

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

TINA M SCHMITZ
Claimant

APPEAL NO: 06A-UI-08922-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ACCESSIBLE MEDICAL STAFFING
Employer

**OC: 08/06/06 R: 04
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Accessible Medical Staffing (employer) appealed a representative's August 28, 2006 decision (reference 01) that concluded Tina M. Schmitz (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 21, 2006. The claimant participated in the hearing. Karey Segó appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The employer is a temporary medical staffing employment firm. The claimant began taking assignments with the employer on February 6, 2005. After a period of time in which the claimant did not check in for assignments with the employer, she resumed contact with the employer on or about March 10, 2006. She would check in on Mondays each week to indicate her availability that week, and the employer would respond with any work that might be available. The claimant's final assignment began on July 27, 2006. She was to work three nights from 11:00 p.m. to 7:00 a.m. as a certified nursing aide (CNA) in the employer's business client's long-term care nursing facility on July 27, July 28, and July 29. The July 29 schedule was subsequently changed to be an 11:00 p.m. to 11:00 a.m. shift. The claimant worked her scheduled shifts on July 27 and July 28, but did not work her shift on July 29. The employer discharged her on July 31, 2006. The reason asserted for the discharge was excessive absenteeism and an improper call-off for an absence.

No specifics as to prior absences was provided, but the employer did verbally counsel the claimant on May 26, 2006 with regard to an attendance issue. The employer requires a minimum of four hours' notice before the start of an overnight shift if the employee is going to be absent; the employer also requires that the call be from the employee themselves, not a third

party. On July 29 the claimant called at approximately 9:30 p.m., only an hour and half prior to her shift, to report she would not be able to be at work. The report made to Ms. Segoe, the employer's staffing coordinator and client manager, was further that it was the claimant's mother or another family member who had initially called in; however, the claimant testified that it had been herself who had called. The reason for the absence was that at approximately 9:00 p.m. she had attempted suicide.

After getting off work at 7:00 a.m. the morning of July 29, the claimant went home. She slept from about 11:00 a.m. to about 3:00 p.m.; she and her husband then drove to her brother's home about 45 miles from her home and about 35 miles from the business client's site. While there, she and her husband had an argument, and her husband left without her with their car at approximately 7:45 p.m., rather than leaving later with her and dropping her off at work as had been planned. The claimant became despondent, both because of the situation with her husband and because of another argument she had earlier in the day with her brother-in-law. She walked to the town cemetery and attempted to cut her wrists and neck. Her sister-in-law retrieved her and brought her home. At that point the contact was made to the employer to report the claimant could not work her shift that night. While the claimant had not seriously injured herself and did not receive medical treatment, she did have numerous visible scrapes with which she felt she could not work; she further had no immediate means of transportation to get to the worksite.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982). The question is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). The focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
 - a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
 - b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
 - a. Manifest equal culpability, wrongful intent or evil design; or
 - b. Show an intentional and substantial disregard of:
 1. The employer's interest, or
 2. The employee's duties and obligations to the employer.

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(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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. In this case, the employer asserts that the reason for the final absence was not properly reported. However, it is clear that the claimant's failure to report her absence at least four hours before the start of her shift was not volitional, as the incidents that caused her absence did not even begin to occur until less than four hours prior to the start of her shift. While it is unclear what level of rational intent the claimant may have had in making the suicide attempt, there is no specific or direct evidence the situation occurred other than as she testified or that she did so

with deliberate intent to create an excuse to be absent from work. Further, there is insufficient evidence from which the administrative law judge could conclude that this was part of a continuing pattern of questionable absences. Under the circumstances of this case, the claimant's absence on July 29, 2006 and her failure to report it within four hours prior to the start of the shift was the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence in an isolated instance, or was a good faith error in judgment or discretion. The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's August 28, 2006 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/pjs