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

NICOLE L FERDIG
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SIOUX CITY IA 51105-1933

SHREE PADMAVATI CORPORATION
DAYS INN
3000 SINGING HILLS BLVD
SIOUX CITY IA 51106

Appeal Number: 06A-UI-05013-S2T
OC: 04/16/06 R: 01
Claimant: Respondent (1)

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 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Days Inn (employer) appealed a representative's May 8, 2006 decision (reference 01) that concluded Nicole Ferdig (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 25, 2006. The claimant participated personally. The employer participated by Linda Davis, Manager, and Baerbe Youssefpour. The claimant offered one exhibit which was marked for identification as Exhibit A. Exhibit A was received into evidence.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on April 15, 2005, as a part-time housekeeper.

She worked the hours that her supervisor posted on the schedule. At the end of December 2005, the supervisor told the claimant that her hours would be on-call. The supervisor told the claimant she would be called if she were needed. The supervisor never called the claimant. The claimant called the supervisor and worked some hours through January 12, 2006. On January 13, 2006, the claimant collected her paycheck. The claimant continued to call the supervisor but there were no hours available for the claimant to work. On January 27, 2006, the claimant collected her final paycheck and assumed she had been laid off.

The supervisor placed the claimant on on-call status for a short period of time and then the claimant's hours were posted. The supervisor expected the claimant to check the posted schedule but did not tell the claimant to do so. The employer does this every year and thought the claimant understood this. The claimant had not worked a full year for the employer. When the claimant did not appear for her posted hours on January 14 and 15, 2006, the employer assumed the claimant had quit work.

The testimony of the employer and claimant was inconsistent. The administrative law judge finds the claimant's testimony to be more credible because she was an eyewitness to the events. The employer's eyewitness, the supervisor, appeared confused when examined and her testimony was inconsistent in and of itself. In addition, she could not remember certain facts. The employer's other witness, the manager, was not an eyewitness to the conversations between the claimant and the supervisor.

REASONING AND CONCLUSIONS OF LAW:

The first issue is whether the claimant voluntarily quit without good cause attributable to the employer. For the following reasons, the administrative law judge concludes she did 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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The claimant had no intention of voluntarily leaving work. She intended to continue work if the employer supplied her with hours. This separation from employment was involuntary.

The issue becomes whether the claimant was discharged for misconduct. For the following reasons, the administrative law judge concludes she was not.

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).

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 employer discharged the claimant and has the burden of proof to show misconduct. The employer did not provide sufficient evidence of misconduct at the hearing. The claimant did not appear for work because she did not know she was supposed to appear. The employer told her to wait at home until she was called. The employer did not call. The claimant's failure to appear for work was due to the employer's inaction. Consequently, the employer did not meet its burden of proof to show misconduct. Benefits are allowed.

DECISION:

The representative's May 8, 2006 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

bas/kkf