

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LAURIE L REHA
Claimant

APPEAL NO. 09A-UI-17273-S

**ADMINISTRATIVE LAW JUDGE
DECISION**

WESLEY RETIREMENT SERVICES INC
Employer

OC: 10/18/09
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
871 IAC 24.32(1) – Definition of Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

The claimant appealed a department representative's decision dated November 5, 2009, reference 01, that held the claimant was discharged for excessive unexcused absenteeism on April 16, 2009, and benefits are denied. A hearing was held in Des Moines, Iowa on December 16, 2009. The claimant participated. Betty Stone, HR Director, and Chris Butters, Executive Director, participated for the employer. Employer Exhibit One and Claimant Exhibits A through C was received as evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony of the witnesses, and having considered the evidence in the record, finds that: The claimant began employment on October 9, 2007, and last worked as a full-time nurse/case manager on April 28, 2009. The claimant received an employee handbook that contains the policies of the employer.

The employer terminated the claimant's employment by certified letter dated July 6, 2009 that "stated this action is taken as a result of failure to follow agency procedures regarding the taking of leave. Because you have not reported to work since April 17, your status changed to PRN on May 29 (rather than termination), because you asserted you could obtain the paperwork necessary to classify this absence as FMLA protected and produce it within days."

The claimant began feeling ill in April 2009 to the point she had a colonoscopy the 27th, Dr. Giller diagnosed severe diverticulitis with a large uterine fibroid with the prospect of surgery for June 3. Claimant requested a leave of absence due to health issues on April 20 that the employer approved effective the 17th on condition that it receive medical documentation to support it (meaning a protected, FMLA). The employer sent the required documents to the claimant who then forwarded it to her treating physicians. Since the physicians must follow

FMLA procedure by directly sending documentation to the employer, the claimant relied upon them to do so.

The employer conducted a conference call with the claimant on May 2 to advise it had not received the required medical documentation to grant her request for FMLA (protected leave). The claimant responded on June 2 that she would submit the medical statements. When the employer did not receive the documents, the claimant was terminated on July 6. The employer does not challenge the claimant properly reporting her absenteeism from work due to health issues.

The claimant had surgery scheduled for June 3, but it was postponed due to the claimant losing health insurance coverage thru the employer. When the claimant became Medicaid eligible, the surgery was performed on July 22. The claimant was released by her doctor without any work restriction as of September 28, 2009. The claimant contacted the employer about work, but was denied employment.

REASONING AND CONCLUSIONS OF LAW:

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(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 administrative law judge concludes that the employer failed to establish misconduct in the discharge of the claimant on July 6, 2009. The claimant did not deliberately fail to follow the employer instruction regarding the taking of leave that the employer asserts is misconduct.

The employer had received sufficient doctor statements to corroborate the claimant's reason for missing work was due to a serious health issue. A reasonable inference is that the employer believed the claimant was suffering from a serious health condition or it would not have granted a conditional leave of absence effective April 17. The employer did not question that claimant provided adequate notice as to the reasons for being absent from work, and it did not discipline the claimant for violating the absenteeism policy during the period she missed work. The claimant was not discharged for excessive absenteeism, she was discharged for failing to provide medical documentation to justify her FMLA request.

The employer decision to change the claimant's employment status and cancel her health coverage caused the claimant to re-schedule her surgery set for June 3, and it made it more difficult for her to have her doctors provide the medical documentation the employer was requesting to approve the leave. Unknowingly, the employer delayed the ability of the claimant to provide the medical documentation through her treating physicians, as they did not want to document the leave until after surgery. It was not until after her termination, the claimant was Medicaid eligible to have the surgery on July 22. The claimant was released without restriction on September 28, and she was able and available to work for the employer who rejected her request to return to work.

DECISION:

The decision of the representative dated November 5, 2009, reference 01, is reversed. The claimant was not discharged for misconduct in connection with employment on July 6, 2009. Benefits are allowed, provided the claimant is otherwise eligible.

Randy L. Stephenson
Administrative Law Judge

Decision Dated and Mailed

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