

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHEENA M GOREHAM
Claimant

APPEAL NO. 11A-UI-00696-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

POGIE INC
Employer

OC: 12/12/10
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

The claimant filed a timely appeal from a representative's decision dated January 7, 2011, reference 01, which denied unemployment insurance benefits. After due notice was issued, a telephone hearing was held on February 21, 2011. The claimant participated personally. The claimant's witness, Stephanie Carter, the claimant's sister, disconnected due to a delay in the hearing. The employer participated by Ms. Connie Pogemiller, company owner.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Sheena Goreham was employed by Pogie, Inc. as a full-time house cleaner from November 6, 2008, until November 19, 2010, when she was separated from employment by the company. Ms. Goreham was paid by the hour. Her immediate supervisor was the owner, Ms. Pogemiller.

Ms. Goreham was separated from her employment with Pogie, Inc. after the claimant called off work on three consecutive days in her last week of employment. The claimant called off work for compelling personal reasons. Family members were undergoing cancer diagnosis and giving birth to a child. After the claimant called in the third consecutive day, she was told that she need not report back to work and that the employer would call her if she were needed. Ms. Goreham had been warned approximately one month before her discharge about tardiness. The claimant did not realize that her employment was in jeopardy and believed that it was necessary to accompany the family members because of the serious medical issues involved.

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 not.

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 benefits. Misconduct serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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 App. 1992). While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based upon such past acts. The termination of employment must be based upon a current act. See 871 IAC 24.32(8).

In this matter, the employer made a management decision to separate Ms. Goreham after she had called off work for three consecutive workdays. The evidence as to whether the claimant called in each day is disputed. The administrative law judge finds the claimant to be a credible

witness and finds that her testimony is not inherently improbable. Ms. Goreham attempted to secure telephone records in support of her position that she called in each day and was prepared to offer the testimony of a witness to corroborate that she had called in as required. Ms. Goreham had called in each day to report that she would not be coming to work because she was needed to accompany family members who were having serious health issues.

The Iowa Supreme Court in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that excessive unexcused absenteeism is a form of misconduct. The Court further held, however, that absence due to illness and other excusable reasons is deemed excused if the employee properly notifies the employer. For the above-stated reasons, the administrative law judge concludes that the claimant did provide proper notification to the employer and was nonetheless discharged from employment.

The question before the administrative law judge is not whether the employer has a right to discharge an employee for this reason but whether the discharge is disqualifying under the provisions of Employment Security Act. While the decision to terminate Ms. Goreham may have been a sound decision from a management viewpoint, intentional misconduct sufficient to warrant the denial of unemployment insurance benefits has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated January 7, 2011, reference 01, is reversed. The claimant was discharged for no disqualifying reason. Unemployment insurance benefits are allowed, provided the claimant meets all other eligibility requirements of Iowa law.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

kjw/kjw