IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

KELLY S ANDREWS
Claimant

NUTRI-JECT SYSTEMS INC
Employer

APPEAL NO. 12A-UI-05934-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/15/12
Claimant: Respondent (1)

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

STATEMENT OF THE CASE:

The employer filed an appeal from the May 10, 2012 (reference 02) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on June 14, 2012. Claimant participated. Employer participated through human resources and safety director Brian Latusic. Department's Exhibit D-1 was admitted to the record. The administrative law judge took judicial notice of the administrative record.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full-time as an administrative assistant from April 2008 and was separated from employment on April 18, 2012. Claimant became ill on Tuesday, April 17 from a medication change made on April 16 related to her mental health condition, of which the employer was aware. (Fact-finding record, page 2) She reported for work an hour early at 7 a.m. to work for another employee who was absent. She told COO and immediate supervisor Sharon Waschkat she was queasy and had diminished voice because of the medication change and a chest cold. She told Waschkat a hospital visit may be necessary to get the medication issue resolved. Waschkat told her to stop taking the medication if she could not work with it but agreed to keep her work load light because of the illness. At 8:30 a.m. Waschkat put work files on her desk that would have required her to make 30 time-intensive phone calls to contractors and immediately walked away. Claimant went to Waschkat's office and tried to speak with her about her nausea and laryngitis, told her she would not be able to handle the calls, and told her she had to leave. Waschkat said "what?" and picked up the phone and started talking on it, effectively ignoring her. Claimant notified accounting clerk April and receptionist Jean Waschkat, Sharon Waschkat's mother, that she had to leave. She also texted Sharon about leaving the office. Because there was no response, she called the office twice and was told Waschkat was not

available but she was very upset about claimant leaving the office because of the work left for her. Claimant texted Latusic and notified him Waschkat was not responding to her text messages and asked if he wanted her to bring in her work property. He said he did not know about the situation. There was no discussion about whether to report the next day. Claimant called the office at 7 a.m. on April 17 since Latusic was usually in the office at 6 a.m. He was not there or available when she called again at 8 a.m. Later that morning he called claimant and directed her to report at 11 a.m. and shortly before 11 a.m. he called and told her he wanted to change the meeting time to 1:30 p.m. Claimant told him she was already there and did not wish to commute again back and forth 11 miles at 1:30 p.m. She told him what happened the day before and Latusic told her the employer was "going to have to let you go." She had been warned about her attendance but all absences were related to properly reported illness. Sharon and Jean Waschkat and April did not participate.

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 section 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 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(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 quitting means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer and requires an intention to terminate the employment. *Wills v. Emp't Appeal Bd.*, 447 N.W. 2d 137, 138 (Iowa 1989); *see also* Iowa Admin. Code r. 871-24.25(35). 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). Where a claimant walked off the job without permission before the end of his shift saying he wanted a meeting with management the next day, the Iowa Court of Appeals ruled this was not a voluntary quit because the claimant's expressed desire to meet with management was evidence that he wished to maintain the employment relationship. Such cases must be analyzed as a discharge from employment. *Peck v. Emp't Appeal Bd.*, 492 N.W.2d 438 (Iowa Ct. App. 1992).

When the record is composed solely of hearsay evidence, that evidence must be examined closely in light of the entire record. *Schmitz v. Iowa Dep't of Human Svcs.*, 461 N.W.2d 603, 607 (Iowa Ct. App. 1990). Both the quality and the quantity of the evidence must be evaluated to see whether it rises to the necessary levels of trustworthiness, credibility, and accuracy required by a reasonably prudent person in the conduct of serious affairs. See, Iowa Code § 17A.14(1). In making the evaluation, the fact-finder should conduct a common sense evaluation of (1) the nature of the hearsay; (2) the availability of better evidence; (3) the cost of acquiring better information; (4) the need for precision; and (5) the administrative policy to be fulfilled. *Schmitz*, at 608. Allegations of misconduct without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. Iowa Admin. Code r. 871-24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. *Crosser v. Iowa Dep't of Pub. Safety*, 240 N.W.2d 682 (Iowa 1976).

Claimant clearly initiated and maintained communication with Waschkat and Latusic about her absence and to ask whether she should return to work the following day. Because there was unclear communication between claimant and employer about the interpretation of both parties' statements about the status of the employment relationship; the issue must be resolved by an

examination of witness credibility and burden of proof. Because most members of management are considerably more experienced in personnel issues and operate from a position of authority over a subordinate employee, it is reasonably implied that the ability to communicate clearly is extended to discussions about employment status. Since Waschkat did not answer or return claimant's texts and calls and Latusic belatedly did so, claimant's interpretation of the interactions, or lack thereof, as a discharge was reasonable and the burden of proof falls to the employer.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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 Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

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. Inasmuch as claimant left the office due to illness after unsuccessfully attempting to communicate with her immediate supervisor, notifying others in the office, and texting Latusic, her last absence was due to illness and was properly reported. The employer has not established a final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed.

DECISION:

The May 10, 2012 (reference 02) decision is affirmed. Claimant did not quit but was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/pjs