IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MICHAEL SHEA Claimant	**APPEAL NO: 12A-UI-03721-ET**
	ADMINISTRATIVE LAW JUDGE DECISION
AMERICAN MULTI-CINEMA INC Employer	
	OC: 02-26-12 **Claimant: Respondent (1)**

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the March 29, 2012, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on April 25, 2012. The claimant participated in the hearing. Jessica Davis, General Manager, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time film crew for American Multi-Cinema from January 29, 2008 to February 22, 2012. The last day the claimant worked was December 22, 2011. He contracted pneumonia and suffered complications and consequently was off work from December 23, 2011, to February 22, 2012. He properly reported his illness and absence to the employer and the employer filed a claim for Family and Medical Leave (FML) on the claimant's behalf with its third party insurer January 23, 2012. The employer was notified the claimant was not eligible for FML January 25, 2012, because he had not worked enough hours during the previous 12 months to qualify for FML. General Manager Jessica Davis was instructed to contact the claimant and inform him of the denial and tell him he needed to provide a medical certificate stating he was released to return to work when he was able to do so. Ms. Davis emailed the claimant that information February 6, 2012, and stated he needed to turn in his notice of resignation and reapply when he was ready to return to work because after 30 days the employee becomes inactive in the employer's system and employees must resign and reapply. The employer usually rehires employees in the claimant's situation if they are in good standing and they generally return to the same job with the same hours and wages. The claimant kept the employer apprised of his condition throughout his absence. On February 22, 2012, the claimant called and spoke to Ms. Davis and she again explained he needed to resign and reapply once he received a doctor's release, with or without restrictions, because his absence was longer than 30 days and thus he was placed on the inactive list. The claimant did

not ask the likelihood of him being rehired, or when, or what his position, wages or hours would be. He received a full release to return to work February 29, 2012, but did not contact the employer at that time and did not reapply because he thought his employment was terminated, he would have to start at a lower wage and "assumed (he) was done and there was no sense in trying."

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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(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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). While the claimant was told he could reapply he was forced to resign before he could do so and consequently his employment is considered terminated under Iowa law. Although the claimant probably would have been rehired in his same or a similar position within one week of reapplying and would have received the same number of hours, he correctly assumed he would be starting over with regard to his wages and would be making $7.25 per hour rather than the $9.00 per hour he was making before he became ill. Under those circumstances the claimant is not required to reapply for a job he was compelled to resign from February 22, 2012, and accept significantly less pay per hour. Because the final absence was related to properly reported illness, no final or current incident of unexcused absenteeism has been established and the claimant is not required to reapply for his previous job at lower wages. Therefore, benefits are allowed.

DECISION:

The March 29, 2012, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

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