IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CAITLIN B CROW
Claimant

WELLS FARGO BANK NA
Employer

APPEAL NO: 11A-UI-14002-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/25/11
Claimant: Appellant (2/R)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Caitlin B. Crow (claimant) appealed a representative's October 13, 2011 decision (reference 02) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Wells Fargo Bank, N.A. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 21, 2011. The claimant participated in the hearing. Kelly Landolphi of Barnett Associates appeared on the employer's behalf and presented testimony from one witness, Joel Potter. 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.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on October 13, 2008. She worked full time as a customer service representative at the employer's West Des Moines, Iowa home mortgage service center. Her last day of work was September 26, 2011. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The claimant had been on a leave of absence due to pregnancy from December into about mid-March; as this was covered by medical documentation, this period was not counted against the claimant for attendance purposes. After returning to work, she had absences due to illness on March 31, April 15, April 18, April 29, and April 30. She then had another leave of absence covered by medical documentation from May 14 through June 17, and another leave from June 26 through July 5, which also were not counted against the claimant. During this period she was diagnosed with post-partum depression and bipolar disorder.

She returned to work from July 6 through July 20. As of July 21 the claimant again reported that she was not physically or mentally able to report for work; she did not return to work again until August 11. She worked on August 11 and August 12, and then was absent on August 15 and August 16 due to the illness of her then eight-month old child. She returned to work on

August 17 and was given a warning that she was subject to discharge unless her absences, particularly those from July 21 through August 10, where excused by being covered by FMLA (Family Medical Leave) which required medical documentation.

The claimant worked through August 28, and then was again absent through September 20, which absence again was supported with documentation for purposes of FMLA. However, the claimant was unable to obtain medical documentation from her care providers for the period of July 21 through August 10; she had missed two appointments with her care providers during that period, and since she had not actually been seen by a care provider during that period, they were unable to provide her with the medical documentation she needed in order for the period of absence to qualify for FMLA. As a result, the employer considered that period of absence to be unexcused, which then took the claimant beyond the allowable number of absences, so the employer discharged the claimant.

The claimant is now pregnant again. On September 19, 2011 the claimant's therapist recommended to her that she should take a year leave of absence before returning to employment with an employer.

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).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445 (Iowa 1979); Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; Huntoon, supra; Henry, supra. In contrast, 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(1)a; Huntoon, supra; Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984).

Excessive and unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). 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 up to or including discharge for the absence under its attendance policy. 871 IAC 24.32(7); Cosper, supra; Gaborit v. Employment Appeal Board, 734 N.W.2d 554 (Iowa App. 2007).

Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. Gaborit, supra. The FMLA provisions were enacted to be an employee protection and shield, not a sword to be used by an employer as a weapon against the employee. The employer has not established that the claimant had excessive absences which would be considered unexcused for purposes of unemployment insurance eligibility. Because claimant's absences, including the period of July 21 through August 10, were related to properly reported illness or other reasonable grounds, 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.

An issue as to whether the claimant is able and available for work arose during the hearing. This issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5).

DECISION:

The representative's October 13, 2011 decision (reference 02) is reversed. 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. The matter is remanded to the Claims Section for investigation and determination of the able and available issue.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs