

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

FATIMATA BARIKIRE
Claimant

APPEAL NO. 11A-UI-14132-LT

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE HON COMPANY
Employer

**OC: 09/25/11
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from the October 17, 2011 (reference 01) decision that allowed benefits. After due notice was issued, a hearing was held by telephone conference call on February 21, 2012. Claimant participated and declined a French interpreter. Employer participated through member and community relations generalist, Josh Blair and was represented by Deniece Norman of Employer's Edge.

ISSUE:

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 a work cell operator from and was separated from employment on July 8, 2011. Her last day of work was December 11, 2010. She was on a family medical leave of absence to care for her mother in Africa. The leave was scheduled to end on March 14, 2011. On March 18 Blair e-mailed her about her intention to return to work. A week or so later she e-mailed that she had her own medical issue (malaria, anemia, pregnancy). She was approved for further leave through June 28, 2011. He instructed her to maintain communication. Her malaria returned she was hospitalized on and off, including on June 28, 2011; she was very weak and dizzy and was unable to communicate directly with the employer but relied on a French-speaking friend, whom she was unable to contact. E-mail communication and internet connection was very difficult from Africa After she was released from the hospital on July 28, 2011 she discovered she had been discharged by contacting the person who had been e-mailing for her on August 16, 2011. She returned to the United States on September 17, 2011 and contacted Blair.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes 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.

Excessive and unexcused absenteeism can constitute misconduct. Iowa Admin. Code r. 871-24.32(7). 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). 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. 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

The FMLA provisions were enacted to be an employee protection and shield, not a sword to be used by an employer as a weapon against the employee. In spite of claimant's inability to contact the employer at the end of the leave on June 28 because of her malaria illness, hospitalization, and difficulty with communication from Africa, claimant's continued absence was excused. See, *Gimbel v. EAB*, 489 N.W.2d 36 (Iowa App. 1992) where a claimant's late call to the employer was justified because the claimant, who was suffering from an asthma attack, was physically unable to call the employer until the condition sufficiently improved. Since she was discharged while under medical care and reasonably unable to contact the employer, no misconduct has been established and benefits are allowed.

DECISION:

The October 17, 2011 (reference 01) decision is affirmed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

Dévon M. Lewis
Administrative Law Judge

Decision Dated and Mailed

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