IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KELLY M LEGRAND
Claimant

MERCY HEALTH SERVICES – IOWA CORP
Employer

APPEAL NO. 09A-UI-01225-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/02/08 R: 04
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
Iowa Code § 96.5(1) – Voluntary Leaving

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the January 21, 2009, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on February 24, 2009. Claimant participated with Mark LeGrand. Employer participated through Glenna O'Connor and John Laprell.

ISSUE:

The issue is whether quit the employment without good cause attributable to the employer or if she was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a file technician and was employed from December 27, 1999 until August 22, 2008 when she was discharged. Her last day of work was in early January 2008. She had exhausted her Family Medical Leave Act (FMLA) (January 7, 2008 through March 27, 2008) and her personal leave of absence and paid time off (PTO) expired (March 27, 2008 through August 22, 2008) while she was absent because of her son's illness and transplant. She could have returned to work any time after July 29, 2008 but did not tell employer that she could return then. Nor did employer tell her how much PTO or donated leave time she had available or when it would expire. She was told not to worry about the time away from work, to take care of her son, and "things were being handled" at work. Employer never told her that she would be terminated or that her position would not be filled if she did not return by a date certain.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant did not quit but was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980).

While claimant might have notified employer when she felt able to return to work, especially since her husband was laid off and could have attended to their son, employer was not forthright with claimant that she needed to return to work by a date certain or face losing the employment. That there was unclear communication between claimant and employer about the status of the employment relationship, the resolution of the issue must be resolved by an examination of witness credibility and burden of proof. Since claimant never indicated an intention to leave the employment, employer never discouraged claimant from continuing her absence or inquiring into when she might return to work and failed to give her a specific timeline as to when her leave would expire, the burden then falls to employer. Because most members of management are considerably more experienced in personnel issues including giving instruction than a lay employee, it is reasonably implied that the ability to communicate clearly is extended to discussions about employment status. Since employer had multiple opportunities but did not simply and clearly ask claimant when she expected to be able to return to work, claimant's interpretation of the separation as a discharge was reasonable.

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(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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Absences related to lack of childcare are generally held to be unexcused. *Harlan v. Iowa Department of Job Service*, 350 N.W.2d 192 (Iowa 1984). However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Technology, Inc.*, 465 N.W.2d 721 (Minn. App. 1991).

An employer may discharge an employee for any number of reasons or no reason at all if it is not contrary to public policy, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, employer incurs potential liability for unemployment insurance benefits related to that separation. Because employer discharged claimant while she was on an approved leave of absence and did not tell her she must return to work by a date certain or face losing her job, no misconduct has been established and no disqualification is imposed.

DECISION:

The January 21, 2009, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs