

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: Pamela Brown was employed by Compass One LLC from September 30, 2004 until August 5, 2005. She was a full-time cashier/utility person.

On July 21, 2005, the claimant asked Food Service Director Mike Ferraro if she could have time off to go to Colorado to get her mother and bring her back to Des Moines. Mr. Ferraro pointed out the claimant had already exhausted all of her paid time off, including floating holidays which she had technically not even earned yet. He agreed to let her go but she was to return to work on July 27, 2005.

Ms. Brown was no-call/no-show to work on Wednesday, July 27, 2005, but called later and left a message on the director's cell phone saying her mother was doing better and would not be coming back to Des Moines to live with her, but that her mother's birthday was the next day and the employer should "count [her] out until the end of the week."

On Sunday, July 31, 2005, the claimant's daughter called and said her grandmother was not doing well and Ms. Brown would not be back to work the next day as planned. The next day the claimant left a message saying she was "heading home" on Wednesday, but on Wednesday she indicated she was "heading home" on Thursday. That same day Mr. Ferraro finally was able to talk directly to Ms. Brown and told her he expected her at work on Friday, August 5, 2005, and she agreed. However, she was no-call/no-show on that day and has not made any contact with the employer after that date.

Mr. Ferraro consulted with the corporate office and was notified that the claimant should be discharged. A letter was sent from the corporate office notifying her of the discharge.

Pamela Brown has received unemployment benefits since filing a claim with an effective date of August 7, 2005.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes she is.

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).

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 claimant did not qualify for FMLA because she had not been employed by Compass One for at least 12 months. However, the employer worked with her to give her the requested time off in spite of her not having any paid time off to use. Instead of returning in good faith, the claimant continued to extend her visit on spurious grounds such as her mother's birthday, and vague assertions that she was "not doing well."

The final communication between claimant and employer was when the claimant agreed to return to work on Friday, August 5, 2005, but was again a no-call/no-show to work. The claimant has provided no testimony or evidence to explain why she did not return to work as agreed, and her absences must be considered unexcused. This is conduct not in the best interests of the employer and the claimant is disqualified.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be

credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of September 1, 2005, reference 02, is reversed. Pamela Brown is disqualified and benefits are withheld until she has earned ten times her weekly benefit amount provided she is otherwise eligible. She is overpaid in the amount of \$604.00.

bgh/kjw/kjw