

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CHARLEEN LUDWIG
Claimant

APPEAL NO: 10A-UI-06975-ET

**ADMINISTRATIVE LAW JUDGE
DECISION**

CARE INITIATIVES
Employer

OC: 04-04-10
Claimant: Appellant (2R)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the May 7, 2010, reference 01, decision that denied benefits. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on June 28, 2010. The claimant participated in the hearing. Amy Johnson, Administrator; Miriam Ramsden, Director of Nursing; and Lynn Corbeil, Employer Representative, participated in the hearing on behalf of the employer. Employer's Exhibits One through Three were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a casual status CNA for Care Initiatives from May 4, 2000 to May 7, 2010. She suffered a stroke at work October 7, 2009, and was on personal leave for 30 days because she did not qualify for FMLA. After 30 days the claimant was still in therapy and unable to work so the employer moved her to casual status as a courtesy so she could keep her job (Employer's Exhibit One). The claimant completed rehabilitation April 30, 2010. The employer sent her job description to her occupational therapist to see if she could meet the essential functions and requirements of her job. The occupational therapist concluded the claimant could not meet the requirements of her job, including lifting, walking and squatting frequently and therefore was unable to perform her job (Employer's Exhibit Two). On May 7, 2010, the employer notified her it could no longer hold her position open and her employment was terminated (Employer's Exhibit Three).

The claimant has not received a full release to return to work but can work in a position that does not require lifting, squatting and walking. There are some jobs that she could work that could accommodate those restrictions.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason and is able and available for work.

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(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.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The evidence establishes the claimant was unable to work due to a non-work-related medical condition. When an employee is unable to work and does not return to work due to a non-work-related medical condition, the separation is typically considered to be a voluntary quit without good cause attributable to the employer. Benefits are then denied until the claimant completely recovers and returns to offer her services to the employer. However, in the case herein, the employer took the first step and discharged the claimant for the same reasons. When the employer initiates a separation, the reasons must constitute work-connected misconduct before a claimant can be denied unemployment insurance benefits. The claimant's separation from employment was not due to any misconduct on her part nor did she quit her job. The claimant is qualified to receive unemployment insurance benefits, provided she is otherwise eligible.

The remaining issue is whether the claimant is able and available for work. The administrative law judge concludes she is. A claimant must be able to perform some type of work, not the same job she previously held, in order to be found able and available for work. Although the claimant is restricted from lifting, squatting and walking, there are some types of employment, even if somewhat limited, that could accommodate her restrictions. Therefore, she must be considered able and available for work.

DECISION:

The May 7, 2010, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason and is able and available for work. Benefits are allowed effective the week ending May 15, 2010, rather than the week ending April 10, 2010, provided the claimant is otherwise eligible. The issue of offsetting the claimant's benefits is remanded to the Claims Section.

Julie Elder
Administrative Law Judge

Decision Dated and Mailed

je/pjs