IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

FELTON LEWIS Claimant **SEVENTH AVENUE INC** Employer	**APPEAL 17A-UI-07405-CL-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 07/02/17** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.4(3) – Ability to and Availability for Work
Iowa Admin. Code r. 871-24.22(2) – Able & Available - Benefits Eligibility Conditions

STATEMENT OF THE CASE:

The claimant filed an appeal from the July 20, 2017, (reference 01) unemployment insurance decision that denied benefits based upon a separation from employment. The parties were properly notified about the hearing. A telephone hearing was held on August 9, 2017. Claimant participated. Employer participated through employment coordinator, Teah Shirk. Employer's Exhibit 1 was received.

ISSUES:

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

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on September 22, 2016. Claimant last worked as a part-time forklift operator. Claimant was separated from employment on May 17, 2017, when he was terminated.

Claimant injured his back at work. Claimant originally saw his personal doctor for the injury until he filed a workers' compensation claim and was restricted to seeing the doctor approved by employer's workers' compensation insurance carrier. Claimant worked on light duty until the workers' compensation doctor released him to work with no restrictions on April 20, 2017. Claimant had continued pain so he saw his personal doctor. Claimant called into work absent from April 21, 2017, going forward because he could not work full duty due to the pain. Claimant called in weekly, and employer never indicated there was an issue with the way he reported his absences. Claimant informed employer he was seeing his personal doctor. Employer asked claimant to bring in a doctor's note from his personal doctor excusing him from

work. Claimant attempted to obtain a note, but his personal doctor would not issue a note until she received confirmation from the workers' compensation doctor that he had been released from his care. Claimant attempted to obtain such documentation from the workers' compensation doctor, but the doctor's office would not provide claimant the documentation. Claimant explained the situation to employer, who did nothing to assist him with the situation. Claimant continued to miss work.

On May 10, 2017, employer sent claimant a letter stating that if he did not bring in a note from his personal doctor excusing him from work by Monday, May 15, 2017, he would be terminated. Claimant spoke with employee Terri Luett on May 11, 2017, and reiterated the situation he was in.

By Monday, May 15, 2017, claimant was unable to obtain the requested doctor's note, so he did not return to work or report absent. Employer terminated claimant on May 17, 2017.

Claimant is restricted from bending due to his back injury, but is able to work in customer service positions. Claimant recently began working in a customer service position.

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.

As an initial matter, I conclude claimant was terminated for missing approximately one month of work and not bringing in a doctor's note excusing that time by May 15, 2017. Although employer contends that claimant was terminated for missing work without reporting absent on Monday, May 15, 2017, Tuesday, May 16, 2017, and Wednesday, May 17, 2017, I do not find this assertion credible. Employer's witness was unable to confirm whether claimant would have been terminated had he reported absence or appeared to work on Monday, May 15, 2017. Furthermore, claimant reasonably interpreted the May 10, 2017, letter and many conversations he had with employer to mean that if he could not produce the doctor's note by May 15, 2017, his employment was ended.

The next issue is whether claimant's absences up until May 12, 2017, and his failure to bring in a doctor's note on May 15, 2017, amount to disqualifying misconduct.

A claimant is disqualified from receiving unemployment benefits if the employer discharged the individual for misconduct in connection with the claimant's employment. Iowa Code § 96.5(2)a. The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. Iowa Dep't of Job Serv.*, 425 N.W.2d 679 (Iowa Ct. App. 1988).

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.

The term "absenteeism" also encompasses conduct that is more accurately referred to as "tardiness." *Higgins v. Iowa Dep't of Job Serv.*, 350 N.W.2d 187, 190 (Iowa 1984).

In order to show misconduct due to absenteeism, the employer must establish the claimant had excessive absences that were unexcused. Thus, the first step in the analysis is to determine whether the absences were unexcused. The requirement of "unexcused" can be satisfied in two ways. An absence can be unexcused either because it was not for "reasonable grounds," *Higgins* at 191, or because it was not "properly reported," holding excused absences are those "with appropriate notice." *Cosper* at 10. Absences due to properly reported illness are excused, 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. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins, supra.* However, a good faith inability to obtain childcare for a sick infant may be excused. *McCourtney v. Imprimis Tech., Inc.*, 465 N.W.2d 721 (Minn. Ct. App. 1991).

The second step in the analysis is to determine whether the unexcused absences were excessive. The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. *Higgins* at 192.

The employer has failed to establish claimant was terminated for excessive, unexcused absenteeism. Claimant's last absence was Friday, May 12, 2017. Claimant's absence was due to a medical condition and employer had no issue with the way it was reported. In spite of employer's request for a doctor's note excusing the absence, claimant's absence is excused. Claimant was unable to obtain a doctor's note from his personal physician without a note from the workers' compensation doctor releasing him from his care. Employer was aware of this, but did nothing to remedy the situation.

Because his last absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. Since the employer has not established a current or final act of misconduct, without such, the history of other incidents need not be examined.

The administrative law judge further concludes that the claimant is able to work and available for work effective July 2, 2017.

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that the individual is able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4(3).

Here, claimant has bending restrictions. Claimant is still able to perform light duty work and customer service positions. To be able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." *Sierra v. Employment Appeal Board*, 508 N.W.2d 719, 721 (Iowa 1993); *Geiken v. Lutheran Home for the Aged*, 468 N.W.2d 223 (Iowa 1991); Iowa Admin. Code r. 871-24.22(1).

Regardless whether the condition is work-related, claimant is able to perform work even with his restrictions. Although he may not be able to perform the position of forklift driver without restrictions, he is able to perform customer service work. Claimant is able to work in some gainful employment, which means he is considered able to work pursuant to the Employment Security Law.

DECISION:

The July 20, 2017, (reference 01) unemployment insurance decision is reversed. The claimant was discharged from employment for no disqualifying reason. Claimant is able to and available for work effective July 2, 2017. Benefits are allowed, provided the claimant is otherwise eligible. Benefits withheld based upon this separation shall be paid to claimant.

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Christine A. Louis
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Decision Dated and Mailed

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