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

TONDA ALLEN
Claimant

CASEYS MARKETING COMPANY
Employer

APPEAL NO: 14A-UI-08302-ET

ADMINISTRATIVE LAW JUDGE
DECISION

OC: 07/20/14
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the August 6, 2014, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on September 2, 2014. The claimant participated in the hearing. Bill Brauer, Warehouse Manager and Tonya Mesner, Light-Duty Supervisor, participated in the hearing on behalf of the employer.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a part-time light-duty order filler for Casey's warehouse from April 13, 2012 to July 18, 2014. She was discharged from employment due to a final incident of absenteeism that occurred July 16, 2014.

The employer allows two no-call/no-show absences before it discharges an employee. The claimant suffered a work-related injury September 30, 2013, and was off until returning to work half days March 26, 2014. She was absent due to her injury and resulting surgery April 2, 11, 16, May 16, 19, 21, June 3, 9, 19, 30 and July 7, 2014. Those absences were all excused.

The claimant was a no-call/no-show June 18 and June 20, 2014, because she could not wake up due to the strong medication she was prescribed as a result of her injury and her surgery. She had not slept much in the preceding days because she could not get comfortable and when she did fall asleep it was difficult for her to wake up. She testified she believed she had called in to work each of those two days. She was scheduled to work at 6:00 a.m. July 16, 2014, but failed to call or show up for work until she called the employer at 12:15 p.m. The claimant was arrested the evening of July 15, 2014, and was in jail until 8:00 p.m. July 16, 2014, after reporting a robbery. The police asked permission to look around her house and found a duffle bag left there by her nephew, which contained drug paraphernalia and a powdery substance.

Consequently, the claimant was arrested and charged with possession of a controlled substance.

The claimant received a written warning December 11, 2013, after accumulating eight absences between January 14, 2013 and December 7, 2013. The evidence indicates all but one of those absences were related to the claimant's own illness and the remaining absence was due to her mother suffering a stroke. She was not warned after the June 18 or 20, 2014, no-call/no-show absence.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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.

Iowa Admin. Code r. 871-24.32(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 cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The standard in attendance cases is whether the claimant had an excessive unexcused absenteeism record. (Emphasis added).

In Gimbel v. EAB, 489 N.W.2d 36 (Iowa App. 1992) the claimant's late call to the employer was justified because the claimant, who was suffering an asthma attack, was physically unable to call the employer until his condition sufficiently improved. In this case, the claimant had two no-call/no-show absences within three days, which occurred on June 18 and June 20, 2014. When the employer was finally able to reach her, the claimant stated she was in pain and finally became comfortable enough to fall asleep late at night or early in the morning and slept through both mornings, forgetting to call the employer on those two days. The reason the claimant was in pain was because of her work-related injury. It is not unreasonable to believe that an employee, in pain and groggy from medication taken to ease the symptoms from a work-related injury, could fall asleep late in the evening or early in the morning and fail to awake on time to call the employer by 5:00 a.m. Under these specific conditions, and given the claimant had no previous no-call/no-show absences, the administrative law judge does not find these two absences should be considered no-call no-show absences.

The final absence, when the claimant was in jail July 16, 2014, and failed to call the employer, cannot be excused. Incarceration is not considered a good cause reason for failing to call or report for work. That being said, however, that was the claimant's only legitimate no-call/no-show absence and as such, cannot be the basis of disqualifying her from receiving unemployment insurance benefits. Consequently, benefits are allowed.

DECISION:

The August 6, 2014, 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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Julie Elder
Administrative Law Judge

_____
Decision Dated and Mailed

je/css