

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JUDY CULLETT
Claimant

APPEAL NO. 07A-UI-09559-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**TRUSTEES OF THE GRAND CHARITY
FUND / IA MASONIC HEALTH FACILITIES**
Employer

**OC: 08/26/07 R: 04
Claimant: Respondent (1)**

Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Trustees of the Grand Charity Fund / Iowa Masonic Health Facilities (employer) appealed a representative's October 2, 2007 decision (reference 01) that concluded Judy Cullett (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on October 29, 2007. The claimant participated in the hearing. Kim Bockenfeld appeared on the employer's behalf and presented testimony from one other witness, Marsha Miller. 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 the claimant discharged for work-connected misconduct?

Is the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

The claimant started working for the employer on October 31, 1987. She worked full time as a certified nursing aide (CNA) in the employer's long-term care nursing facility. Her last day of work was April 28, 2007. The employer discharged her on August 8, 2007. The reason asserted for the discharge was her absence from work and current inability to return to work.

The claimant broke her ankle while off work on April 20, 2007 necessitating emergency surgery. Her doctor took her off work indefinitely, and on FMLA (Family Medical Leave) paperwork indicated the period of absence would be from six to twelve weeks. The twelve weeks of FMLA covered absence expired as of August 2. The employer had most recently spoken with the claimant on or about July 20, when she had a doctor's appointment and reported that she was not yet released to return to work and was not scheduled to be seen again until August 28 when

she anticipated that she would be released by her doctor to return to work and that the employer should plan on beginning scheduling her for work as of that date. The employer did not provide any written notice or clear verbal notice to the claimant specifying that her failure to be able to return to work by August 2 would result in any jeopardy to her employment status.

On August 8, the claimant summoned the claimant in for a meeting. At that time she was told that since her FMLA had expired and she had not yet been released to return to work, the employer could no longer hold her position due to business needs and that she was therefore being released from employment. The claimant was released by her doctor on August 28. The claimant did not present that release to the employer or seek to return to work with the employer at that time as she had already been terminated from employment.

REASONING AND CONCLUSIONS OF LAW:

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). The question 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 matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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.

Absenteeism from work can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. Absences due to properly reported illness or injury 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 up to or including discharge for the absence under its attendance policy. Cosper, supra. While the employer is not compelled to hold the claimant's position beyond the FMLA period and the employer may have a good business reasons for not holding the claimant's position for her any longer, an inability return to work duties due to a non-work-related medical condition is still not misconduct Wells v. Employment Appeal Board, 447 N.W.2d 137 (Iowa 1989). Because the claimant's absence from work was due to a properly reported injury, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. 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.

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

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.

Prior to a separation, a person may not be eligible for unemployment insurance benefits if they are temporarily unemployed due to being on a medical leave of absence for a non-work-related injury or illness. White v. Employment Appeal Board, 487 N.W.2d 342 (Iowa 1992). 871 IAC 24.22(2); IAC 24.23(10). However, after a separation has occurred, unless the separation was a voluntarily quit due to a non-work-related medical condition, so long as the claimant has then been released by her doctor, to be found able to work, "[a]n 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." Sierra v. Employment Appeal Board, 508 N.W.2d 719, 721 (Iowa 1993); Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1); 871 IAC 24.23(35). The claimant has sufficiently demonstrated that she has been released from her doctor's care and is now able to work in some gainful employment. As the claimant did not initiate the separation by voluntarily quitting, she was not obliged to present her doctor's post-discharge release to the employer and seek to return to her prior employment. Hedges v. Iowa Department of Job Service, 368 N.W.2d 862 (Iowa App. 1985); Iowa Code § 96.5-1-d. Benefits are allowed, if the claimant is otherwise eligible.

DECISION:

The representative's October 2, 2007 decision (reference 01) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/css