IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

IRENE E KIRALY
Claimant

SIOUXLAND ADULT MEDICINE
Employer

APPEAL NO. 15A-UI-01383-NT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 01/04/15
Claimant: Respondent (2)

Section 96.5(2)a – Discharge
Section 96.3(7) – Benefit Overpayment

STATEMENT OF THE CASE:

Siouxland Adult Medicine filed a timely appeal from a representative's decision dated January 20, 2015 (reference 01) which held claimant eligible to receive unemployment insurance benefits, finding that the claimant was laid off work on January 5, 2015 while absent for reasons beyond the claimant's control. After due notice was provided, a telephone hearing was held on February 25, 2015. Claimant participated. The employer participated by Ms. Deb Carlson, Office Manager, and Dr. Mark Carlson, Medical Director/CEO. Employer's Exhibit A was admitted into evidence.

ISSUE:

At issue is whether the claimant was discharged for misconduct sufficient to warrant the denial of unemployment insurance benefits.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Irene Kiraly was employed by Siouxland Adult Medicine from September 18, 2012 until December 30, 2014 when the claimant was discharged based upon her failure to report back to work at the end of an approved leave of absence that ended on December 24, 2014 and her failure to provide notification to the employer of the reason why she continued to be absent from work. Ms. Kiraly was employed as a full-time laboratory technician and was paid by the hour. Her immediate supervisor was Ms. Deb Carlson. The claimant's last day at work was September 23, 2014.

Ms. Kiraly was discharged by the employer and replaced with another worker after the claimant did not return to work on the agreed upon date of December 24, 2014; the ending date of an approved leave of absence that had been requested by Ms. Kiraly for orthopedic surgery.

Ms. Kiraly had previously requested and been approved for two separate 90-day medical leave of absences by the employer. Ms. Kiraly had returned from both previous 90-day leave of absences on the date agreed upon, or earlier.

After beginning her 90-day approved medical leave of absence, Ms. Kiraly had no personal contact either by telephone or in-person with either Ms. Deb Carlson, the office manager, or Dr. Mark Carlson, the clinic's medical director and CEO. No information had been provided to the employer by Ms. Kiraly to indicate that she would be required to be absent from work for any amount of work proceeding the 90-day leave of absence that the parties had agreed would end on December 24, 2014. Although it appears that Ms. Kiraly was at the employer's facility on approximately three occasions during her medical leave of absence, the claimant did not give her employer or any staff members any indication that she would be required to extend her medical leave of absence beyond the initial 90 days agreed upon by the parties. The claimant instead left messages on two to three occasions for Ms. Carlson "to call" the claimant. These messages were left with hourly employees and provided no further information. It is unclear whether Ms. Carlson received the messages to call the claimant but in any event she did not do so, expecting the claimant to return to work as agreed upon and having received no information to the contrary.

After Ms. Kiraly had not made any direct contact with the management of the medical facility and had not indicated in any way that she would not be returning on December 24, 2014, the employer expected Ms. Kiraly to return on that date. When the claimant did not return that day or provide any notification that day or in the days leading up to December 30, 2014, a decision was made to replace Ms. Kiraly because the services of a lab technician were needed by the employer and the claimant had not reported or notified the employer why she was absent for three or more work days.

The company handbook provides that an employee who fails to report for scheduled work and does not provide notification to the employer for two or more consecutive work days, is considered to have self-terminated their employment with the company.

On December 30, 2014, after the claimant had already been replaced because she had not reported back to work or provided any notification, Ms. Kiraly contacted Siouxland Adult Medicine and stated at that time that she was not authorized by her doctor to return to work until January 5, 2015.

Ms. Kiraly had been put on notice by her doctor on October 21, 2014 that she would not be released to return to work by the date previously agreed upon by the parties of December 24, 2014 because the doctor had scheduled Ms. Kiraly for a December 30, 2014 appointment and stated that he would determine at that time when Ms. Kiraly could return to work. Although Ms. Kiraly knew then that she would not be returning to work as agreed on December 24, 2014, she did not inform Siouxland Adult Medicine of that fact for over two months; allowing the employer to believe that she would be returning on December 24, 2014 as previously agreed.

It is the claimant's position that she did provide notification to the employer by requesting the employer's office manager to "call her" but the employer did not do so.

REASONING AND CONCLUSIONS OF LAW:

The first question before the administrative law judge is whether the evidence in the record establishes that the claimant was temporary laid off or whether the claimant was permanently separated from employment by being discharged by the employer.

Iowa Admin. Code r. 871-24.1(113)a provides:

> Separations. All terminations of employment, generally classifiable as layoffs, quits, discharges, or other separations.
>
> a. Layoffs. A layoff is a suspension from pay status (lasting or expected to last more than seven consecutive calendar days without pay) initiated by the employer without prejudice to the worker for such reasons as: lack of orders, model changeover, termination of seasonal or temporary employment, inventory-taking, introduction of laborsaving devices, plant breakdown, shortage of materials; including temporarily furloughed employees and employees placed on unpaid vacations.

The administrative law judge concludes that the claimant was not being temporarily laid off from work but was discharged and permanently separated from her employment and replaced by another worker.

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

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).

In discharge cases, the employer has the burden of proof to establish disqualifying conduct on the part of a claimant. 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, may not necessarily be 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. of Appeals 1992).

In the case at hand, it is undisputed that Ms. Kiraly had requested a 90-day medical leave of absence that was specified by the parties to end on December 24, 2014. The employer agreed to the claimant's request to be placed on a medical leave of absence and expected the claimant to return to work on the date agreed upon by the parties or before, as Ms. Kiraly had done in the past. Although Ms. Kiraly had been placed on notice by her doctor on October 21, 2014 that she would not be allowed to return to work by her doctor on the agreed upon date of December 24, 2014, Ms. Kiraly did not provide that information in any manner to her employer for over two months until six days after she had been expected to return to work by the medicine center. The claimant's leaving messages simply requesting the employer to "call her" were not sufficient to place the employer on notice in any manner that Ms. Kiraly would not be returning on the agreed upon date.

After Ms. Kiraly had not returned on December 24, 2014 and had provided no notice to the employer why she was absent that day or the remainder of that week, the employer made a decision to replace Ms. Kiraly because she had not returned as agreed and provided no further notice as to why she continued to be absent. When Ms. Kiraly contacted the employer six days later, she was informed that she had been separated from employment and had been replaced. The employer could wait no longer as the services of a full-time lab technician were essential to the medical office and the claimant had been absent without authorization or notification.

The Supreme Court of the State of Iowa in the case of Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984) held that absence due to illness or other excusable reasons are deemed excused if the employee properly notifies the employer. Under the provisions of 871 IAC 24.25(4) a legal presumption arises that an employee who has been absent for three or more days without giving notice to the employer of the reasons for being absent in violation of a company rule, is presumed to have voluntarily quit employment because of the length of time that has passed without the employee reporting or providing the employer a good cause reason for failing to do so.

Upon application of the facts of this case to the law, the administrative law judge concludes that the employer has sustained its burden of proof in showing that the claimant's conduct showed a disregard for the employer's interests and reasonable standards of behavior that an employer has the right to expect of an employee under the provisions of the Iowa Employment Security Law. The claimant in this case was not discharged because she continued to be absent due to illness or injury but was discharged because she had provided no notice to the employer that she would not be reporting back to work after her leave of absence had expired although the

claimant had over two months of advance notice that she would not be reporting on that date. Accordingly, the claimant is disqualified from receiving unemployment insurance benefits until she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, and she is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of $1236 since opening a claim for unemployment insurance benefits with an effective date of January 4, 2015 for the week ending dates of January 31, 2014 through February 21, 2015. The administrative record also establishes the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal.

Iowa Code § 96.3-7, as amended in 2008, provides:

> 7. Recovery of overpayment of benefits.
>
> a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
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> b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.
>
> (2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

> Employer and employer representative participation in fact-finding interviews.
>
> (1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most

effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)"b" as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which she was not entitled. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment if: (1) the benefits were not paid due

to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the proceeding to award benefits. The employer will not be charged for benefits if it is determined that they did participate in the fact-finding interview. Iowa Code Section 96.3(7).

In this case, the claimant has received benefits but was not eligible for those benefits. Since the employer did participate in the fact-finding interview, the claimant is obligated to repay the Agency the benefits she received and the employer's account shall not be charged.

DECISION:

The representative's decision dated January 20, 2015 (reference 01) is reversed. The claimant was discharged for misconduct in connection with her work. 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 she is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of $1236 and is liable to repay that amount. The employer's account shall not be charged based upon the employer participation in the fact finding in this matter.

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Terence P. Nice
Administrative Law Judge

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Decision Dated and Mailed

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