IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRYSTAL L BUMGARDNER
Claimant

3M COMPANY
Employer

APPEAL NO. 17A-UI-09856-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/27/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Chrystal Bumgardner (claimant) appealed a representative's September 14, 2017, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with 3M Company (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for October 12, 2017. The claimant participated personally. The employer participated by Ashley Zwier, Human Resources Manager, and Andrea Flores, Human Resources Representative. The employer offered and Exhibit 1 was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on June 28, 2010, as a full-time slitter operator. The claimant signed for receipt of the employer's handbook on August 20, 2014. The handbook stated a person who accumulated six attendance points would be terminated. The claimant was diagnosed with a brain aneurism and suffered from chronic migraine headaches. She was granted Family Medical Leave (FMLA) each year since about 2013. She always properly reported her absences.

The claimant was absent from work on October 18, 19, December 23, and 28, 2016. Her absences were properly reported and due to her own medical issues. Her supervisor issued her a verbal warning for the three points she accumulated.

In April 2017, the claimant suffered a work-related injury and saw the employer's physician. He gave her injections and muscle relaxers. She was told she could not work when she took the muscle relaxers. On April 24 and 25, 2017, the claimant properly reported her absence due to taking the medication for the workers compensation injury. The employer decided the absences were unexcused because they thought the doctor must indicate the need for the absence prior to the absence. She accrued 1.5 points for her absences on those days.

On June 15 and 16, 2017, the claimant properly reported her absences due to personal medical issues. On July 27, 2017, the claimant faxed FMLA documentation to Sedgwick, the third party administrator of the employer's leave. The documentation was due on August 1, 2017. The claimant received confirmation of receipt of the documentation. The papers she faxed were a request for FMLA that, in part, would cover the absences on June 15 and 16, 2017.

The claimant was granted FMLA from August 7 to 28, 2017. On August 11, 2017, the employer learned from Sedgwick that the claimant's absences on June 15 and 16, 2017, were not covered by FMLA. It assessed the claimant 1.5 attendance points. This gave the claimant six attendance points. On August 20, 2017, the claimant learned this information. On August 28, 2017, the claimant returned to work with a release from her physician after having surgery on July 7, 2017. The employer terminated the claimant for having accrued six attendance points.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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).

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a properly reported illness which occurred on June 16, 2017. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's September 14, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs