

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

JODI L MOORE
2009 7TH ST APT 5
DES MOINES IA 50314

FIVE STAR QUALITY CARE INC
C/o TBT ENTERPRISES
PO BOX 848
GAITHERSBURG MD 20884

Appeal Number: 04A-UI-02791-B4T
OC: 07/06/03 R: 02
Claimant: Respondent (5)

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 96.6-2 – Timeliness of Appeal

Section 96.5-2-a – Whether claimant was discharged for misconduct

Section 96.5-1 – Whether claimant voluntarily left with good cause attributable to the employer

STATEMENT OF THE CASE:

An appeal was filed on behalf of the employer from an unemployment insurance decision dated July 30, 2003, reference 01, that held, in effect, Jodi L. Moore was discharged from her employment with Five Star Quality Care, Inc., on July 7, 2003 for no disqualifiable reason. Unemployment insurance benefits were allowed.

A telephone conference hearing was scheduled and held on March 31, 2004 pursuant to due notice. Jodi L. Moore participated. Jonathon Comisiak, Supervisor at TBT Enterprises represented the employer during the hearing and participated as a witness. Donna Manning,

Bookkeeper and Linda Thomas, Director of Nursing participated as witnesses on behalf of the employer.

Official notice was taken of the unemployment insurance decision dated July 30, 2003, reference 01, together with the pages attached thereto (6 pages in all). Employer Exhibit One consisting of four pages was admitted into evidence. Employer Exhibit Two was admitted into evidence.

FINDINGS OF FACT:

The administrative law judge, having examined the entire record in this matter, finds that:

Termination of Employment Issue

Jodi L. Moore was employed with Five Star Quality Care, Inc. from September 28, 2001 through July 7, 2003 as a certified nurses' aid. Following the termination of the claimant's employment on or about July 5, 2003. The claimant filed an initial claim for benefits having an effective date of July 6, 2003. Subsequently, a fact-finding interview was held during which the employer did not participate. A decision of the representative was dated and mailed to the parties of record on July 30, 2003, reference 01. Said decision held in effect the claimant was discharged from her employment with Five Star Quality Care, Inc. on July 7, 2003 for no disqualifiable reason and unemployment insurance benefits were allowed. Said decision also had a caveat or warning that required an appeal to be postmarked or received by Iowa Workforce Development Appeals Section by August 9, 2003. Exhibit One admitted into evidence discloses that an appeal letter was filed on March 25, 2004 as shown by the TBT Enterprise Fax mark. The record, however, establishes that the employer did fax a letter of appeal to the Workforce Development Department on August 7, 2003 as identified at page three attached to Exhibit One admitted into evidence. In addition, at page four attached to Exhibit One is disclosed the social security number of the claimant and the fax number to which the original letter of appeal was sent. There is no record of the appeal letter in the administrative file. The documentation provided by the employer however, establishes that a timely appeal was filed through the decision under consideration and the administrative law judge finds that the Workforce Development Department has jurisdiction of the parties hereto and of the subject matter hereof necessary to enter upon a determination relating to the nature of the claimant's termination of employment.

Termination of Employment Issue

The claimant was employed with Five Star Quality Care, Inc., from September 28, 2001 to approximately July 7, 2003. The claimant performed the job duties of a certified nurses aid and received a copy of the employer handbook containing rules and regulations relating to a procedure for termination of employment due to absenteeism and tardiness and other disciplinary incidents. In addition, the employer had adopted a rule that determined an individual voluntarily left her employment if they were absent for two consecutive days on a no-call/no-show basis.

The claimant had been warned in writing on several occasions April 5, 2002 and August 15, 2002 because she was absent because of illness or family illness problems. In addition, the claimant has been warned on January 24, 2003 and January 25, 2003 that her job was in jeopardy because she was absent because of illness.

On June 28, 2003, the claimant's niece was having a baby and unable to baby-sit for the claimant. The claimant notified the employer that she was unable to report to work on June 28, 2003. The employer did not establish that the claimant was scheduled to work again until July 5, 2003. The claimant was preparing to report to work on July 5, 2003 and received a letter indicating that she had voluntarily terminated her employment because of being absent for two days on a no-call/no-show basis. The claimant was then allegedly discharged on July 7, 2003 but no documentation was provided to establish that date.

REASONING AND CONCLUSIONS OF LAW:

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).

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.

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 evidence in the record does not establish that the claimant was absent or tardy on an excessive number of occasions without reasonable cause or because of illness. The employer has failed to establish that the claimant committed a series of deliberate acts or omissions that would constitute misconduct or excessive unexcused absenteeism and tardiness.

In addition, the employer contended that the claimant voluntarily left her employment because of violating a company rule that determined the claimant voluntarily left her employment if she were absent for two days on a no-call/no-show basis.

871 IAC 24.25(4) provides:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

An employer may adopt whatever rule it desires with respect to absenteeism and tardiness as well as a two-day no-call/no-show rule, however, the claimant had contacted the employer informing the employer that she was absent because of a justifiable reason and a two-day absence on a no-call/no-show basis does not constitute a voluntary quit.

The administrative law judge concludes that Jodi L. Moore was separated from her employment with Five Star Quality Care, Inc., on July 7, 2003, on or about July 7, 2003 for no disqualifiable reason within the intent and meaning of the foregoing sections of the Iowa Code and Iowa Administrative Code.

DECISION:

The unemployment insurance decision dated July 30, 2003, reference 01, is modified. Five Star Quality Care, Inc., filed a timely appeal to the decision under consideration and the Workforce Development Department has jurisdiction of the parties hereto and in the subject matter hereof necessary to enter upon a determination relating to the nature of the claimant's termination of employment. Jodi L. Moore was separated from her employment with Five Star Quality Care, Inc., on or about July 7, 2003 for no disqualifiable reason and unemployment insurance benefits are allowed provided the claimant is otherwise eligible under the provisions of the Iowa Employment Security Law.

kjf/b