IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

GAIL A THEMAS
Claimant

SSW ENTERPRISES INC
COLLIS INC
Employer

APPEAL NO. 09A-UI-00106-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/23/07 R: 04
Claimant: Appellant (5)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Gail A. Themas (claimant) appealed a representative's December 24, 2008 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from SSW Enterprises / Collis, Inc. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 15, 2009. The claimant participated in the hearing. Michelle Anderson appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

FINDINGS OF FACT:

The claimant started working for the employer in approximately August 2006. She worked full time as a resistance welder operator in the employer's wire product manufacturing business. She normally worked on the second shift, 3:00 p.m. to 11:00 p.m., Monday through Friday. Her last day of work was August 15, 2008. She went on a leave of absence from that point through November 6. When she was ready to return to work at that time, her regular position was laid off, and she declined a position in another department, deciding to accept the layoff.

On the morning of December 3, 2008 Ms. Anderson, the human resources coordinator, called the claimant. Ms. Anderson informed the claimant that she was being recalled to work but on the first shift; the claimant was to report the next day, December 4, for work at 7:00 a.m. The claimant was unhappy about being recalled to a first shift position, as she had always worked on second shift and had transportation issues. However, under the employer's bargaining agreement with the union that covered the claimant's position, an employee on layoff with lower

seniority than other employees who decline to switch to a different shift can be compelled to report for work on a shift other than the shift the employee normally works.

The claimant agreed that she would report for work at 7:00 a.m. on December 4. She had a subsequent conversation on December 3 with the human resources manager in which she indicated she might look for another job, but she also confirmed to that manager that she would report for work with the employer as scheduled on December 4. Even though the claimant did not have her own transportation, she planned on calling her mother when she got up on December 4 and having her mother give her a ride to work at the employer. However, on December 4 the claimant was a no-call/no-show for work at 7:00 a.m. because the claimant had overslept. When she called Ms. Anderson at approximately 10:30 a.m., she was informed that she was discharged for her attendance with the final absence being that morning.

The employer's attendance policy provides for termination if an employee reaches 12 points. Prior to August 15 the claimant had nine attendance points, two of which were due to illness, the remainder due to personal or transportation reasons. She had received a warning on July 28, 2008 that she was at eight points under the policy. Under the policy, a no-call/no-show as occurred on December 4 is assessed as three points. As a result, that absence brought the claimant to 12 points and termination.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993); Wills v. Employment Appeal Board, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that she quit by not reporting to work after indicating to the human resources manager that she might be needing to look for work elsewhere. Simply admitting that one is or might start looking for another job is not paramount to quitting. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code § 96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Absenteeism can constitute misconduct. To be misconduct, absences must be both excessive and unexcused. 871 IAC 24.32(7). Absences due to oversleeping are not excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The claimant had numerous prior absences that were not excused, and the claimant's final absence was not excused or due to illness or other reasonable grounds. The claimant had previously been warned that future absences could result in termination. Higgins, supra. The employer discharged the claimant for reasons amounting to work-connected misconduct.

DECISION:

The representative's December 24, 2008 decision (reference 01) is modified with no effect on the parties. The claimant did not voluntarily quit but the employer did discharge the claimant for disqualifying reasons. The claimant is disqualified from receiving unemployment insurance benefits as of December 4, 2008. This disqualification continues until she has been paid ten times her weekly benefit amount for insured work, provided she is otherwise eligible. The employer's account will not be charged.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/css