IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

JULIE A BAHL-KNIEFF
1015 S PROSPECT DR APT 203
TOLEDO IA 52342-2115

COUNTRY LIVING CARE CENTER INC
D/B/A COUNTRY LIVING CARE CENTER
2040 KAVE
TOLEDO IA 52342

Appeal Number: 06A-UI-04663-RT
OC: 04/09/06 R: 02
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Julie A. Bahl-Knieff, filed a timely appeal from an unemployment insurance decision dated April 28, 2006, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on May 17, 2006, with the claimant participating. Terri Mayo, Administrator, participated in the hearing for the employer, Country Living Care Center, Inc., doing business as County Living Care Center. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time cook or dietary aid from late October or early November of 2003, until she separated from her employment on April 7, 2006. On that day the employer sent the claimant a letter of the same date indicating that her employment was being terminated because of attendance. On April 6, 2006, the claimant was absent for illness. Although the claimant three times tried to call the employer, she could not get through. The claimant did not realize until April 9, 2006 that her telephone was not working. She realized this when she tried to call her mother and could not reach her. The employer treated the absence as a no-call/no-show. The employer has a rule or policy in its handbook, a copy of which the claimant received and for which she signed an acknowledgement, providing that an employee must notify the employer of an absence as soon as possible.

On April 14, 2005, the claimant was absent as a no-call/no-show without notifying the employer. The claimant did not know why she was absent on that day. The claimant was also absent as a no-call/no-show on June 16, 2005 for personal illness. The claimant did not notify the employer because she had no telephone at the time. The employer had no other record of any absences on the part of the claimant. The claimant had other absences but they were for personal illness and always properly reported. The claimant received a verbal warning for attendance prior to June 20, 2005 and then a written warning on June 20, 2005 informing the claimant that if she was absent as a no-call/no-show again she would be terminated. The claimant received no other warnings since.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

Iowa Code section 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.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

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 first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily quit when she was absent as a no-call/no-show on April 7, 2006 or perhaps on April 6, 2006. The employer's witness, Terri Mayo, Administrator, was not sure of the exact date of the absence. The claimant maintained that she was discharged by a letter dated April 7, 2006 which informed her that her employment was being terminated because of attendance and, in particular, for the absence on April 6, 2006. The administrative law judge concludes that the employer has failed to demonstrate by a preponderance of the evidence that the claimant voluntarily left her employment. There is no evidence that the claimant had more than one no-call/no-show absence which was not properly reported. It is true that the claimant received a written warning approximately ten months prior that she would be discharged if she had another absence as a no-call/no-show. A letter then was sent to the claimant on April 7, 2006 notifying the claimant that her employment was terminated. On the record here, the administrative law judge is constrained to conclude that the claimant did not voluntarily leave her employment but was discharged on April 7, 2006 by the letter of that date. The issue then becomes whether the claimant was discharged for disqualifying misconduct.

Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See

Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. Ms. Mayo could only testify as to three absences that the claimant had that were not reported or were no-call/no-shows. One was on April 6 or 7, which was actually on April 6, 2006. One of the others was one year earlier on April 14, 2005 and the third on June 16, 2005, almost ten months before the claimant's discharge. Ms. Mayo had no other evidence of any other absences or tardies on the part of the claimant. Ms. Mayo testified that she did not have time to go through the employer's records to ascertain other absences or tardies. The claimant testified that concerning the absence on April 6, 2006, that she was ill and tried three times to call the employer and could not get through. The claimant testified that her telephone was not working but did not realize that it was not working until April 9, 2006. Although the claimant stated at fact finding that she did not call the employer, the claimant did say that her phone was not working. There is no evidence to the contrary. Accordingly, the administrative law judge concludes that the claimant's absence on April 6, 2006 was for personal illness and the claimant was justified or had an excuse for not properly reporting this absence. The only other absences in the record are one on April 14, 2005 which was not properly reported and of which the claimant does not recall and another on June 16, 2005 for personal illness but not properly reported. The administrative law judge concludes that both of these absences were not properly reported and at least one was not for reasonable cause or personal illness. However, the administrative law judge is constrained to conclude that two such absences do not establish excessive unexcused absenteeism. The term excessive unexcused absenteeism implies more than one unexcused absence or tardy. In general, at least three unexcused absences or tardies are required to establish excessive unexcused absenteeism. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here, the claimant only had two. Even assuming that the claimant was not justified in properly reporting her absence on April 6, 2006, there would only be three such absences or tardies. The administrative law judge does not believe that this establishes excessive unexcused absenteeism.

It may well be that the claimant had other absences or tardies that were not for reasonable cause or personal illness and not properly reported but the employer had no such evidence and the employer has the burden of proof on this issue. Further, the most recent warning for attendance, a written warning on June 20, 2005, is almost ten months before the claimant's discharge. The claimant had no warnings since and the only other warning in the record is a verbal warning sometime before June 20, 2005. Accordingly, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged on April 7, 2006 but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision of April 28, 2006, reference 01, is reversed. The claimant, Julie A. Bahl-Knieff, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

cs/pjs