

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LISA M SIMMONS

Claimant

APPEAL NO. 13A-UI-03058-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DIAL SILVERCREST CORP

Employer

OC: 08/15/10

Claimant: Appellant (1)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Claimant filed a timely appeal from a representative's decision dated March 7, 2013, reference 07, which denied unemployment insurance benefits finding that the claimant was discharged from work for repeated tardiness after being warned. After due notice was provided, a telephone hearing was held on April 11, 2013. Claimant participated. Participating as a witness for the employer was Mr. Gregg Ernst, Assistant Executive Director.

ISSUE:

The issue in this matter is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

The administrative law judge, having considered the evidence in the record, finds: Lisa Simmons was employed by Dial Silvercrest Corporation, doing business as Woodland Creek Retirement Community, from September 13, 2011 until February 5, 2013 when she was discharged for excessive tardiness. Ms. Simmons was employed as a full-time certified nursing assistant and was normally scheduled to work 3:00 p.m. until 11:30 p.m. on scheduled workdays. Ms. Simmons was paid by the hour. Her immediate supervisor was Kevin Moeckly.

Ms. Simmons was discharged after the claimant failed to report for her scheduled beginning work time on February 2, 2013. Ms. Simmons was scheduled to begin work at 3:00 p.m. that day but had reported to work at 4:00 p.m. that day without securing the specific approval of her supervisor as required by company policy. At the time of the final incident Ms. Simmons was on a final warning for excessive tardiness. That final warning had been issued to the claimant on August 22, 2012. The claimant had also been previously warned for excessive tardiness on August 6 and August 8, 2012 and had served a three-day suspension from work for tardiness.

On February 2, 2013, Ms. Simmons did not contact her immediate supervisor as required but instead contacted a licensed practical nurse to request permission to arrive one hour late. Ms. Simmons knew that the LPN did not have authority to schedule or vary scheduling but nonetheless telephoned the LPN to vary her work schedule. At the time of the request

Ms. Simmons knew that her immediate supervisor expected her to report for work as scheduled and was aware that overtime hours were being scheduled for and authorized by her supervisor for the claimant that week.

Established company policy required the claimant to specifically notify her immediate supervisor or a specified charge nurse if the claimant was going to be absent or tardy.

It is the claimant's position that she had only inquired as to whether she could change her work shift that day and that the LPN that she called did not object.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes misconduct sufficient to warrant the denial of unemployment insurance benefits. It does.

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.

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 employer has the burden of proof in this matter. See Iowa Code section 96.6-2. Misconduct must be substantial in order to justify a denial of unemployment benefits. The focus is on deliberate, intentional or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

Here, the claimant knew or should have known based upon the repetitive warnings given to her by her employer that the claimant was expected to report to work on time and when scheduled by her employer. The claimant also knew that the facility policies required her to notify only a specified charge nurse or her immediate supervisor to report any absences or impending tardiness. Based upon the final warning that had been served upon the claimant, Ms. Simmons knew that her employment was in jeopardy if she did not follow the employer's reasonable expectations.

On February 2, 2013, Ms. Simmons was aware that she was scheduled to report for work at 3:00 p.m. in the afternoon and that she had also been assigned to work mandatory overtime hours. Instead of reporting to work as scheduled or notifying her direct supervisor or the charge nurse with a request to vary her work schedule, the claimant instead called a licensed practical nurse who did not have the authority to schedule or allow employees to reschedule their work hours. Ms. Simmons stated her request to the LPN in a manner that made it appear that the employer wanted to minimize any overtime being worked by the claimant. The claimant at that time knew that she was not only requested to work her regular hours plus overtime hours but also expected to do so. When the employer reasonably concluded that the claimant had gone around the normal chain of command to facilitate yet another late arrival after being specifically warned, a decision was made to terminate Ms. Simmons from her employment.

For the reasons stated above, the administrative law judge concludes that the employer has sustained its burden of proof in establishing that the claimant's discharge took place under disqualifying conditions. Unemployment insurance benefits are withheld.

DECISION:

The representative's decision dated March 7, 2013, reference 07, is affirmed. The claimant is disqualified. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount and is otherwise eligible.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

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