IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ROSALINA RIVERA AGUAYO
Claimant

JOHN Q HAMMONS HOTELS MANAGEMENT
Employer

APPEAL NO. 08A-UI-05763-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/18/08 R: 02
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the June 17, 2008, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on July 10, 2008. The claimant participated personally through Interpreter, Sara Gardner. The employer participated through Christy Long, Human Resources Assistant, and Barb Foertsch, Human Resources Director.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on March 22, 2006, as a full-time laundry attendant. The claimant signed for receipt of the employer's handbook on June 6, 2007. The employer did not issue the claimant any warnings during her employment. The claimant had never been absent from work until the final incident.

On April 25, 2008, the claimant went to the hospital for heart issues. The claimant's daughter left a message for the executive housekeeper that her mother would not be at work on April 26, 2008. The claimant was released from the hospital and returned home on April 26, 2008. The claimant's daughter left messages on eight of the nine days the claimant was absent from April 26 through May 6, 2008. The daughter did this on speaker telephone so the claimant could hear. The executive housekeeper did not give this information to the employer.

On May 7, 2008, the claimant's physician released her to return to work. The claimant took the note to the employer on May 9, 2008. The employer said the claimant could not return to work because she quit.

REASONING AND CONCLUSIONS OF LAW:

For the following reasons, the administrative law judge concludes the claimant did not voluntarily quit work without good cause attributable to the employer.

Iowa Code section 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The claimant had no intention of voluntarily leaving work. The claimant did not chose to leave employment. The employer prevented her from returning. The separation was not voluntary.

For the reasons that follow, the administrative law judge concludes the claimant was not discharged for misconduct.

Iowa Code section 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(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. “Misconduct” is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such 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. On the other hand 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(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer must establish not only misconduct, but that there was a final incident of misconduct that precipitated the discharge. The last incident of absence was a properly reported illness that occurred in April and May 2008. The claimant's absence does not amount to job misconduct, because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct that was the final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

DECISION:

The June 17, 2008, reference 01, representative's decision is reversed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw