IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KELSEY M BENSON
Claimant

RISEN SON CHRISTIAN VILLAGE
Employer

APPEAL NO. 11A-UI-13409-H2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09-11-11
Claimant: Appellant (2)

Iowa Code § 96.4(3) – Able and Available
Iowa Code § 96.5(1)d – Voluntary Leaving/Illness or Injury
871 IAC 24.26(6) – Separation Due to Illness or Injury
Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 6, 2011, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on November 3, 2011. The claimant did participate. The employer did participate through Debra Wise, human resources director. Employer's Exhibit One was entered and received into the record. Claimant's exhibit A was entered and received into the record.

ISSUES:

Is the claimant able to and available to and available for work?

Was the claimant discharged due to job-related misconduct or did she voluntarily quit without good cause attributable to the employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was hired to work full-time as a certified nurse's assistant beginning on June 29, 2009 through August 31, 2011, when she resigned after being told her Family Medical Leave (FMLA) had expired and that she would be discharged if she did not quit.

The claimant notified the employer on June 6, 2011 that her obstetrician had imposed a ten-pound lifting restriction on her work activities due to her high-risk pregnancy. The claimant's baby is not due until January 2012. The employer informed the claimant that they did not accommodate any work restrictions that were due to pregnancy. Since the claimant could not perform all of her work duties without restrictions, she was told she could apply for a leave of absence under the Family Medical Leave Act (FMLA). The claimant applied for and received 12 weeks of leave of absence under the FMLA. When her leave expired on August 31, 2011, she was told that she had to either resign or she would be discharged, since she was unable to return to work at that time without restrictions. The claimant resigned because she was going to be discharged. While the claimant is

not physically able to work as a certified nurses' assistant because of her current work restrictions, she is able to perform work as a telemarketer as she has in the past.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes that the claimant is able to work and available for work.

Iowa Code § 96.4-3 provides:

> An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:
>
> 3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.22(1)a provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> (1) Able to work. An individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

871 IAC 24.23(35) provides:

> Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
>
> (35) Where the claimant is not able to work and is under the care of a physician and has not been released as being able to work.

Inasmuch as the pregnancy was not work-related and the treating physician has released the claimant to return to work, albeit with a ten-pound lifting restriction, the claimant has established her ability to work at some job other than as a certified nurse's aide.

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code § 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.

871 IAC 24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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.

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.

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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The claimant only quit because she was told that if she did not do so, she would be discharged. Under such circumstances, cases must be analyzed as a discharge from employment. *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992).

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, 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 misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Employment Appeal Board*, 423 N.W.2d 211 (Iowa App. 1988).

The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). Missing work due to doctors' restrictions that the employer will not accommodate is not intentional job connected misconduct. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. The employer's no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Even though the claimant ran out of FMLA time and was unable to return to work as a CNA due to her work restrictions, she has established that she is able to engage in other types of work, thus she is able to and available for work. The employer discharged her for that reason, which is not job-connected misconduct. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's decision dated October 6, 2011, reference 01, is reversed. The claimant is able to work and available for work effective September 11, 2011. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Teresa K. Hillary
Administrative Law Judge

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Decision Dated and Mailed

tkh/kjw