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

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CAMP DAVID INC
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Appeal Number: 06A-UI-07686-JTT
OC: 06/18/06 R: 02
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

STATEMENT OF THE CASE:

Camp David filed a timely appeal from the July 20, 2006, reference 04, decision that allowed benefits. After due notice was issued, a hearing was held on August 17, 2006. Owner David Krogh represented the employer. Claimant Kristine Becker participated. Employer's Exhibit One and Claimant's Exhibits A through D were received into evidence.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kristine Becker commenced her employment with Camp David on April 19, 2006 and worked in Woody's Sports Bar & Grill. During her first two weeks of employment, Ms. Becker was a part-time bartender. Ms. Becker then became the bar manager. Ms. Becker worked full-time

hours for a few weeks and then reduced her hours to part-time. Ms. Becker was also a full-time student. On June 12, Ms. Becker asked owner David Krogh if she could have June 20-25 off. Ms. Becker did not provide a reason for the request at that point. Mr. Krogh told Ms. Becker that he ordinarily required employees to work a year before honoring requests for time off. Mr. Krogh told Ms. Becker that he needed a manager to run the bar at Woody's. Mr. Krogh indicated that if Ms. Becker took the time off and if anything went wrong while she was gone, it could cost Ms. Krogh her job. Ms. Becker indicated that she had made arrangements for another reliable employee to run the bar in her absence and would make certain that all proper arrangements were in place before her absence began. The conversation ended with an understanding that Ms. Becker was to let Mr. Krogh know later in the week whether she would in fact be taking the time off.

On June 15, Mr. Krogh approached Ms. Becker and asked her whether she was going forward with her proposed absence on June 20-25. Ms. Becker indicated she was. On the same day, Mr. Krogh provided Ms. Becker with a copy of the Camp Davis employee handbook. Ms. Becker did not read the handbook at that point. The handbook contains multiple references to at-will employment. The handbook also contains the following provision: "Failure to report for work without prior notice will be considered a voluntary resignation."

On the morning of June 16, Ms. Becker became ill due to the side effects of an anti-depressant medication. On June 5, 2006, a doctor had prescribed anti-depressant medication for Ms. Becker. On Monday, June 12, the doctor had increased the dosage. On June 16, Ms. Becker was scheduled to work at 3:00 p.m. Despite the fact that she was feeling too sick to work, Ms. Becker went to Woody's at 2:30 p.m. with the intention of working and/or giving Mr. Krogh an opportunity to observe that she was too sick to work. Ms. Becker did not feel well and sat down in a booth and laid her head on the table. Mr. Krogh and the bartender on duty both noticed Ms. Becker in the booth, but did not approach her to inquire about what was the matter with her. Shortly after 3:00 p.m., two regular customers, a husband and wife, approached Ms. Becker to inquire about her wellbeing. At 3:32 p.m., the female patron contacted Ms. Becker's psychiatrist and informed the doctor that Ms. Becker was very ill. The doctor instructed the female patron to have Ms. Becker discontinue the medication. The female patron then took Ms. Becker home. Before Ms. Becker left the workplace, she was advised that another bartender had been summoned to work her shift. At 4:25 p.m., Mr. Krogh telephoned Ms. Becker. Mr. Krogh asked Ms. Becker what was wrong with her and why she had been making a scene at the bar. Ms. Becker explained that she was ill due to the side effects of the medication she was on. Mr. Krogh was upset that Ms. Becker was sick on a Friday. Mr. Krogh indicated he should call Ms. Becker's doctor to confirm her story. Ms. Becker offered to provide Mr. Krogh with the telephone number for her doctor. Mr. Becker indicated that he did not have time and that he was late for a meeting. Mr. Krogh then hung up.

Ms. Becker was next scheduled to work on June 18 at 6:00 p.m. Between 11:00 a.m. and noon, Mr. Krogh telephoned Ms. Becker. Mr. Krogh was not able to speak with Ms. Becker, but left a message. Mr. Krogh told Ms. Becker that if she did not come to work that night, she did not have a job. Ms. Becker believed she was still not well enough to work. Ms. Becker wished to avoid another conversation with Mr. Krogh similar to the conversation on June 16, when Mr. Krogh had bluntly questioned whether she was in fact ill. Ms. Becker did not return Mr. Krogh's call. During the afternoon, a coworker left a message on Ms. Becker's voice mail indicating that she was able to cover Ms. Becker's shift. Ms. Becker was absent without notifying the employer and concluded she had been discharged from the employment.

On June 19, Ms. Becker went to the workplace to collect her belongings. Ms. Becker asked the bartender on duty whether Mr. Krogh was there and the bartender advised that Mr. Krogh was out of town. The employer and Ms. Becker had no further contact.

REASONING AND CONCLUSIONS OF LAW:

The first question for the administrative law judge is whether Ms. Becker quit or was discharged from the employment. A discharge is a termination of employment initiated by the employer for such reasons as incompetence, violation of rules, dishonesty, laziness, absenteeism, insubordination, or failure to pass a probationary period. 871 IAC 24.1(113)(c). A quit is a separation initiated by the employee. 871 IAC 24.1(113)(b). In general, a voluntary quit requires evidence of an intention to sever the employment relationship and an overt act carrying out that intention. See Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 698, 612 (Iowa 1980) and Peck v. EAB, 492 N.W.2d 438 (Iowa App. 1992). 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. See 871 IAC 24.25.

In considering an understanding or belief formed, or a conclusion drawn, by an employer or claimant, the administrative law judge considers what a reasonable person would have concluded under the circumstances. See Aalbers v. Iowa Department of Job Service, 431 N.W.2d 330 (Iowa 1988) and O'Brien v. Employment Appeal Bd., 494 N.W.2d 660 (1993).

The greater weight of the evidence in the record establishes that Ms. Becker did not voluntarily quit the employment. At no point did Ms. Becker evidence an intention to sever the employment relationship. Instead, the evidence indicates that the employer notified Ms. Becker on June 18 that she would be discharged from the employment if she failed to appear for her shift on June 18. Based on this phone message from the employer, Ms. Becker reasonably concluded that she had been discharged from the employment in connection with her failure to appear for her shift on that date.

The remaining question is whether the evidence in the record establishes that Ms. Becker was discharged for misconduct in connection with the employment. It does 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.

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. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). 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).

In order for Ms. Becker's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the evidence must establish that her *unexcused* absences were excessive. See 871 IAC 24.32(7). The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the evidence must first establish that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32(8). Absences related to issues of personal responsibility such as transportation and oversleeping are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. Tardiness is a form of absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

The evidence establishes that Ms. Becker's final absence on June 18 was unexcused because it was not properly reported to the employer. The administrative law judge concludes that Ms. Becker's absence on June 16 was an excused absence under the applicable law. Ms. Becker appeared at the workplace prior to her shift, but was too ill to work. The employer was aware that she was there and that she had some kind of problem and was aware that two patrons had intervened, but avoided contact with her. The administrative law judge concludes, under the circumstances of the absence, that Ms. Becker provided sufficient notice to the employer of her need to leave the workplace and her inability to work her scheduled shift. The evidence demonstrates one unexcused absence. A single unexcused absence does not constitute misconduct. See Sallis v. EAB, 437 N.W.2d 895 (Iowa 1989).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Becker was discharged for no disqualifying reason. Accordingly, Ms. Becker is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Becker.

DECISION:

The Agency representative's July 20, 2006, reference 04, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

jt/kjw