

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**LISETTE R VERLO**

Claimant

**APPEAL NO. 10A-UI-04425-CT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**CARE INITIATIVES**

Employer

**OC: 02/07/10**

**Claimant: Respondent (1)**

Section 96.5(2)a – Discharge for Misconduct

Section 96.4(3) – Able and Available

**STATEMENT OF THE CASE:**

Care Initiatives filed an appeal from a representative's decision dated March 12, 2010, reference 01, which held that no disqualification would be imposed regarding Lisette Verlo's separation from employment. After due notice was issued, a hearing was held by telephone on May 6, 2010. Ms. Verlo participated personally. The employer participated by Marilyn Hoffman, Business Office Manager, and Sara Einck, Director of Nursing. The employer was represented by Tom Kuiper of TALX Corporation.

**ISSUE:**

At issue in this matter is whether Ms. Verlo was separated from employment for any disqualifying reason. A secondary issue is whether she is able to and available for work.

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Verlo began working for Care Initiatives on February 7, 2007 and worked full time as a CNA. Her last day of work was October 8, 2009. She was hospitalized on October 15 and underwent an aortic valve replacement on October 20. She maintained periodic contact with the employer during her absence. In a notice dated November 9, her doctor estimated she would need 8 to 12 weeks to recover.

Ms. Verlo used remaining Family and Medical Leave Act (FMLA) benefits to cover her absences. The leave expired on or about December 8, 2009. In a letter dated December 10, 2009, Ms. Verlo was notified that her leave had expired and that, because she was not yet able to return to work, her employment was terminated. She was not eligible for an extension of leave time. Her doctor did not release her to work until February 10, 2010. The inability to return to work at the expiration of her leave of absence was the sole reason for Ms. Verlo's discharge.

## **REASONING AND CONCLUSIONS OF LAW:**

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Ms. Verlo's discharge was due to her attendance as she was not medically able to return to work when her FMLA expired. An individual who was discharged because of attendance is disqualified from benefits if she was excessively absent on an unexcused basis. In order for an absence to be excused, it must be for reasonable cause and must be properly reported. 871 IAC 24.32(7). The administrative law judge is not bound by an employer's designation of an absence as unexcused.

The absences which prompted Ms. Verlo's discharge were due to her surgery and resultant period of recuperation. As such, they were all for reasonable cause. The employer was kept advised of her status. Inasmuch as the absences were for reasonable cause and were properly reported, they are all excused. Excused absences may not form the basis of a misconduct disqualification, regardless of how excessive. While the employer may have had good cause to discharge, factors that might warrant a discharge will not necessarily result in disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa App. 1983). For the reasons stated herein, the separation was not a disqualifying event.

Ms. Verlo does not have any restrictions at this time. There was a doctor's statement dated December 2, 2009 that limited her lifting to 25 pounds until January of 2010. However, this restriction would only cover non-work activities as she was not released to resume work activities until February. She was able to perform lifting as tolerated after January. The administrative law judge concludes that Ms. Verlo was able to work within the meaning of Iowa Code section 96.4(3) as of the effective date of her claim for job insurance benefits, February 7, 2010.

## **DECISION:**

The representative's decision dated March 12, 2010, reference 01, is hereby affirmed. Ms. Verlo was separated from Care Initiatives on December 10, 2009 for no disqualifying reason. She satisfied the availability requirements of the law effective February 7, 2010. Benefits are allowed, provided she is otherwise eligible.

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Carolyn F. Coleman  
Administrative Law Judge

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Decision Dated and Mailed

cfc/css