IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TORI M JOHNSON
Claimant

CENTRAL IOWA HOSPITAL CORP
Employer

APPEAL NO. 09A-UI-08384-VST

ADMINISTRATIVE LAW JUDGE DECISION

Original Claim: 05/03/09
Claimant: Appellant (1)

Section 96.5-2-a – Misconduct

STATEMENT OF THE CASE:

The claimant filed an appeal from a representative's decision dated June 5, 2009, reference 01, which held the claimant ineligible for unemployment insurance benefits. After due notice, a telephone conference hearing was scheduled for and held on June 29, 2009. The claimant participated. The employer participated by Barb Oweca, human resources business partner. The record consists of the testimony of Barb Oweca, the testimony of Tori Johnson, and Claimant's Exhibits A and B.

ISSUE:

Whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses and having considered all of the evidence in the record, makes the following findings of fact:

The claimant worked as a registered nurse for Blank Children's Hospital. The employer has a no-fault attendance policy. According to the policy, an employee is allowed seven occurrences within a six-month period. If the employee has more than these seven occurrences, termination follows. All occurrences count against the seven allowed occurrences. There are no excused absences.

On December 17, 2008, the claimant was given a warning for having six occurrences. A written warning was given on December 24, 2008. The claimant was not terminated at that point. On January 27, 2009, the claimant was given a probationary warning, which is the third level of discipline for having both a tardy and an occurrence. She again was not terminated. A second probationary warning was given on April 2, 2009. Finally on May 4, 2009, the claimant had yet another occurrence and was terminated on May 7, 2009. The claimant's occurrences were due to lack of child care.

REASONING AND CONCLUSIONS OF LAW:

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.

The gravity of the incident, number of policy violations, and prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation. The Iowa Supreme Court has opined that one unexcused absence is not misconduct even when it followed nine other excused absences and was in violation of a direct order. Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989). Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984), held that the absences must be both excessive and unexcused. The Iowa Supreme Court has held that excessive is more than one. Three incidents of tardiness or absenteeism after a warning has been held misconduct. Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). While three is a reasonable interpretation of excessive based on current case law and Webster's Dictionary, the interpretation is best derived from the facts presented.

In this case, the employer had a no-fault attendance policy that did not distinguish between excused and unexcused absences. The evidence clearly established that the claimant had excessive absenteeism and had violated the attendance policy. There were written warnings and the claimant was given two probationary warnings. It appears, therefore, that the claimant was given extra occurrences by the employer before termination actually occurred on May 7, 2009.

The question, therefore, is whether the absences were unexcused. Absences due to matters of personal responsibility, e.g. transportation problems and oversleeping, are considered unexcused. See Harlan v. IDJS 350, N.W. 2d 192 (Iowa 1984). The claimant testified that her absences were due to problems with child care. Child care is a matter of personal responsibility. Because it is a personal responsibility, it does not constitute an excused absence. The employer has established misconduct and benefits are denied.

DECISION:

The representative's decision dated June 5, 2009, reference 01, is affirmed. Unemployment insurance benefits shall be withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.

_____
Vicki L. Seeck
Administrative Law Judge

_____
Decision Dated and Mailed

vls/kjw