IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

PAULA J NOAH
Claimant

TPI IOWA LLC
Employer

APPEAL NO. 13A-UI-08116-L

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/16/13
Claimant: Appellant (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 5, 2013, (reference 01) decision that denied benefits. After due notice was issued, a hearing was held on August 13, 2013, in Des Moines, Iowa. Claimant participated with her spouse Billie Noah. Employer did not respond to the hearing notice instruction and did not participate. Claimant's Exhibit A was received. Employer's Exhibit 1 was received.

The ALJ reopened the record for employer participation after it was discovered the notice was sent to an incorrect address. Hearing was set for September 16, 2013, and due notice was issued to the parties at correct addresses. The employer responded to the hearing notice instructions but its witness, Danielle Williams, was not available at the number provided when the hearing was called and did not participate. The claimant and her witnesses were available to participate but the decision is based upon the earlier record to avoid duplication of testimony. Claimant's Exhibit A and Employer's Exhibit 1 remain part of the record.

ISSUE:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time production worker through June 16, 2013, when she was discharged. On June 15, backup shift supervisor Alex Richardson gave claimant a final warning for attendance after taking vacation on May 26 for her daughter's graduation. He recalled giving her approval for the vacation but found she only had one hour of vacation accrued on that date. (Employer's Exhibit 1, p. 1) She believed she had earned enough vacation to cover it on May 21. She recalls having signed the warning, returned to her work station and where she began having a panic attack. Her team lead, Ricky, asked her what was wrong. She said she was having a panic attack and needed to leave for the day. Ricky said he would tell

Richardson. The employer argues that she walked to her work area, said "Fuck this shit" to the backup team lead, told him to "tell Alex (Richardson) I'm taking FMLA" and walked off the job. (Employer's Exhibit 1, p. 3) Claimant left a voice mail message for human resources coordinator Danielle Williams "stating that she had left early the other day, and told Alex (Richardson) she was leaving on FMLA." Williams confirmed with Richardson that she did not tell him she was leaving. (Employer's Exhibit 1, p. 2) Claimant says she was fired; the employer argues she quit. Either way, she did not ask and Richardson did not give her permission to leave.

Claimant had been granted Family Medical Leave Act (FMLA) leave on January 9, 2013, backdated to November 13, 2012. The expected usage was two to four days per month. (Claimant's Exhibit A, pp.1, 7) As of the separation date, claimant had used 403 hours of FMLA in the last seven months (57.57 hours or 7.2 days per month). In the last 12 months she had 68 hours of illness, 56 hours of no-call/no-show, and 68 hours of personal business (PB). She had a verbal attendance warning on October 2, 2012 (Employer's Exhibit 1, p. 4); a written attendance warning on February 24, 2013 (Employer's Exhibit 1, p. 5); and the final written attendance warning on June 15, 2013. (Employer's Exhibit 1, p. 3) Claimant believed the employer did not track her attendance properly and intermingled FMLA with personal business leave. The employer's attendance policy and FMLA Notice of Eligibility, Rights & Responsibilities and the Designation Notice advised claimant she would be required to use her available paid vacation towards FMLA absences. (Claimant's Exhibit A, p. 3, at form "Page 2" and p. 4)

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code § 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 24.26(21) and (28) provide:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.
>
> (28) The claimant left after being reprimanded.

A voluntary quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); *see also* Iowa Admin. Code r. 871-24.25(35). A voluntary leaving of employment 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

a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992). While her leaving after Richardson reprimanded her could be considered a voluntary quitting without good cause attributable to the employer, she told a lead worker to tell the supervisor she was "leaving on FMLA." That indicates an intention to return to work. Thus, the separation was a discharge and the burden of proof falls to the employer.

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment due to job-related misconduct.

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.

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 determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. Absences due to illness or injury must be properly reported in order to be excused. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982).

Claimant had been warned about absenteeism (lack of accrued vacation time) just moments before leaving, but did not report the absence to her supervisor as she claimed in the voice mail to Williams. Since the absence was not properly reported, it was unexcused even if it were for a legitimate medical reason. Additionally, she exceeded her medically authorized FMLA usage and had been warned twice before about excessive absenteeism. The evidence shows that claimant was warned that further unexcused absences could result in termination of employment and the final absence was not excused. The final absence, in combination with claimant's history of unexcused absenteeism, is considered excessive. Benefits are withheld.

DECISION:

The July 5, 2013, (reference 01) decision is affirmed. Claimant was discharged from employment due to excessive, unexcused absenteeism. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

_____
Dévon M. Lewis
Administrative Law Judge

_____
Decision Dated and Mailed

dml/css