

**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**

**LISA K BRIMEYER
1348 BIRCHWOOD LN
HAZEL GREEN WI 53811**

**PARISIAN VIRGINIA LLC
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283**

**Appeal Number: 04A-UI-02332-RT
OC: 01-25-04 R: 04
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
Section 96.5-1 – Voluntary Quitting
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Parisian Virginia LLC, filed a timely appeal from an unemployment insurance decision dated February 23, 2004, reference 01, allowing unemployment insurance benefits to the claimant, Lisa K. Brimeyer. After due notice was issued, a telephone hearing was held on March 22, 2004 with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing as instructed in the notice of appeal. The employer was represented by TALX UC eXpress which is well aware of the need to call in a telephone number if an employer wants to participate in the hearing. The

administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer from October 25, 1998 until she was terminated or discharged on May 16, 2003. The claimant's last day of work for the employer was January 3, 2003. At that time, the claimant took a short-term leave of absence for 12 weeks because she required major surgery. The claimant's recuperative period was to last from 6 months to 1 year. The employer was aware of all of this. When the claimant's short-term leave of absence was over, the claimant was not able to return to work and so informed the employer. The employer put the claimant on long-term disability but according to the employer's policy, a termination automatically results so the claimant was terminated on May 16, 2003. The claimant was finally released to work on January 16, 2004. When she went back to the employer and offered to go back to work, there was no position available for the claimant. Her job had been filled. The claimant had received no warnings or disciplines for attendance prior to January 3, 2003. Pursuant to her claim for unemployment insurance benefits filed effective January 25, 2004, the claimant has received unemployment insurance benefits in the amount of \$2,583.00 as follows: \$287.00 per week for nine weeks from benefit week ending January 31, 2004 to benefit week ending March 27, 2004.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.
2. Whether the claimant is overpaid unemployment insurance benefits. She is 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, (7) 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).

(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.

Iowa Code Section 96.5-1-d 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. But the individual shall not be disqualified if the department finds that:

d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

The administrative law judge concludes that the claimant was effectively discharged on May 16, 2003 when she had to take long-term disability because of major surgery and the employer's policy requires that an employee be terminated. The claimant was so terminated. The claimant had been on a short-term leave of absence for 12 weeks but this was not enough time for her to recover from her major surgery. At all material times hereto, the claimant kept the employer informed of her medical situation and condition. When the claimant learned that she was to have major surgery, she was also informed that the recuperative period could take between 6 months and 1 year. The employer was aware of this. The claimant's recuperative period took 1 year. When the claimant was finally released to work by a physician on January 16, 2004, she went back to the employer but the employer had no position for her. Accordingly, the administrative law judge concludes that the claimant was effectively discharged on May 16, 2003.

In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused

absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including excessive unexcused absenteeism. See Iowa Code Section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, including excessive unexcused absenteeism. Specifically, the employer failed to participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of her duties and/or evincing a willful or wanton disregard of the employer's interests and/or in carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. The administrative law judge also concludes that the employer has failed to demonstrate by a preponderance of the evidence that the claimant's absences were not for reasonable cause or personal illness and not properly reported. The claimant credibly testified that she required major surgery with a recuperative period from 6 months to 1 year and that the employer was at all material times hereto informed of her condition. In fact, the claimant was granted first a short-term leave of absence of 12 weeks for the surgery. This was not sufficient and the claimant was then placed on long-term disability. The administrative law judge concludes that at all material times hereto the claimant's absences were for personal illness and were properly reported and not excessive unexcused absenteeism and not disqualifying misconduct.

Accordingly, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct, and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

Even should the claimant's separation be considered a voluntary quit, at some point prior to January 16, 2004, the administrative law judge would conclude that this voluntary quit would not be disqualifying. The evidence establishes that, if she quit, the claimant quit because of illness or injury upon the advice of a licensed and practicing physician and upon knowledge of a necessity by the employer and that the claimant informed the employer. Further, the evidence establishes that after recovering from the illness or injury and being released by her physician, which certified her recovery, the claimant returned to the employer and offered to go back to work for the employer and there was no regular work or comparable work available to her. Under these circumstances, the claimant would be entitled to unemployment insurance benefits when she offered to go back to work and work was refused. The claimant did not file for unemployment insurance benefits until an effective date of January 25, 2004 which was after she had been released to work and after she had went back to the employer and sought employment. Accordingly, the administrative law judge concludes that even if the claimant's separation was considered a voluntary quit, the claimant would not be disqualified to receive unemployment insurance benefits on and after January 16, 2004.

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 administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$2,583.00 since separating from her employer herein on or about May 16, 2003 and filing for such benefits effective January 25, 2004. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of February 23, 2004, reference 01, is affirmed. The claimant, Lisa K. Brimeyer, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible. As a result of this decision, the claimant has not been overpaid any unemployment insurance benefits arising out of her separation from the employer herein.

tjc/b