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

TOMMIE M KENNEDY
Claimant

APPEAL NO. 12A-UI-10063-LT

ADMINISTRATIVE LAW JUDGE
DECISION

PILOT TRAVEL CENTERS LLC
Employer

OC: 07/15/12
Claimant: Respondent (1)

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The employer filed an appeal from the August 9, 2012 (reference 02) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on September 12, 2012. Claimant participated. Employer participated through general manager, John Waller.

ISSUE:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a Subway worker from December 9, 2011 and was separated from employment on June 27, 2012. She was a no-call/no-show on June 27. On June 23 she told shift lead worker Darcy Kephart her father was in the hospital and was scheduled for emergency surgery and she would leave town later that day. Waller and restaurant manager Cynthia Estock were not on site at the time of the emergency phone call. Darcy agreed to cover the claimant's Sunday shift and said her days off on Monday and Tuesday, June 25 and 26 would give her enough time to adjust the schedule for Wednesday, June 27. The schedule was not complete beyond that date. Claimant attempted to call Estock when she returned but Estock was not available so she spoke to Kephart who told her to call Estock on Tuesday, July 3. Claimant tried to call Estock again twice on July 3 and was told Estock was busy each time. When claimant called Estock on July 4 to find out about the schedule Estock told her, "You're done" and hung up. Claimant had not been warned her job was in jeopardy for absenteeism, reporting absences, or any other reason.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

871 IAC 24.25(4) provides:

> Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Since claimant did not have three consecutive no-call/no-show absences and there was no evidence of a policy to that effect as required by rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

Iowa Code § 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(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. *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 claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences

related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

A failure to report to work without notification to the employer is generally considered an unexcused absence. However, claimant made reasonable efforts to notify the employer of her intended absences given the emergency situation and the fact that both managers were off site at the time. Because the absences were related to a family medical emergency, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. Benefits are allowed.

DECISION:

The August 9, 2012 (reference 02) decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

_____
Dévon M. Lewis
Administrative Law Judge

_____
Decision Dated and Mailed

dml/css