IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

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

DARCIE K MESECHER
Claimant

FORT MADISON COMMUNITY HOSPITAL
Employer

APPEAL NO. 15A-UI-05619-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/05/15
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
Section 96.6(2) – Timeliness of Appeal

STATEMENT OF THE CASE:

Darcie Mesecher (claimant) appealed a representative's April 30, 2015, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Fort Madison (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on June 23, 2015. The claimant participated personally. The employer participated by Vicki Kokjohn, Vice President of Compliance and Employee Operations, and Heather Stevenson, Director of Maternal Child Services. Exhibit D-1 was received into evidence.

ISSUE:

The issue is whether the appeal was filed in a timely manner and, if so, whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on October 26, 2010, as a full-time registered nurse. The claimant signed for receipt of the employer's handbook at her orientation. The handbook states that an employee will be terminated if she accumulates eight instances of tardiness or eight instances of absenteeism in a rolling calendar year. An employee must properly report an absence prior to the start of the shift.

The claimant was tardy on November 1, 2, December 3, 5, 2014, January 25, February 18, and 19, 2015. The employer issued the claimant a final written warning for attendance. The employer notified the claimant she could be terminated from employment if she had another incident prior to March 11, 2015. The claimant did not have any incidents prior to March 11, 2015.

On March 24, 2015, the claimant was scheduled to report to work at 6:00 p.m. She was ill and called the employer at 5:55 p.m. reporting she overslept due to fever and nausea. The claimant requested she be placed on "on call" status. The employer denied her request and told her to

appear for work even though she was sick. The claimant arrived at 7:05 p.m. and vomited repeatedly during her shift at the hospital. The employer terminated the claimant on March 30, 2015, for attendance. At the time of her termination the claimant had been absent six times and tardy seven times.

A disqualification decision was mailed to claimant's last-known address of record on April 30, 2015. She did receive the decision within ten days. The decision contained a warning that an appeal must be postmarked or received by the Appeals Section by May 10, 2015. The appeal was not filed until May 12, 2015, which is after the date noticed on the disqualification decision. Her appeal was late because the system would not take her email because the site was freezing.

REASONING AND CONCLUSIONS OF LAW:

The first issue to be considered in this appeal is whether the claimant's appeal is timely. The administrative law judge determines it is.

Iowa Code § 96.6-2 provides:

> 2. Initial determination. A representative designated by the director shall promptly notify all interested parties to the claim of its filing, and the parties have ten days from the date of mailing the notice of the filing of the claim by ordinary mail to the last known address to protest payment of benefits to the claimant. The representative shall promptly examine the claim and any protest, take the initiative to ascertain relevant information concerning the claim, and, on the basis of the facts found by the representative, shall determine whether or not the claim is valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and its maximum duration, and whether any disqualification shall be imposed. The claimant has the burden of proving that the claimant meets the basic eligibility conditions of section 96.4. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to section 96.5, except as provided by this subsection. The claimant has the initial burden to produce evidence showing that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 10, and has the burden of proving that a voluntary quit pursuant to section 96.5, subsection 1, was for good cause attributable to the employer and that the claimant is not disqualified for benefits in cases involving section 96.5, subsection 1, paragraphs “a” through “h”. Unless the claimant or other interested party, after notification or within ten calendar days after notification was mailed to the claimant's last known address, files an appeal from the decision, the decision is final and benefits shall be paid or denied in accordance with the decision. If an administrative law judge affirms a decision of the representative, or the appeal board affirms a decision of the administrative law judge allowing benefits, the benefits shall be paid regardless of any appeal which is thereafter taken, but if the decision is finally reversed, no employer's account shall be charged with benefits so paid and this relief from charges shall apply to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant attempted to email an appeal within the time period allowed by law but the system would not accept the transmission. Therefore, the appeal shall be accepted as timely.

The next issue is whether the claimant was discharged for misconduct.

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on March 24, 2015. The claimant was ill and should have been allowed to stay home with a fever and vomiting. The employer insisted she come to work and, therefore, she was tardy. The claimant's absence does not amount to job misconduct because it was properly reported. In addition, the employer terminated the claimant without sufficient incidents of absenteeism according to the employer's own handbook.

The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The April 30, 2015, reference 01, decision is reversed. The claimant's appeal is timely. The employer has not met its proof to establish job related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/pjs