IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ARIEL S PRITCHARD
Claimant

ABM JANITORIAL SERVICES NORTH
Employer

APPEAL NO: 14A-UI-00759-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/29/13
Claimant: Appellant (2/R)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving
Section 96.7-2-a(2) – Charges Against Employer's Account

STATEMENT OF THE CASE:

Ariel S. Pritchard (claimant) appealed a representative's January 17, 2014 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment from ABM Janitorial Services North (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 13, 2014. The claimant participated in the hearing. Deneice Norman of Employer's Edge appeared on the employer's behalf and presented testimony from two witnesses, Diane Latusick and John Van Kamen. During the hearing, Claimant's Exhibit A was entered into evidence. Based on the evidence, the arguments of the parties, a review of the law, and assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

OUTCOME:

Reversed. Benefits allowed. Remanded on unreported wage issue.

FINDINGS OF FACT:

The claimant started working for the employer on July 3, 2013. She worked full time as a general cleaner at the employer's Waterloo, Iowa business client's account, working on a 4:00 p.m. to 12:30 a.m. shift. Her last day of work was October 4, 2013.

On September 23, 2013 the employer had given the claimant a written warning for attendance after missing three days of work. These absences were all due to the claimant's infant child being ill. The claimant was then again absent on October 7, October 8, and October 9, which

the employer asserted were all no-call, no-shows. However, the claimant had spoken to the employer on October 7 and had indicated that she had fallen down some stairs over the weekend and hurt her back, and that she was going to go to her doctor the next day; she was told to turn in any doctor's note to a particular supervisor, Nathan or Nate. She did go to her doctor on October 8 and was given a note excusing her from work through October 13. Her mother had driven her to the doctor, and on the way home they drove to the business client's premises, where the claimant saw the supervisor Nathan and gave him a copy of the note. The note subsequently made its way to the account manager, Van Kamen. There may also have been a further contact between the claimant and the second shift supervisor, Latusick, on October 10 at which time the claimant also reported that she had turned in a doctor's note.

On October 14 the claimant sought to return to work; she was then given a three-day suspension for her additional absence. When she came back on October 17, she was informed that she was discharged as she had not gotten the appropriate paperwork for a leave of absence to cover her time away from work.

The claimant had previously established an unemployment insurance benefit year effective December 30, 2012. She reactivated that claim by filing an additional claim effective July 7, 2013. While she was fully employed by the employer for the period of July 3 through October 4, 2013, she continued to make weekly continued claims on her existing claim for unemployment insurance benefits, but she failed to report any of her wages earned when making those weekly claims. Upon expiration of that 2012 claim year, she established a second benefit year effective December 29, 2013.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. *Bartelt v. Employment Appeal Board*, 494 N.W.2d 684 (Iowa 1993); *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that she quit by being a three-day no-call, no-show in violation of company rule. 871 IAC 24.25(4). The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code §96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. 871 IAC 24.26(21).

The issue in this case is then whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, 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 is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct.

Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer effectively discharged the claimant was her absenteeism. Excessive unexcused absences can constitute misconduct. *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). 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). In this case, the employer asserts that the reason for the final absence was not properly reported. However, while it appears there was some failure to communicate within the ranks of the employer's supervisors, the claimant did timely inform the employer that she would be off work for at least a week, and that it was due to a bona fide personal illness or injury. *Floyd v. Iowa Dept. of Job Service*, 338 N.W.2d 536 (Iowa App. 1986). The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

The next issue is whether the employer's account is subject to charge. An employer's account is only chargeable if the employer is a base period employer. Iowa Code § 96.7. The base period is "the period beginning with the first day of the five completed calendar quarters immediately preceding the first day of an individual's benefit year and ending with the last day of the next to the last completed calendar quarter immediately preceding the date on which the individual filed a valid claim." Iowa Code § 96.19-3. The claimant's base period for her 2013 claim year began July 1, 2012 and ended June 30, 2013. The employer did not employ the claimant during this time, and therefore the employer is not currently a base period employer and its account is not currently chargeable for benefits paid to the claimant in the 2013 claim year, nor was the employer a base period employer or chargeable for benefits paid to the claimant in the 2012 claim year.

Finally, during the hearing it became apparent that the claimant likely received income that should have been reported to reduce her benefits on her 2012 claim year. This is a matter not included on the notice of hearing, and the administrative law judge is without jurisdiction to make a ruling on the issue. This matter is remanded to the Investigations and Recovery Unit to determine if the claimant received wages that she failed to report.

DECISION:

The representative's January 17, 2014 decision (reference 01) is reversed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The matter is remanded to Investigations and Recovery for investigation and determination of the unreported wage issue.

_____
Lynette A. F. Donner
Administrative Law Judge

_____
Decision Dated and Mailed

ld/pjs