

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

PATRICIA L SARAZIN
Claimant

APPEAL NO. 09A-UI-09467-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HILLS & DALES CHILD DEV CENTER INC
Employer

OC: 05/31/09
Claimant: Appellant (2)

Section 96.5-2-a – Suspension

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated June 25, 2009, reference 01, that concluded she was suspended for work-connected misconduct. A telephone hearing was held on July 24, 2009. The parties were properly notified about the hearing. The claimant participated in the hearing. Carol Boge participated in the hearing on behalf of the employer with a witness, Kris Kurt. Exhibit One was admitted into evidence at the hearing.

ISSUE:

Was the claimant discharged or suspended for work-connected misconduct?

FINDINGS OF FACT:

The claimant worked part time for the employer as a personal assistant providing support services to mentally disabled adults who live in apartment settings from March 9, 2009, to May 14, 2009.

On May 9, 2009, the claimant was working at an apartment for a group of clients. As part of her duties, she was supposed to take clients to the wedding of a supervisor with the employer. She had forgotten her dress clothes at home. She asked a friend to pick up her clothes from her home and bring them to the apartment. She intended to leave the apartment to get the clothes when the friend called, but she was giving a client a shower at the time and did not hear her cell phone ring. The friend brought the clothes to the door, gave them to another staff member who was there, and immediately left. She did not enter the apartment. An employee reported to the employer that the claimant was allowing friends to visit her at the apartment. The employer was also concerned that the claimant was taking photographs of clients, which was not the case. Management considered these matters violations of the rules regarding client confidentiality and the Health Insurance Portability and Accountability Act.

The claimant's supervisor, Kris Kurt, questioned the claimant about these matters over the phone on May 20, 2009. In the end, Kurt notified the claimant that she was suspended from employment until further notice pending an investigation of her actions.

The claimant had requested and been granted the day off from work on May 22, 2009. This had been requested before the claimant started working for the employer. She and her husband were out of town on May 22.

Despite the fact that the claimant was scheduled off work at her request on May 22, Kurt attempted to call her twice on May 22 to follow up on the confidentiality issues. She left messages on the claimant's cell phone and her home phone to call her as soon as possible.

The claimant gave her cell phone to her daughter while she was out of town with her husband. When the claimant got home on May 23, she did not notice any messages on her home phone or her cell phone. She was not aware that Kurt had called and considered herself still suspended until further notice.

Kurt assumed the claimant had gotten her messages and decided not to return the calls, which was not true. She reported this to the human resources manager, Carol Boge. On May 28, 2009, Boge sent the claimant a letter asserting that the claimant had failed to return two voice messages left for her on May 22 and her lack of response was interpreted as a resignation of employment. The letter stated that May 28 was considered her resignation date with the employer. The claimant considered herself terminated and did not contact the employer.

The employer's account is not presently chargeable for benefits paid to the claimant since it is not a base period employer on the claim.

REASONING AND CONCLUSIONS OF LAW:

The unemployment insurance law disqualifies claimants who voluntarily quit employment without good cause attributable to the employer or who are discharged for work-connected misconduct. Iowa Code section 96.5-1 and 96.5-2-a. The employer suspended the claimant indefinitely and then considered her to have resigned when she failed to return Kurt's calls. I believe the claimant's testimony that she was out of town on a scheduled day off when the calls were made and she never knew Kurt called. The separation from employment was due to the employer's false assumption that the claimant had received the messages and had deliberately failed to respond. Since the claimant was told that she was "suspended until further notice," the employer was obligated to contact the claimant about her employment status. The claimant had no reason to contact the employer prior to May 28. The letter of May 28 notified the claimant that she no longer had a job. The separation must be deemed a discharge by the employer.

The issue in this case is whether the claimant was discharged or suspended for work-connected misconduct as defined by the unemployment insurance law.

The unemployment insurance law disqualifies claimants discharged for work-connected misconduct. Iowa Code section 96.5-2-a. The rules define misconduct as (1) deliberate acts or omissions by a worker that materially breach the duties and obligations arising out of the contract of employment, (2) deliberate violations or disregard of standards of behavior that the employer has the right to expect of employees, or (3) carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design. 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 misconduct within the meaning of the statute. 871 IAC 24.32(1).

871 IAC 24.32(9) provides:

(9) Suspension or disciplinary layoff. Whenever a claim is filed and the reason for the claimant's unemployment is the result of a disciplinary layoff or suspension imposed by the employer, the claimant is considered as discharged, and the issue of misconduct must be resolved. Alleged misconduct or dishonesty without corroboration is not sufficient to result in disqualification.

First, I conclude the suspension in this case was not disciplinary but instead was a suspension pending investigation. Second, the separation from employment really occurred due to the employer's erroneous assumption that the claimant resigned not based on the employer's decision that the claimant had committed misconduct. Finally, even if I were to consider the issue of whether the claimant's conduct on May 9 constituted disqualifying misconduct, my conclusion would be that no willful and substantial misconduct. I cannot conclude that the claimant deliberately violated any confidentially rules by having a friend drop off her clothes so the claimant could take a client to a staff member's wedding.

The employer's account is not presently chargeable for benefits paid to the claimant since it is not a base period employer on the claim. If the employer becomes a base period employer in a future benefit year, its account may be chargeable for benefits paid to the claimant based on this separation from employment.

DECISION:

The unemployment insurance decision dated June 25, 2009, reference 01, is reversed. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/pjs