

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DOROTHY J CONGDON
Claimant

APPEAL NO. 12A-UI-12272-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

NEW CHOICES INCORPORATED
Employer

OC: 09/09/12
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 October 2, 2012, reference 01, which denied unemployment insurance benefits. After due notice was issued, a telephone hearing was held on November 7, 2012. The claimant participated. The employer participated by Mr. Dave Jessen, human resource coordinator.

ISSUE:

At issue is whether the claimant was discharged under disqualifying conditions.

FINDINGS OF FACT:

Having considered the evidence in the record, the administrative law judge finds: Dorothy Congdon was employed by New Choices Incorporated for approximately one year before being discharged on September 9, 2012. Ms. Congdon was initially employed as a full-time direct care associate providing cares to mentally disabled individuals in a home setting. The claimant was paid by the hour. Her immediate supervisor was Carla Williams.

Ms. Congdon was discharged based upon the employer's belief that she had failed to report for a mandatory training class on September 9, 2012, and had not notified the employer of her impending absence. Under company policy, employees are subject to discharge if they accumulate five absences in a one-year rolling period.

During the course of her employment, Ms. Congdon had been absent on a number of occasions due to the illness of her father and had been absent on one occasion due to a domestic issue. Ms. Congdon had, in the past, always provided notification to the employer of impending absences.

On September 9, 2012, the claimant was ill with flu-like symptoms and could not report to work. As Ms. Congdon was unsure who to notify because she had a training class that day, the claimant left a message at the company's Bettendorf offices prior to training that day, explaining she was ill and unable to report. It is the claimant's belief that the message was received but not forwarded to her supervisor.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes intentional misconduct sufficient to warrant the denial of unemployment insurance benefits.

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 establishing disqualifying job misconduct. See Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating the claimant, but whether the claimant is entitled to unemployment insurance benefits. See Infante v. Iowa Department of Job Service, 364 N.W.2d 262 (Iowa App. 1984).

The Supreme Court of Iowa 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 job misconduct. The Court held that the absences must both be excessive and unexcused. The Court further held, however, absences due to illness and other excusable reasons are deemed excused if the employee properly notifies the employer.

The evidence in this matter establishes Ms. Congdon was aware that her employment was in jeopardy based upon previous warnings that had been served upon her by the employer. The employer allows only five unexcused absences each year and the claimant had missed work in the past because of the illness of her father and, on one occasion, because of a domestic circumstance. Ms. Congdon had always provided notice to the employer when she was going to be absent.

The claimant testified under oath that on the morning of September 9, 2012, she was unsure exactly who to give notice to, as she was scheduled for training that day in a different location. She therefore left a message at the Bettendorf offices, believing that was the appropriate way to notify the employer she was unable to report that day due to illness. The administrative law judge finds the claimant's testimony to be credible and not inherently improbable, based upon her past history of providing notice to the employer of impending absences. Because the last absence was due to illness and was properly reported, the administrative law judge concludes the claimant's discharge took place under non-disqualifying conditions.

DECISION:

The representative's decision dated October 2, 2012, reference 01, is reversed. The claimant was discharged under non-disqualifying conditions. 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