IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

LORIN T WEIDLER
Claimant

CITY CARTON COMPANY
Employer

APPEAL NO: 10A-UI-17069-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/31/10
Claimant: Respondent (4/R)

Section 96.5-2-a – Discharge
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

City Carton Company (employer) appealed a representative's December 6, 2010 decision (reference 01) that concluded Lorin T. Weidler (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on January 27, 2011. This appeal was consolidated for hearing with one related appeal, 10A-UI-17070-DT. The claimant participated in the hearing. Jennifer Humphrey appeared on the employer's behalf. During the hearing, Employer's Exhibits One and Two and Claimant's Exhibits A and B were entered into evidence. 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.

ISSUES:

Was the claimant discharged for work-connected misconduct? Was the claimant eligible for unemployment insurance benefits by being able and available for work?

FINDINGS OF FACT:

After a prior period of employment working for the employer through a temporary employment firm, the claimant started working directly for the employer on February 14, 2005. He worked full time as a general laborer at the employer's Cedar Falls, Iowa recycling plant. His last day of work was August 9, 2010. He was off work beginning August 10 due to a personal health issue, of which the claimant informed the employer. He was placed on FMLA (Family Medical Leave) status, which would last for 12 weeks, expiring November 1, 2010.

On October 20 the employer sent the claimant a letter reminding him of the ending of the FMLA and the expectation that he return to work on November 2. The claimant had a doctor's appointment on October 27, but his doctor did not release him at that time, indicated that the claimant still needed some additional time, and should be excused for another 14 days, which would go through November 10. The claimant contacted the employer on October 28 to indicate his doctor wanted him off work for the additional time after November 1, and asked

what would happen if he did not return to work on November 2, to which he received no direct response.

On November 2 the employer sent the claimant a letter advising him that his employment was terminated due to his failure to return to work. The claimant received the letter on November 3 and contacted the employer to learn what he should do. One employer representative told the claimant that he should reapply for employment after November 10; but another representative told him that it would be a waste of the claimant's time, as his position was already being filled.

The employer has continued to make non-worker's compensation temporary disability payments to the claimant; those payments of $250.00 per week will go through February 12, 2010. The employer is making those payments under its policy despite awareness that the claimant was effectively released by his doctor as of November 11, 2010. The claimant began filing weekly claims for unemployment insurance benefits as of the week ending November 6, but he has not received any unemployment insurance benefits because he was advised by his local Agency office that he would not receive any benefits while receiving the temporary disability payments. As a result, he ceased making weekly claims after the week ending January 1, 2011. However, no formal determination has been made regarding the deductibility of the temporary disability payments.

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).

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).

Absenteeism can constitute misconduct; however, to be misconduct, absences must be both excessive and unexcused. 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 employer asserts in effect that the claimant's absence after November 1 was no longer excused because his FMLA had expired. However, an absence for illness is not only treated excused for purposes of unemployment insurance eligibly if it is covered by FMLA. The FMLA provisions in particular were enacted to be an employee protection and shield, not a sword to be used by an employer as a weapon against the employee. Because the final absence was not shown to be related to be other than the properly reported illness as claimed by claimant, no final or current incident of unexcused absenteeism occurred which establishes work-connected misconduct. While the claimant's job may no longer have been protected by FMLA and so the employer was within its discretion to discharge the claimant, it 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.

The next question is whether the claimant was able and available for work. With respect to any week in which unemployment insurance benefits are sought, in order to be eligible the claimant must be able to work, is available for work, and is earnestly and actively seeking work. Iowa Code § 96.4-3. To be found able to work, "[a]n individual must be physically and mentally able to work in some gainful employment, not necessarily in the individual's customary occupation, but which is engaged in by others as a means of livelihood." Sierra v. Employment Appeal Board, 508 N.W.2d 719, 721 (Iowa 1993); Geiken v. Lutheran Home for the Aged, 468 N.W.2d 223 (Iowa 1991); 871 IAC 24.22(1). The claimant has demonstrated that as of November 11, 2010 he was able to work in some gainful employment. Benefits are allowed as of the week beginning November 14, 2010, if the claimant was otherwise eligible. He was not able and available for the majority of the benefit weeks ending November 6 or November 13, but no benefits have been paid for those weeks.

An issue regarding the deductibility of the claimant's temporary disability payments arose during the hearing. There has not been a formal representative's decision issued on the question, and the issue was not included in the notice of hearing for this case, and the case will be remanded for an investigation and preliminary determination on that issue. 871 IAC 26.14(5). The administrative law judge notes that the provisions typically applied to deduct temporary disability benefits from unemployment benefit eligibility, Iowa Code § 96.5(5)(a)(2) and 871 IAC 24.13(3)(d), do not apply to this situation, as those provisions are in the context of temporary disability benefits under the workers' compensation program, which the benefits in this case are not.

DECISION:

The representative's December 6, 2010 decision (reference 01) is modified in favor of the employer. The employer did discharge the claimant but not for disqualifying reasons. The claimant was not able to work and available for work the benefit weeks ending November 6, and

November 13, but he was able and available for work effective November 14, 2010. The claimant is qualified to receive unemployment insurance benefits as of that date, if he is otherwise eligible. The matter is remanded to the Claims Section for investigation and determination of the non-worker's compensation temporary disability benefit deductibility issue.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

ld/pjs