

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NINA M ZEBLEY
Claimant

APPEAL NO. 12A-UI-12742-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

T C SUBWAY
Employer

OC: 09/09/12
Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Nina Zebley filed a timely appeal from a representative's decision dated October 5, 2012, reference 02, which denied unemployment insurance benefits. After due notice was provided, a telephone hearing was held on November 27, 2012. Claimant participated. The employer participated by Mr. Ted Camamo, Company Owner. Claimant's Exhibits One through Eight were received into evidence.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct in connection with her work.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Nina Zebley began employment with T C Subway on September 14, 2011. The claimant was discharged from employment on August 2, 2012. At the time of discharge the claimant had been promoted to a full-time assistant manager and was being paid by the hour. Her immediate supervisor was the store manager, Kerri Healey.

A decision was made to terminate Ms. Zebley from her employment with T C Subway on August 2, 2012 after the claimant had been unwilling to finish her work shift on the evening of August 1, 2012 when the claimant felt it was necessary to transport her children to her mother's residence for security reasons. Although the claimant was aware that she was to find her own replacement if she chose to leave a scheduled shift, Ms. Zebley was unable to find a replacement and the company owner had to be contacted to provide coverage for the remainder of the claimant's work shift. When the claimant reported to work the following morning late, she was informed of her termination.

After being hired by the company in September of 2011, Ms. Zebley's punctuality was repeated and excessive. On May 7, 2012 the claimant was issued a written warning due to her reoccurant lack of punctuality.

On July 13, 2012 the claimant had been promoted to a full-time assistant manager and at that time the company owner, Mr. Ted Camamo, personally emphasized to Ms. Zebley the special requirement that she be dependable and punctual in her new job position. Ms. Zebley agreed to do so. In the approximate 15 days following the claimant's promotion Ms. Zebley was late in reporting to work on each day.

The employer reasonably concluded that although the claimant had been warned she continued to be undependable providing numerous excuses for absences and tardiness and reasonably concluded that the claimant had not heeded the previous caveats to improve her punctuality or her dependability.

It is Ms. Zebley's position that although she had been warned on May 7, 2012 about attendance and that she had been reminded of the importance of being dependable and punctual when promoted to assistant manager approximately 15 days before, that she had not been adequately warned that her employment was in jeopardy. Ms. Zebley denied receiving approximately three other warnings the employer believes were issued to the claimant. It is the claimant's further position that her leaving early on the evening of August 1, 2012 was approved.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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.

871 IAC 24.32(7) provides:

(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 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 insurance benefits. 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).

The Supreme Court of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that excessive unexcused absenteeism is one form of job misconduct. The Court held that the absences must be both excessive and unexcused and that the concept includes tardiness, leaving early, etcetera.

In this matter the evidence establishes that Ms. Zebley was considered to be a good and valued employee except for the employer's ability to rely on Ms. Zebley to be dependable and punctual. On May 7, 2012 the employer placed Ms. Zebley on notice that her punctuality was not acceptable and that could jeopardize her employment. The employer believed that it had endured excuses of every variety given by the claimant to excuse her tardiness and in some cases included tardiness of being hours late for work.

It appears that after that warning Ms. Zebley made some effort to improve her punctuality, still arriving from minutes to one-half hour after the beginning of her work shift.

When the employer made a management decision to promote Ms. Zebley the company owner intentionally and specifically stressed the importance to the claimant at that time of the importance of being dependable and punctual each day that she was scheduled to work. The claimant accepted the new position and the caveat of needing to improve her punctuality. In the approximate 15 days that followed, Ms. Zebley was late each day and on the night of August 1 was unwilling to complete her work shift and did not secure her own replacement as required by company policy. It appears that the employer considered the claimant's excuse for leaving that night to be another of many excuses given by the claimant during the course of her employment. The claimant again reported late the following morning. She was informed of the employer's decision to terminate her employment.

The administrative law judge concludes based upon the evidence in the record that the claimant was sufficiently warned that her employment was in jeopardy due to her excessive and repetitive unexcused tardiness and a lack of dependability. The employer has sustained its burden of proof in showing the claimant's discharge took place under disqualifying conditions. Unemployment insurance benefits are withheld.

DECISION:

The representative's decision dated October 5, 2012, reference 02, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in

and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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