

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

HEATHER R LATSHAW

Claimant

APPEAL NO: 12A-UI-11372-S

**ADMINISTRATIVE LAW JUDGE
DECISION**

WELLS FARGO BANK NA

Employer

OC: 08/19/12

Claimant: Appellant (4)

Section 96.5-2-a – Discharge
871 IAC 24.32(7) – Excessive Unexcused Absenteeism
Section 96.4- 3 – Able and Available

STATEMENT OF THE CASE:

The claimant appealed a department decision dated September 11, 2012, reference 01, that held she was voluntarily quit without good cause on March 9, 2012, and benefits are denied. A hearing was held in Des Moines, Iowa on December 4, 2012. The claimant, and Interpreter Julia Matson, participated. Kelci Tingley, Manager, and Steven Zaks, Representative, participated for the employer. Claimant Exhibit A, Employer Exhibit One was received as evidence. Official Notice was taken of the Claimant Appeal documents with no employer objection.

ISSUES:

Whether the claimant was discharged for misconduct in connection with employment.

Whether claimant is able and available for work.

FINDINGS OF FACT:

The administrative law judge having heard the testimony of the witnesses, and having considered the evidence in the record, finds: The claimant began work thru a temporary employment business on May 31, 2007, and became a full-time employee on September 10, 2008. She received the employer policies that included attendance. She worked as a full-time loan document specialist. She last worked for the employer on March 9, 2012. Claimant was diagnosed with depression and she was granted short-term disability (STD).

Unbeknownst to claimant her STD was denied as of July 31. Claimant e-mailed her manager on August 10 confirming this and asked to return to work. The manager delayed the employer response until August 28 because she was consulting with management about how to respond. Although claimant had received no notification from the employer FMLA had expired during the STD period. In the meantime claimant filed an unemployment claim effective August 19 though she had not received a doctor release to return to work.

The employer manager e-mailed claimant on August 28 telling claimant if you return to work tomorrow or the next day (August 30) she would be placed on corrective action for unapproved absences. If she did not return, she would be moved to unapproved leave and ineligible for re-hire. The employer would require a doctor's release to return to work.

Claimant responded her grandmother had died with the funeral on August 31 and requested a return to work date for Monday (September 3 – Labor Day). The request was taken under advisement. The request was approved and claimant was reminded to have a doctor release for her return on September 5.

Claimant advised her manager by e-mail she was not able to get an appointment on September 5 to get a medical release. Claimant e-mailed her manager about noon the next day she would get the release after her appointment and return to work. Claimant had a transportation problem and was unable to get to work with the release. The employer terminated her on September 7 for unapproved absences on September 5 and 6.

Claimant provided an unrestricted doctor release to return to work for September 7

REASONING AND CONCLUSIONS OF LAW:

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.

The administrative law judge concludes the employer has failed to establish claimant was discharged for misconduct in connection with employment on September 7, 2012.

The employer discharged claimant for excessive absences and focused on September 5 and 6 though she had been off work for an extended period of time. The employer admits claimant was granted extended leave thru September 4.

After claimant separated from work on March 9, the bulk of communication between claimant and her employer-manager was by e-mail and text. Since the manager is hearing impaired, this communication means is understandable. There is a lack of employer documentation to show claimant understood her leave status was other than off work on STD due to depression. She requested to return to work on August 10 and it was not answered for 18 days. This is why she thought she was unemployed when she filed a claim effective August 19.

The employer did not discipline claimant during the period of extended leaves thru September 4 though she was warned about the prospect of corrective action for unapproved absences in an August 28 employer-e-mail. In essence, the employer discharged claimant on September 7 for being absent the previous two days. She was absent because she could not get an appointment to see her doctor who would not release her until she did so. Claimant had a good cause for her absences, let the employer know about her difficulty to get the release such that her absences are for excusable reasons and not job disqualifying misconduct.

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".

The administrative law judge further concludes the claimant is not eligible for benefits for the period from the effective date of her claim thru September 7, 2012, because she had not been released by her doctor to return to work.

While the release is not dated, it does refer to a release date of September 7 when she is able to return to work without restriction.

DECISION:

The department decision dated September 11, 2012, reference 01, is modified. The claimant was not discharged for misconduct on September 7, 2012. The claimant did not meet the availability requirements of law and is not eligible for the period from August 19, 2012 thru September 7. Benefits are then allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

rls/pjs