

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SHIRI M BORMAN
Claimant

APPEAL NO. 13A-UI-10518-VST

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 08/11/13
Claimant: Respondent (1R)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated September 5, 2013, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice, a hearing was held on October 8, 2013, by telephone conference call. The claimant participated personally. The claimant was represented by Steve Hamilton, Attorney at Law. The employer participated by April Jennings, Administrator. The employer was represented by Alyce Smolsky. The record consists of the testimony of April Jennings; the testimony of Shiri Borman; and Employer's Exhibits 1-8.

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 long-term care facility located in Rock Rapids, Iowa. The claimant was hired on January 21, 2005, as a full time certified nursing assistant. The claimant's last day of actual work was June 21, 2013. The claimant was terminated on July 10, 2013.

The employer sent the claimant a written letter, which states as follows:

We have not received your completed FMLA Physician Certification that was provided to you on 2 different occasions. We have allowed you to be absent from work for 12 weeks, exhausting the 12 weeks allowed by FMLA even if you had returned the paperwork. Therefore we are terminating your employment effective July 10, 2013. You are welcome to reapply when you are able to work again.
(Exhibit 1)

At the time this letter was written, the claimant had not been released to return to work.

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.

The claimant is eligible for benefits provided she is able and available for work and meets all other eligibility requirements. Issues surrounding separations of employment for medical reasons and subsequent entitlement to unemployment insurance benefits are among the most challenging in unemployment insurance law. The evidence in this case showed that the claimant was unable to return to work by the time she had exhausted her FMLA leave on July 10, 2013. Although the employer alleged that the claimant was terminated because she failed to return her FMLA paperwork by July 5, 2013, the termination letter is fairly read to show that she would have been terminated even if she had returned the paperwork because she was not released to return to work. In other words, it was the inability to return to work as opposed to late paperwork that led to her discharge. The separation of employment is clearly not a voluntary and is not disqualifying misconduct. Benefits are allowed based on the separation decision.

The administrative law judge has serious reservation on whether the claimant was able and available for work on August 11, 2013, which is when she established her original claim for unemployment insurance benefits. The Claims Section has not ruled on whether the claimant was able and available for work. This case is remanded to the Claims Section for a determination and when and if the claimant was able and available for work.

DECISION:

The decision of the representative dated September 5, 2013, reference 01, is affirmed. The claimant is eligible for unemployment insurance benefits based on the separation of employment on July 10, 2013. This case is remanded to the Claims Section for a consideration of whether the claimant was able and available to work was August 11, 2013.

Vicki L. Seeck
Administrative Law Judge

Decision Dated and Mailed

vls/css