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

MARY K CARLSON
111 – 5TH ST S
HUMBOLDT IA 50548

GREGG A BUCHANAN ET AL
BUCHANAN BIBLER BUCHANAN AND GABOR
PO BOX 617
ALGONA IA 50511-0617

Appeal Number: 05A-UI-03472-RT
OC: 02-27-05 R: 01
Claimant: Appellant (2)

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

STATEMENT OF THE CASE:

The claimant, Mary K. Carlson, filed a timely appeal from an unemployment insurance decision dated March 25, 2005, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on April 21, 2005, with the claimant participating. Scott Buchanan, Partner, participated in the hearing for the employer, Gregg A. Buchanan et al, Buchanan, Bibler, Buchanan and Gabor. Employer's Exhibit One was admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full time legal assistant from February 1, 2005 until she separated on February 4, 2005. On that day, the claimant called and spoke to the employer's witness Scott Buchanan, Partner, at approximately 9:15 a.m. The claimant was to start work at 8:30 a.m. The claimant called Mr. Buchanan to request that day off. The exact conversation between the two is uncertain. The claimant did indicate that she had a lot going on in her personal life and wanted to take that day, a Friday, off and consider whether her job would work out. In some way the claimant indicated that she was not feeling well. The night before, the claimant had difficulties with her estranged spouse and got no sleep and was upset. She did not want to inform Mr. Buchanan of these matters and therefore did not, other than to say something to the effect that she had a lot going on in her personal life. The claimant did not say in this conversation that she was quitting. Mr. Buchanan did not object to the claimant's taking the day off.

After thinking about the conversation he had had with the claimant, Mr. Buchanan sent the claimant an e-mail as shown at Employer's Exhibit One. Mr. Buchanan believed that the claimant was going to quit the following Monday and also doubted her commitment to a long-term employment with the employer. Accordingly, he wrote the e-mail as set out at Employer's Exhibit One.

The claimant interviewed for the position on January 19, 2005 and an offer was made to her on January 20, 2005. However, when the employer did not hear from the claimant for several days, Mr. Buchanan contacted the claimant to inquire about whether she was going to take the position. She did so. The claimant had not been previously absent or tardy and had received no other warnings or disciplines. The employer does have a rule that employees must notify the employer of an absence or tardy prior to their start time but Mr. Buchanan did not review that with the claimant. The claimant waited until approximately 9:15 a.m. to call the employer to ask for the day off on Friday, February 4, 2005 because she wanted to specifically and directly talk to Mr. Buchanan and wanted to be sure that he was in the office. When the claimant was interviewed Mr. Buchanan made it quite clear to the claimant that he was looking for a long-term commitment and that it was very important to him and to the employer. The claimant also was interested in such a long-term commitment with an employer.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was 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 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).

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.

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.

The first issue to be resolved is the character of the separation. The claimant maintains that she was discharged by the e-mail as shown at Employer's Exhibit One. The employer's witness, Scott Buchanan, Partner, testified that the characterization of the separation was vague but that he believed the claimant was going to quit in the future. Mr. Buchanan conceded that the claimant had not quit through any communication and in particular a telephone call on February 4, 2005, before the e-mail at Employer's Exhibit One was sent. Under the evidence here, the administrative law judge is constrained to conclude that the employer has not demonstrated by a preponderance of the evidence that the claimant left her employment voluntarily. The employer's witness, Scott Buchanan, Partner, testified that the claimant called him about being absent on February 4, 2005 at approximately 9:15 a.m. but that the claimant in that conversation did not say she was quitting. There was no other communication with the claimant until the e-mail sent by Mr. Buchanan as shown at Employer's Exhibit One. Mr. Buchanan testified that he felt the claimant was going to quit. It may well be

that the claimant was going to quit or would have quit but the claimant had not quit at the time the e-mail was sent. The claimant denies that she was going to quit. The e-mail at Employer's Exhibit One clearly appears to be a separation initiated by the employer. Accordingly, the administrative law judge concludes that the claimant did not voluntarily quit but was discharged on February 4, 2005 by the e-mail as shown at Employer's Exhibit One.

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. IDJS, 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. The evidence establishes that the claimant was absent on February 4, 2005 because she had had difficulties with her estranged spouse the night before and that she was not feeling well. It also appears that the employer, although not necessarily specifically approving the absence, did not object to it. It is true that the claimant was not forth coming to Mr. Buchanan about the real reason for her absence and if she had been, this matter would probably not have arisen. Nevertheless, the administrative law judge is constrained to conclude that the claimant's absence on February 4, 2005 was for personal illness and reasonable cause. The issue becomes whether it was properly reported. The administrative law judge concludes that it was. Although the employer has a rule that requires that an employee call and notify the employer of an absence prior to the start of the employee's shift, the claimant was not informed of this rule. The claimant called at approximately 9:15 a.m., 45 minutes after her start time of 8:30 a.m. The claimant testified that she did so because she wanted to specifically talk to Mr. Buchanan and wanted to be sure that he was in the office. Under these circumstances, the administrative law judge is constrained to conclude that the claimant properly reported her absence. Accordingly, the administrative law judge concludes that the claimant's absence was not excessive unexcused absenteeism and not disqualifying misconduct.

Even if the claimant's absence was not for reasonable cause or personal illness and was not properly reported, the evidence establishes that the claimant had only one such absence. The term excessive unexcused absenteeism implies more than one absence or tardy. In general, it requires three unexcused absences or tardies to establish disqualifying misconduct. See for example, Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982).

During a conversation between the claimant and Mr. Buchanan at approximately 9:15 a.m. on February 4, 2005, the claimant did indicate to Mr. Buchanan some second thoughts about her job or at least whether the job was going to work out. Mr. Buchanan believed that the claimant was going to quit in the future. However, the claimant did not indicate that she was going to quit in the future. The evidence establishes that the claimant made those comments at least in part because of the difficulty she was having with her estranged spouse. Under the evidence here, the administrative law judge is constrained to conclude that the claimant's allusions to her job during this conversation do not rise to the level of disqualifying misconduct as defined above.

In summary, 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.

DECISION:

The representative's decision dated March 25, 2005, reference 01, is reversed. The claimant, Mary K. Carlson, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged but not for disqualifying misconduct.

sc/pjs