Barrios' secretary gave the claimant the phone number for the corporate office. The claimant contacted someone at the employer's corporate office who told her that none of the documentation she had provided to Barrios had been submitted to corporate; therefore, she had not been on an approved leave and her employment had ended.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,806.00, since filing a claim with an effective date of August 28, 2016, for the seven weeks ending October 15, 2016. The administrative record also establishes that the employer did participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant did not voluntarily quit her employment but was discharged for no disqualifying reason. Benefits are allowed.

Iowa unemployment insurance law disqualifies individuals who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct from receiving unemployment benefits. Iowa Code §§ 96.5(1) and 96.5(2)a. The burden of proof rests with the employer to show that the claimant voluntarily left her employment. *Irving v. Empl. App. Bd.*, 15-0104, 2016 WL 3125854, (Iowa June 3, 2016). A voluntary quitting of employment requires that an employee exercise a voluntary choice between remaining employed or terminating the employment relationship. *Wills v. Emp't Appeal Bd.*, 447 N.W.2d 137, 138 (Iowa 1989); *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438, 440 (Iowa Ct. App. 1992). It requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). Where there is no expressed intention or act to sever the relationship, the case must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

If an individual is absent for three days without notifying the employer and the employer has a policy prohibiting that conduct, the individual is considered to have voluntarily quit without good cause attributable to the employer. Iowa Admin. Code r. 871-24.25(4). The employer contends the claimant had three consecutive no-call/no-show absences on July 6, 7, and 8, 2016. The claimant testified she reported her absences.

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't Human Servs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14 (1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, 461 N.W.2d at 608. The Iowa Supreme Court has ruled that if a party has the power to produce more explicit and direct evidence than it chooses to present, the administrative law judge may infer that evidence not presented would reveal deficiencies in the party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

The decision in this case rests, at least in part, upon the credibility of the parties. The employer did not present a witness with direct knowledge of the situation. No request to continue the hearing was made and no written statement of the individual was offered. Given the serious nature of the proceeding and the employer's allegations resulting in the claimant's discharge from employment, the employer's nearly complete reliance on hearsay statements is unsettling. Mindful of the ruling in *Crosser, id.*, and noting that the claimant presented direct, first-hand testimony while the employer relied upon second-hand reports, the administrative law judge concludes that the claimant's recollection of the events is more credible than that of the employer.

The employer has not established that the claimant missed three days of work without notification. The claimant continued to provide updates on her medical status during her leave which is indicative of her desire to remain employed. The employer has not met its burden to show the claimant voluntarily left her employment. Therefore, the case must be analyzed as a discharge.

The next issue is whether the claimant was discharged for misconduct. Iowa regulations define misconduct:

"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.

Iowa Admin. Code r. 871-24.32(1)a. This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden to prove the claimant was discharged for work-connected misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 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. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. 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. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988). The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. *Lee v. Emp't Appeal Bd.*, 616 N.W.2d 661 (Iowa 2000). 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. Iowa Admin. Code r. 871-24.32(7) (emphasis added); see *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190, n. 1 (Iowa 1984) holding "rule [2]4.32(7)...accurately states the law."

The requirements for a finding of misconduct based on absences are therefore twofold. First, the absences must be excessive. *Sallis v. Emp't Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192. Second, the absences must be unexcused. *Cosper* at 10. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra*.

An employer's attendance policy is not dispositive of the issue of qualification for unemployment insurance benefits. A properly reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. Excessive absences are not necessarily unexcused. Absences must be both excessive and unexcused to result in a finding of misconduct.

The claimant believed she was adequately reporting her absences to her supervisor and providing all of the documentation requested of her. She did not know or was not notified at any time that her documentation was insufficient or that her job was in jeopardy if she did not fill out additional paperwork. FMLA provisions were enacted to protect an individual's employment, not to be used as a weapon by an employer against its employee. The employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because her last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, and, without such, the history of other incidents need not be examined. Accordingly, benefits are allowed.

As benefits are allowed, the issues of overpayment, repayment, and the chargeability of the employer's account are moot.

DECISION:

The September 30, 2016, (reference 03) unemployment insurance decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed,

provided the claimant is otherwise eligible. The issues of overpayment, repayment, and the chargeability of the employer's account are moot.

Stephanie R. Callahan
Administrative Law Judge

Decision Dated and Mailed

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