IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DOROTHY KELLY
Claimant

NEW CHOICES INCORPORATED
Employer

APPEAL NO. 10A-UI-09012-VS

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/11/09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Employer filed an appeal from a decision of a representative dated June 17, 2010, reference 03, which held claimant eligible for unemployment insurance benefits. After due notice, a hearing was scheduled for and held on February 28, 2011, in Davenport, Iowa. Claimant participated. Sara Jacobi was a witness for the claimant by subpoena. Employer participated by Sarah Lees, human resources coordinator; Cindy Hazelwood, office manager/Muscatine; and Janet Hicks, human resources/Muscatine. The employer was represented by Ralph Heninger, attorney at law. The record consists of the testimony of Sarah Lees; the testimony of Cindy Hazelwood; the testimony of Janet Hicks; the testimony of Sarah Jacobi; the testimony of Dorothy Kelly, n/k/a Dorothy Darnell; Claimant's Exhibits A-D: and Employer's Exhibits 1-11.

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 employer is a for profit corporation that provides human services to individuals with disabilities. The employer has a contract with the Department of Human Services. The employer offers its services in Scott County, Iowa; Muscatine County, Iowa; Louisa County, Iowa; Johnson County, Iowa; and Clinton County, Iowa. The claimant was hired on October 27, 2009, as a direct care professional. She provided services to individuals in their home. She was a full-time employee and worked in Muscatine County. Her last day of actual work was April 19, 2010. She was terminated on May 14, 2010.

The incident that led to the claimant's termination occurred on May 12, 2010. The claimant was a no call/no show for a meeting that the employer had scheduled with her. The employer had a policy that if an individual had two incidents of no call/no show, that termination would result. The claimant had a previous no call/no show on December 15, 2009. She was given a written warning for this no call/no show.

There is a dispute between the parties on whether the claimant knew about the meeting on May 12, 2010. The employer sent the claimant a fax on May 10, 2010, and left her a voice message on May 12, 2010. The claimant's position is that she did not receive the fax and that she did not get a message from the employer because both her phone and fax were not working properly.

REASONING AND CONCLUSIONS OF LAW:

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.

Misconduct that leads to termination is not necessarily misconduct that disqualifies an individual from receiving unemployment insurance benefits. Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. The employer has the burden of proof to show misconduct.

The claimant was terminated because the employer believed there was a no call/no show on May 12, 2010. The employer has a written policy that if an individual has two incidents of no call/no show then the individual is terminated. The claimant had a previous no call/no show on December 15, 2009, for which she received a written warning.

The parties hotly dispute whether the claimant did in fact have knowledge of the meeting on May 12, 2010. Sarah Lees testified that she notified the claimant by fax on May 10, 2010, that the meeting was scheduled for May 12, 2010. Ms. Lees indicated that she did not receive an error message. The claimant testified that she did not receive the fax and that she called and left a message for Ms. Lees on May 11, 2010, at 9:40 p.m. Ms. Lees tried to fax the claimant again on May 12, 2010, and this time had an error message. She then called the claimant and left her a message. The claimant testified that she did not get this message because her phone was not working and that her fax was also malfunctioning.

The testimony of the witnesses and their demeanor at the hearing showed that there is significant element of distrust between the claimant and Ms. Lees. Ms. Lees indicated that she preferred to fax the claimant so that there would be no misunderstanding on what she said. It is impossible to reconcile the testimony of the witnesses and the documentary evidence can be read to support both versions of the testimony. The employer relies heavily on the fact that the claimant checked her voice mail at 10:45 a.m. after Ms. Lees left a message for the claimant about the 12:00 p.m. meeting. The claimant denied that voice mail message was there and there is no definitive proof that in fact the voice mail message was available for the claimant when she checked at 10:45 a.m.

Given the totality of the circumstances, the administrative law judge concludes that there is insufficient proof in this record to establish misconduct. Excessive unexcused absenteeism can constitute misconduct but the evidence does not show excessive absenteeism. Likewise insubordination, that is the failure to follow reasonable instructions, can also constitute misconduct. Again, there is simply not enough proof to show that the claimant knew about the meeting and deliberately failed to come. Violation of the employer's attendance policy also cannot be misconduct unless the employer establishes excessive unexcused absenteeism. Accordingly, benefits will be allowed if the claimant is otherwise eligible.

DECISION:

The decision of the representative dated June 17, 2010, reference 03, is affirmed. Unemployment insurance benefits are allowed, provided claimant is otherwise eligible.

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Vicki L. Seeck
Administrative Law Judge

_____
Decision Dated and Mailed

vls/pjs