IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ARACELI LARA
Claimant

REMBRANDT ENTERPRISES INC
Employer

APPEAL NO: 14A-UI-03084-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/16/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Rembrandt Enterprises, Inc. (employer) appealed a representative's March 17, 2014 decision (reference 01) that concluded Araceli Lara (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on April 14, 2014. The claimant participated in the hearing. Sally Brecher appeared on the employer's behalf and presented testimony from one other witness, Dave Plagman. One other witness, Oscar Gracia, was available on behalf of the employer but did not testify. Ike Rocha served as interpreter. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

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:

Affirmed. Benefits allowed.

FINDINGS OF FACT:

The claimant started working for the employer on September 6, 2011. She worked full time in the employer's food grade egg product facility on a rotating day schedule, working from 5:00 a.m. to 5:00 p.m. Her last day of work was January 16, 2014.

The claimant had been a lead worker. On January 16 she was suspended for two weeks because of an incident on January 15 where she had declined to give a company radio to a supervisor who had asked for it. The claimant had been loaned the radio by another supervisor and she felt she could not turn it over to another supervisor without clearing this with the supervisor who had loaned her the radio, but she was unable to reach that supervisor by the end of the shift, so she left the radio in her locker. The employer concluded that she had been

disrespectful in declining to turn over the radio to the other supervisor, and placed her on the suspension.

The claimant was supposed to report back to work on February 3. That day she sent a message to the employer that she was sick and would not be at work. The employer responded by advising her that she was being switched teams and moved into an operator position, and would not need to report in until Wednesday, February 5. She was told that she would be given a final warning for her absence that day.

On February 5 the claimant was still ill. She had attempted to contact one of the employer's supervisors to indicate she was still ill and would be absent, but the supervisor did not get the message. The employer therefore considered the claimant a no-call/no-show for work that day.

On February 6 the claimant contacted the employer to indicate that she had had no sleep and that her child was also sick, so she would not be at work that day. Later that afternoon the claimant spoke with Brecher, the human resources manager, and advised Brecher that she had a doctor's note for herself for February 5 and February 6.

The claimant was not scheduled to work on February 7, but the employer contacted her to try to discuss her absences that week and to get a copy of the doctor's note. The claimant had agreed that someone from the employer's office could come to her residence and pick up the note later that afternoon. The claimant subsequently attempted to delay the visit, but ultimately agreed. Someone from the employer's office went to an address they believed was the claimant's home and saw no sign that anyone had been at the house for at least a day, and there was no answer. The employer provided only hearsay testimony that the house was actually the claimant's house, but based on this report the employer concluded that the claimant was not even in town that week. The claimant testified that she was at her home all afternoon on February 7, and when no one came to her house she concluded that the employer must have decided to go ahead and wait until she came back to work on February 10. However, when the employer did not receive the doctor's note from the claimant on February 7, it determined to treat the claimant's no-call/no-show on February 5 as a voluntary quit by job abandonment.

The claimant came in for what would have otherwise been her next shift on February 10. The supervisor on duty told the claimant that he had been informed that the claimant was no longer employed with the employer, and sent her home. The employer provided hearsay testimony that the supervisor had only told her that she needed to talk to human resources before she returned to work, but the claimant's first-hand testimony was that he told her that her employment was ended.

The claimant had previously had one instance of an absence in 2013 where she called in an absence after the start of her shift on March 10, 2013, and had at least two instances in 2012 where she had taken excessively long breaks, and one instance in 2012 where she was late to work and was late in calling to report she would be late.

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 voluntarily quit by job abandonment by being a no-call/no-show on February 5. While a consecutive three-day no-call/no-show in violation of company rule can be considered to be a voluntary quit, a single day does not satisfy this provision. 871 IAC 24.25(4). The claimant was in contact with the employer on February 6 and February 7 with regard to her continued intention to return to work. 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). *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992).

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 gravity of the incident and the age and number of prior violations or prior warnings are factors considered when analyzing misconduct. The lack of a current warning may detract from a finding of an intentional policy violation.

The reason the employer effectively discharged the claimant was her absence from work the week of February 3. Excessive unexcused absenteeism can constitute misconduct. 871 IAC 24.32(7). 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). The claimant did properly report her absences on February 3 and February 6 as due to bona fide illness. Even if her absence on February 5 is treated as unexcused because she did not properly report the illness, the employer has not established that the claimant had any recent history of excessive unexcused absenteeism.

To the extent that the employer made its decision that the claimant's employment should be ended because of a conclusion that she was not even in town during the week of February 3 and that her claimed illness was not bona fide, the employer relies exclusively on the second-hand account from other sources, including the persons who supposedly went to the claimant's home on February 7; however, without that information being provided first-hand, the administrative law judge is unable to ascertain whether those persons might have been mistaken or whether they are credible. Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has not satisfied its burden to establish by a preponderance of the evidence that the claimant was not in fact in town and in fact ill during the week of February 3. 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.

DECISION:

The representative's March 17, 2014 decision (reference 01) is affirmed. 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.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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