IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

TAMERA WATTERS
Claimant

GENESIS HEALTH SYSTEM
Employer

APPEAL NO. 08A-UI-00319-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12-09-07 R: 04
Claimant: Appellant (2)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the December 31, 2007, 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 January 28, 2008. The claimant participated in the hearing. Jodi Blake, Human Resources Assistant, 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 front office receptionist for Genesis Health Systems from July 23, 2001 to December 5, 2007. The claimant was experiencing family problems and began FMLA September 4, 2006. On January 1, 2007, the claimant's estranged husband tried to shoot her but missed and then killed himself in the backyard in front of the claimant and their three children. She was released to return to work the end of February 2007. She believed her physician faxed the employer her doctor's excuse and release to return to work but the employer stated it did not receive it so she was not allowed to return until the middle of March 2007. She felt her supervisor harassed her during the time she was off and then wanted to write her up the first day she returned but the claimant fought the warning and won. Ever since she returned, she felt she was "nit-picked" and co-workers sometimes reported she was not "having a good day, was not talkative, did not have make-up on, and was not ready to be back at work." The claimant had received written warnings for attendance because she and her children were dealing with several issues as a result of her estranged husband's suicide and when the children were ill, she was the only person available to care of them or take them to doctor's or counseling appointments. On May 21, 2007, the claimant's supervisor e-mailed her a note stating, "Please remember if you have no PTO, I can't let you be off. I also heard from the girls that they weren't too happy you left early a few times, leaving them short… what's up with that? Are you sure you want to work?" (Claimant's Exhibit A). The claimant replied that

she wanted to leave early that day because her son's school Field Day was postponed until May 21, 2007, and he did not tell her until that morning. She also stated:

> "I had asked the girls if they were ok with that and the ones that came up front were fine with that (one even offered to do it for me) so I don't know why they would be saying anything different now. Yes, I'm sure I want to work but I sure don't like some of the backstabbing that goes on. Kinda like this right here…If they didn't want to do it, they should have not told me yes and I would have stayed and worked. I would not have left the office short staffed. Even when I came back the next day I had asked if everything was fine and they said it was. I had also gotten it all ok'd with Peggy or Dr. Whalen and I had over my hours. And yes, I know if I don't have the PTO that I can't have it off…" (Claimant's Exhibit A).

The claimant also had to take her two youngest children to school, so she was often one to five minutes late. On August 20, 2007, the claimant asked her supervisor if they could adjust her schedule slightly so she would not be under corrective action for being tardy as that had been done for other employees but the employer denied her request in writing stating, "What was done for others doesn't affect you. I need you here by 8:00 a.m." (Claimant's Exhibit One). On December 3, 2007, the claimant's son contracted the flu but the claimant went to work anyway. She talked to her supervisor and explained the situation, stating she felt she needed to be home with her son. She believed if she did not resign at that point she would face termination of her employment. After one and one-half hours the claimant told the employer she was leaving and submitted her resignation effective January 1, 2008 (Claimant's Exhibit A). On December 5, 2007, the claimant called the employer to report she would not be in that day and the employer accepted her resignation effective immediately. Her supervisor told her she would be terminated if she did not resign at that time. The claimant received a verbal warning December 5, 2006; a written warning June 15, 2007; and a final written warning September 10, 2007, due to her attendance

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.

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.

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.

Although the employer maintains the claimant voluntarily quit, the claimant credibly testified she was told by her supervisor she would be discharged if she did not quit and the employer's witness had no knowledge of that event. Consequently, the administrative law judge concludes the claimant quit rather than be fired. The employer has the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000). 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). While there is no doubt the claimant probably had more absences than did her co-workers due to the family tragedy she suffered in January 2007, and it is likely there were other single parents at the employer's facility, it is unlikely they had to go to the number of counseling and medical appointments the claimant and her children were required to attend. Although the employer cannot be expected to treat each employee differently, the claimant's last absence was due to properly reported absence and she believed, and was told by her supervisor, she would have been discharged if she did not resign her employment. Because the final absence

was related to properly reported illness, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed. Benefits are allowed.

DECISION:

The December 31, 2007, 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

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Decision Dated and Mailed

je/kjw