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

ATHENA R SPELLER
154 SHERMAN AVE
WATERLOO IA 50703-2528

BLACK HAWK COUNTY
C/O PERSONNEL DIRECTOR
316 E 5TH ST
WATERLOO IA 50701

Appeal Number: 06A-UI-01674-DT
OC: 01/15/06 R: 03
Claimant: Appellant (2)

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
Section 96.5-1-d - Voluntary Leaving/Illness or Injury
871 IAC 24.25(35) - Separation Due to Illness or Injury
Section 96.4-3 - Able and Available

STATEMENT OF THE CASE:

Athena R. Speller (claimant) appealed a representative's February 8, 2006 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Black Hawk County (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on March 1, 2006. The claimant participated in the hearing. Sherri Niles appeared on the employer's behalf and presented testimony from two other witnesses, Michelle Pendleton and

June Watkins. During the hearing, Claimant's Exhibit A was entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct? Is the claimant able and available for work?

FINDINGS OF FACT:

The claimant started working for the employer on August 5, 2002. She worked full time as developmental aide in the employer's care facility. Her last day of work was September 22, 2005.

The claimant had been experiencing migraine headaches, which had caused her to have some absences prior to September 22. As of at least September 22, she had no personal or vacation time left to use. She again called in sick on September 24, 2005 and indicated that she would need to be taking FMLA (Family Medical Leave). She had a medical condition diagnosed as pseudotumor cerebri and was being treated by a neurologist. On October 4, 2005, the employer was given a doctor's excuse covering the claimant from September 22 through October 11, 2005. An October 7 excuse extended her time through October 13, 2005, and an October 13 excuse extended the time through October 15, 2005. The claimant's time off was subsequently extended to November 17, then December 1, 2005. The final excuse provided to the employer was on November 22, 2005, extending the claimant's time off until January 17, 2006.

During this time, there had been various communications between the claimant and the employer regarding the proper FMLA information and documentation being provided. The claimant was not clear as to whether she was actually on FMLA status or not. On November 9, Ms. Niles, the administrator, sent the claimant a letter indicating that she had been off on FMLA since September 24 and that the FMLA would expire on November 29, that the claimant was expected to return to work on November 30, but that the claimant could request an additional period of general leave. The claimant did not receive Ms. Niles November 9 letter. The claimant had previously submitted a general request for leave, but that had been suspended while the FMLA determination was being made. Ms. Pendleton, a program manager, had spoken to the claimant on or about November 16 and told her she should be getting a letter from Ms. Niles; the claimant told Ms. Pendleton that she was having surgery on November 21, 2005. There were a number of attempted communications between the parties thereafter, but no successful connection.

When the claimant failed to return to work on November 30 and did not submit a renewed request, Ms. Niles sent the claimant a letter of termination on December 13, 2005. The claimant did receive that letter, and on December 28, 2005 contacted June Watkins, the employer's human resources director, asking about how she could grieve the termination. On January 26, 2006, the claimant again called Ms. Watkins and indicated that she had been released to return to work by her doctor; Ms. Watkins responded that the claimant's job was no longer available for her.

The claimant's doctor did release the claimant to work full time with no restrictions on January 25, 2006.

REASONING AND CONCLUSIONS OF LAW:

The first issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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, (7) provide:

> 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 Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

> (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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. A determination as to whether an absence is excused or unexcused does not rest solely on the interpretation or application of the employer's attendance policy. Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline for the absence under its attendance policy. Cosper, supra. Regardless of whether the claimant had remaining FMLA or whether she formally applied for additional leave, at the time of termination the employer was on actual notice that the claimant would be absent for medical reasons through at least January 17, 2006; the period of absence is excused. Floyd v. Iowa Dept. of Job Service, 338 N.W.2d 536 (Iowa App. 1986). The employer has failed to meet its burden to establish misconduct. Cosper, supra. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

In the alternative, the employer asserts that the claimant voluntarily quit by failing to return to work or filing a formal request for additional unpaid leave upon the expiration of her FMLA. Under this analysis, the result is the same.

Iowa Code section 96.5-1-d 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. But the individual shall not be disqualified if the department finds that:
>
> d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

871 IAC 24.25(35) provides:

> Voluntary quit without good cause. 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 from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:

(a) Obtain the advice of a licensed and practicing physician;

(b) Obtain certification of release for work from a licensed and practicing physician;

(c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or

(d) Fully recover so that the claimant could perform all of the duties of the job.

A "recovery" under Iowa Code Section 96.5-1-d means a complete recovery without restriction. Hedges v. Iowa Department of Job Service, 368 N.W.2d 862 (Iowa App. 1985). The claimant has been released to return to full work duties, and she did seek to return to work with the employer, but her position was not available to her. Accordingly, to the extent the separation could be characterized as a voluntary quit, the separation is with good cause attributable to the employer and benefits are allowed.

The final issue in this case is whether the claimant is currently eligible for unemployment insurance benefits by being able and available for employment.

Iowa Code section 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.

The claimant has been released by her doctor for work without restriction as of January 25, 2005. She is able and available as of that time, and qualified for unemployment insurance benefits if otherwise eligible.

DECISION:

The representative's February 8, 2006 decision (reference 01) is reversed. The employer did discharge the claimant but not for disqualifying reasons; in the alternative, the claimant quit for a good cause attributable to the employer. She is able and available for work as of January 25, 2005. Benefits are allowed beginning the benefit week ending January 28, 2006 if the claimant is otherwise eligible.

ld/tjc