IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

HEATHER R SMITH
Claimant

JS PROPERTIES LLC
Employer

APPEAL NO: 09A-UI-04858-D

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/25/08
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving
871 IAC 24.22(2)j – Leave of Absence
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

JS Properties, L.L.C. (employer)) appealed a representative's March 17, 2009 decision (reference 05) that concluded Heather R. Smith (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, an in-person hearing was held on April 22, 2009. The claimant participated in the hearing and was represented by Michael Holzworth, Attorney at Law. Dallas Janssen appeared on the employer's behalf and presented testimony from one other witness, Terry Swanson. 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 there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct? Is the employer's account subject to charge?

FINDINGS OF FACT:

The claimant started working for the employer on August 18, 2008. She worked full time as a receptionist in the law office property maintained by the employer. Her last day of work was December 17, 2008. For approximately the last month of her employment she worked part time due to health issues with a pregnancy. The employer brought in a part time temporary employee to cover the hours the claimant did not work her last month, and to cover full time after the claimant left to have her baby.

The claimant did not work after December 17 because she went into labor on December 18 and delivered on December 19. The understanding between the claimant and Mr. Janssen, the president of the property management company, partner in one of the office's law practices, and grandfather of the claimant's baby, was that the claimant would be off work for approximately six

weeks on maternity leave. Exactly six weeks from the birth would have been January 30, 2009. The employer planned to have a discussion with the claimant prior to her return to work regarding her work performance and attendance, but had not informed the claimant of there being issues that might jeopardize her returning to work.

The claimant lived with Mr. Janssen's son, who was the father of her children and who worked part time as a legal assistant in Mr. Janssen's law practice. On February 1 the claimant was present at a family gathering with Mr. Janssen and he indicated to her that he needed an answer "soon" as to when the claimant would be returning to work. He did not specify a deadline. During the early part of the work week beginning February 2 the claimant attempted to contact Mr. Janssen to discuss a return, but he was not available.

On February 4 the claimant and Mr. Janssen's son had a major argument; the claimant moved out on February 5, and on February 6 she obtained a restraining order against Mr. Janssen's son. The employer concluded that since the claimant had not made an arrangement to return to work by then and since the restraining order would preclude the claimant and Mr. Janssen's son from being in the law offices at the same time, she had effectively abandoned her position. The employer then offered the full time permanent position to the person who had been filling in on temporary basis.

On Monday, February 9, the claimant had her six-week check up with her doctor, who released her to return to work. She called and left two messages for Mr. Janssen indicating that she was ready to return to work. Neither he nor anyone else on behalf of the employer returned the call to the claimant, as it had already been determined to fill her position with the other person.

The claimant established an unemployment insurance benefit year effective May 25, 2008. She filed an additional claim effective February 8, 2009.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. A voluntary quit is a termination of employment initiated by the employee – where the employee has instigated the action which directly results in the separation; a discharge is a termination of employment initiated by the employer – where the employer has instigated the action which directly results in the separation from employment. 871 IAC 24.1(113)(b), (c). A mutually agreed-upon leave of absence is deemed a period of voluntary unemployment. 871 IAC 24.22(2)j. However, if the end of the leave of absence the employer fails to reemploy the employee-individual, the individual is considered laid off and eligible for benefits, and conversely, if at the end of the leave of absence the employee fails to return at the end of the leave of absence and subsequently becomes unemployed the employee is considered as having voluntarily quit and therefore is ineligible for benefits. Id.

Here, the employer did not establish a definite date by which it expected the claimant to return to work from her leave or even a specific date by which it was requiring her to make an answer. The claimant's belief that the "six-week maternity leave" would be in effect at least until she had her follow-up six-week examination with her doctor to get a work release was reasonable at least in the absence of the employer specifying some other date. In fact, she would have needed to have been released by her to return to work in order to seek to return to work. Hedges v. Iowa Department of Job Service, 368 N.W.2d 862 (Iowa App. 1985); 871 IAC 24.25(35). The fact that she also obtained a no-contact order against another

employee at the premises does not create an inference that she was quitting – it would have been an issue for the employer to work out as to how to avoid the two parties being on the premises at the same time so as to avoid a violation of the no-contact order. The claimant did contact the employer to attempt to return to work at the point she was released to return to work and at the point she reasonably understood her leave was ended; however, the employer determined not to reemploy the claimant. She is therefore determined to have been laid off by the employer.

Even treated as a discharge, the result is the same. 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 in question must be "work connected." Diggs v. Employment Appeal Board, 478 N.W.2d 432 (Iowa App. 1991). There must be a showing of 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).

The employer inferred it had some plan to discharge the claimant due to her attendance and work performance. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. There is no evidence the claimant intentionally failed to work to the best of her abilities. Further, there is no current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988). To the extent the claimant's interaction with the other employee outside of work in February 2009 would have made life difficult or uncomfortable for her and for the employer to have her continue in the employment, that conduct was not "work-connected." While it is understandable from a business standpoint why the employer would determine it did not wish to have the claimant return to her employment, the employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The final issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period began January 1, 2007 and ended December 31, 2007. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant.

DECISION:

The representative's March 17, 2009 decision (reference 05) is affirmed. The employer laid off the claimant by deciding not to reemploy her upon the end of her leave of absence; alternatively, the employer discharged the claimant but not for disqualifying reasons. Benefits are allowed, if the claimant is otherwise eligible. The employer's account is not subject to charge in the current benefit year.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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