IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

NICOLE M CLARK
Claimant

METROPOLITAN MEDICAL LABORATORY PLC
Employer

APPEAL NO: 07A-UI-08697-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 08/12/07 R: 04
Claimant: Appellant (2)

Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Nicole M. Clark (claimant) appealed a representative's September 5, 2007 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits after a separation from employment with Metropolitan Medical Laboratory, P.L.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 26, 2007. The claimant participated in the hearing. Julie Schwarz appeared on the employer's behalf and presented testimony from one other witness, Kathy Weiman. 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 the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on December 3, 2001. She worked full time as a phlebotomist on a 4:00 a.m. to 12:00 p.m. schedule on a weekly rotating basis. Her last day of work was August 15, 2007. The employer discharged her on that date. The reason asserted for the discharge was excessive absenteeism.

The employer's policies provide that if an employee has seven unscheduled absences (less than 24 hours notice or without prior approval of a supervisor) within a rolling 12-month period based on the employee's anniversary date, the employee is subject to discharge. The claimant had been given a warning memo on December 22, 2006 for what were considered three occurrences: December 6, 7, and 8, absent due to illness; December 11 and 13, absent due to illness; and December 21, left early because of being too tired. She was absent on December 30 for having no sitter. On January 10, 2007 she was given a written warning for having a fifth unscheduled absence on January 3, when she had been absent due to illness. On March 28 and March 29 the claimant was absent due to illness (migraine); as this was her sixth unscheduled absence occurrence, on April 2, 2007 she was given a warning and

suspension (applied to her days of absence); the document advised her that she could have no further unscheduled absences until December 3, 2007 or she would face discharge.

During the spring of 2007 the claimant had some other periods of absence that were covered either by intermittent or regular FMLA (Family Medical Leave). The primary underlying condition was a diagnosis of anxiety. On March 12 the employer had set up a plan for the claimant to use intermittent FMLA under which the claimant was to notify the employer a few days in advance when she felt the symptoms coming on so that the employer could schedule the claimant off; further, in order to qualify for the intermittent FMLA the claimant was to contact either a site manager, the lab manager, or human resources directly if she was going to take intermittent FMLA time. This plan was further discussed on May 21.

On August 9 the employer had a disaster drill. As a result, the claimant's condition had become aggravated, and on the morning of August 10 the claimant awoke in such a mental state as being unable to work. She called the employer about an hour or two prior to her shift to report she would be unable to report for work, but she spoke only to the lead technician in the laboratory. She did not follow up later in the day by contacting one of the three managerial contacts needed to invoke FMLA coverage. She did see her doctor, and did obtain doctor's notes covering her absence from work through August 13.

She met with Ms. Schwarz, one of the site manager, and Ms. Weiman, a human resources officer, on both August 14 and August 15 to discuss the circumstances of her final absence from work. The employer ultimately determined that since the claimant had not properly followed the imposed procedures to invoke FMLA coverage, the absence would need to be treated as a regular absence. Further, since the claimant had not arranged for the absence at least 24 hours in advance or received prior approval from a supervisor, the absence was her seventh unscheduled absence, resulting in the decision to discharge the claimant from employment.

REASONING AND CONCLUSIONS OF LAW:

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). The question is not whether the employer was right 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 matters. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

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(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
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> 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.

Absenteeism can constitute misconduct, however, to be misconduct, absences must be both excessive and unexcused. 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. Cosper, supra. In this case, there is some question as to whether the final absence was properly reported. However, the administrative law judge concludes that while the claimant may not have followed the necessary procedure for the employer to treat the absence as covered under FMLA, and while the claimant did not report the absence within 24 hours in order for it to be treated as a regular absence as compared to an unscheduled absence, she followed sufficient procedure for reporting an unscheduled absence by reporting the absence to a proper person for reporting such unscheduled absence, and doing so as soon as she was aware she would not be able to work that day. Because the final absence was related to properly reported illness or other reasonable grounds, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct and no disqualification is imposed. The employer has failed to meet its burden to establish misconduct. Cosper, supra. 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 September 5, 2007 decision (reference 01) is reversed. 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

ld/pjs