

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

VICTORIA L ELROD
Claimant

APPEAL NO. 09A-UI-18973-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

VERMEER MANUFACTURING CO INC
Employer

OC: 01/18/09
Claimant: Appellant (2)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Victoria Elrod filed an appeal from a representative's decision dated December 8, 2009, reference 02, which denied benefits based on her separation from Vermeer Manufacturing Company, Inc. (Vermeer). After due notice was issued, a hearing was held by telephone on January 29, 2010. Ms. Elrod participated personally. The employer participated by Becky Fowler, Human Resources Business Partner. Exhibits One and Two were admitted on the employer's behalf.

ISSUE:

At issue in this matter is whether Ms. Elrod was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Elrod began working for Vermeer May 31, 2005. Her last day of work was May 21, 2009, at which point she was a full-time material handler. She was off work on a personal leave-of-absence until June of 2009. She was off work from June 17 until September 17, 2009 pursuant to the Family and Medical Leave Act (FMLA). Because she was still ill, Ms. Elrod was granted an additional personal leave-of-absence on September 23. It expired on October 16.

On October 9, Ms. Elrod notified her manager that she was still experiencing episodes of vomiting and had an appointment with her doctor on October 13. She was notified on October 14 that she would need to speak to Becky Fowler and present something from her doctor in order to extend her medical leave. Ms. Elrod called on October 19 and 20 to report that she would be absent because she was vomiting. She went to the workplace on October 21 and spoke to her manager. She was again told she needed to contact Becky Fowler to extend her leave of absence. She left a vice message for Ms. Fowler on October 23 indicating that her doctor was sending her to Iowa City. When Ms. Fowler returned the call, she told Ms. Elrod that something would be needed from her doctor in order to extend the personal leave.

On the afternoon of October 23, the employer received a statement from Ms. Elrod's doctor releasing her to return to work on October 27. She called on October 27 to again report that she would be absent due to the problem with vomiting. She requested an additional 30 days of personal leave but her request was denied. She was considered separated from the employment effective October 27, 2009. The letter notifying her that she no longer had a job recited the fact that she had exhausted her FMLA and personal leaves-of-absence and was requesting additional leave time.

REASONING AND CONCLUSIONS OF LAW:

The employer initiated Ms. Elrod's separation from employment when she was notified by letter of October 27, 2009 that she no longer had a job. Because the employer initiated the separation, it is considered a discharge. An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Ms. Elrod's discharge was due to the fact that she failed to return to work following a leave-of-absence. Therefore, it raises an attendance issue.

An individual who was discharged because of attendance is disqualified from benefits if she was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused. Ms. Elrod's last leave-of-absence expired on Friday, October 16, and she was to return to work on Monday, October 19. She was in contact with the employer on October 19, 20, 21, and 23 to report that she was still experiencing medical problems. The employer did not take steps to remove her from payroll because of the failure to return to work on October 19.

The employer received notice on October 26 that Ms. Elrod could return to work on October 27. However, she again reported that she could not work due to illness and sought another leave of absence. The decision to end the employment was due to the fact that she wanted additional time off. The administrative law judge appreciates that the doctor had released her to return to work on October 27. The administrative law judge is satisfied from Ms. Elrod's testimony that she still was not feeling well enough to return to work because she was still experiencing episodes of vomiting. Because the absences that brought about the separation were all due to illness, they are excused absences. The only absence that was not properly reported was possibly that of October 22. However, given her contacts with the employer that week, the failure to give notice on October 22 was not so substantial a deviation from the employer's standards as to constitute an act of deliberate misconduct.

The evidence established that Ms. Elrod was absent an excessive number of days. However, the absences that are material to the decision herein were all excused absences. Excused absences may not form the basis of a misconduct disqualification, regardless of how excessive. Although Vermeer may have had good cause to discharge Ms. Elrod, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). For the reasons stated herein, benefits are allowed.

DECISION:

The representative's decision dated December 8, 2009, reference 02, is hereby reversed. Ms. Elrod was discharged by Vermeer but disqualifying misconduct has not been established. Benefits are allowed, provided she is otherwise eligible.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/css