

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LYNETTE KITE

Claimant

APPEAL NO. 14A-UI-02238-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

AT&T MOBILITY SERVICES LLC

Employer

OC: 01/26/14

Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Absenteeism
Iowa Code § 96.5(1) – Voluntary Leaving
Iowa Code § 96.4(3) – Able and Available

STATEMENT OF THE CASE:

The claimant filed an appeal from the February 19, 2014, (reference 01) unemployment insurance decision that denied benefits. After due notice was issued, a hearing was held on March 20, 2014. Claimant participated. Employer did participate through Sarah Hanson, Team Manager AND Mike Mallon Area Manager and was represented by Cheryl Rodermund of TALX UCM Services. Kellen Andersen observed on behalf of TALX.

ISSUES:

Was the claimant discharged due to job-connected misconduct or did she voluntarily quit her employment without good cause attributable to the employer?

Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a customer service representative one beginning on July 18, 2011 through January 30, 2014 when she was discharged. The claimant last worked in October 2013. She was off work due to a medical condition that was not work related. She had exhausted her FMLA leave and her approved leave of absence by November 26, 2013. In a letter dated January 29, 2014 the claimant was told that her employment was ended as of January 30, 2014 due to her failure to have leave to cover her absence. When the claimant was discharged she was still under a doctor's care and had not been released to return to work with or without restrictions.

The claimant saw a new rheumatologist in February 2014 who changed her medication, allowing her to be released to return to work as of February 13, 2014. The claimant was not physically able to and available for work until February 13, 2014.

The claimant did make application for accommodation under the Americans with Disabilities Act through her employer. She discussed her application with Emily Hunter and kept Ms. Hunter apprised of her progress. The claimant's appeal of her denial of leave under the ADA is still pending before the employer.

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 § 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(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 employer has the burden of proof in establishing disqualifying job misconduct. 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 Department of Job Service*, 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. IDJS*, 364 N.W.2d 262 (Iowa 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. IDJS*, 425 N.W.2d 679 (Iowa App. 1988).

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. An employee who is ill or injured is not able to perform their job at peak levels. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. The claimant was not released to return to work by her treating physician until after her employment had ended. Under these circumstances her separation is properly characterized as a discharge not a voluntary quit. Because the final absences for which she was discharged were related to properly reported illness or injury, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed.

For the reasons that follow, the administrative law judge concludes that the claimant is not able to work and available for work until February 13, 2014.

Iowa Code § 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.23(1) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(1) An individual who is ill and presently not able to perform work due to illness.

The claimant was not released to return to work by her physician until February 13, 2014. Since she was not physically able to work prior to that time she is not considered able and available for work and not eligible for unemployment insurance benefits until February 14, 2014.

DECISION:

The February 19, 2014, (reference 01) decision is reversed. The claimant was discharged from employment for no disqualifying reason. The claimant is not able to work and available for work until February 14, 2014. Benefits are allowed, effective February 14, 2014, provided the claimant is otherwise eligible.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/css