IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CHRISTINE D FLEMING
Claimant

MONMOUTH NURSING HOME
Employer

APPEAL NO. 09A-UI-10861-JTT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 05/31/09
Claimant: Appellant (2-R)

Iowa Code Section 96.5(2)(a) – Discharge

STATEMENT OF THE CASE:

Christine Fleming filed a timely appeal from the July 21, 2009, reference 02, decision that denied benefits. After due notice was issued, a hearing was held on August 27, 2009. Ms. Fleming participated and presented additional testimony through her mother, Janet Russell. Beckie Taylor, Bookkeeper, represented the employer and presented additional testimony through Tammy Guile, Director of Nursing. Exhibits A through F were received into evidence.

ISSUE:

Whether Ms. Fleming separated from the employment for a reason that disqualifies her for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Christine Fleming commenced her part-time employment with Monmouth Nursing Home on October 31, 2008 and last performed for work for the employer on May 31, 2009. Ms. Fleming worked as a certified nursing assistant. Ms. Fleming's duties required that Ms. Fleming be able to lift 50 pounds. Tammy Guile, Director of Nursing, was Ms. Fleming's immediate supervisor.

On May 29, 2009, Ms. Fleming was diagnosed with a mass on her brain stem. Ms. Fleming notified the employer that day that her doctor had released her to return to work with an eight-pound lifting restriction and that she would need to undergo surgery on her neck. The surgery was to take place in July. When Ms. Fleming contacted the employer on May 29, the care coordinator told her to bring her medical documentation when she reported for work and the Care Coordinator would make a copy for the director of nursing. The care coordinator told Ms. Fleming that she would have Ms. Fleming perform non-weight bearing duties such as making beds and passing out water to residents.

Ms. Fleming appeared for work on May 30 and provided the medical documentation to the employer. Ms. Fleming performed the altered duties. Ms. Fleming then appeared for work on May 31 and again performed the altered duties.

On June 1, 2009, Tammy Guile, Director of Nursing, returned to work and reviewed Ms. Fleming's medical documentation. Ms. Guile contacted Ms. Fleming by telephone. Ms. Fleming explained that she would need to undergo surgery on her neck in July, and had been released to return to work with the eight-pound lifting restriction. Ms. Fleming shared that her doctor had told her that if she exceeded the weight restriction or turned her neck "wrong" that it could be fatal. Ms. Guile told Ms. Fleming that the regular duties would not be appropriate for Ms. Fleming and that the employer could not accept the liability Ms. Fleming's health condition presented. Ms. Guile told Ms. Fleming that she could not allow Ms. Fleming to return to the employment. Ms. Fleming had said nothing to indicate an intention to separate from the employment and had not requested a leave of absence.

Though Ms. Guile intended to place Ms. Fleming on an involuntary leave of absence until she was released to return, Kathy Kopsack, Administrator, told Ms. Fleming that she would need to reapply for work upon her release.

REASONING AND CONCLUSIONS OF LAW:

In Wills v. Employment Appeal Board, the Supreme Court of Iowa held that an employee was discharged and did not voluntarily separate from employment where a nursing assistant presented a lifting restriction and the employer, as a matter of policy, precluded the employee from working so long as the medical restriction continued in place. See Wills v. Employment Appeal Board, 447 N.W.2d 137 (Iowa 1989). The lifting restriction in Wills, like the lifting restriction in this case, was based on a non-work-related medical condition. Placing the employee on an involuntary leave of absence was deemed the equivalent of discharging the employee. Pursuant to the ruling in Wills, and based on the evidence in the record, the administrative law judge concludes that Ms. Fleming was discharged from the employment and did not voluntarily quit. Accordingly, the next question is whether the discharge was for misconduct in connection with the employment that would disqualify Ms. Fleming for unemployment insurance benefits.

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.

The employer has the burden of proof in a discharge matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

The evidence in the record fails to establish any misconduct on the part of Ms. Fleming. The evidence indicates instead that the employer discharged Ms. Fleming in lieu of providing accommodations that would allow her to continue in the employment and out of concern that Ms. Fleming's presence in the workplace presented an unacceptable liability. Because Ms. Fleming was discharged for no disqualifying reason, Ms. Fleming is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits paid to Ms. Fleming.

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".

871 IAC 24.22(1)a provides:

> Benefits eligibility conditions. For an individual to be eligible to receive benefits the department must find that the individual is able to work, available for work, and earnestly and actively seeking work. The individual bears the burden of establishing that the individual is able to work, available for work, and earnestly and actively seeking work.
>
> (1) Able to work. An 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.
>
> a. Illness, injury or pregnancy. Each case is decided upon an individual basis, recognizing that various work opportunities present different physical requirements. A statement from a medical practitioner is considered prima facie evidence of the physical

ability of the individual to perform the work required. A pregnant individual must meet the same criteria for determining ableness as do all other individuals.

The administrative law judge concludes there is insufficient medical evidence in the record to determine whether Ms. Fleming has met the work ability requirements and work availability requirements of Iowa Code section 96.4(3) since she established her claim for unemployment insurance benefits. This matter will be remanded to the Claims Division for further proceedings on those issues.

DECISION:

The Agency representative's July 21, 2009, reference 02, decision is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

This matter is remanded to the Claims Division for determination, through consideration of appropriate medical documentation, of whether and when the claimant has been able to work and available for work since she established her claim for benefits.

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James E. Timberland
Administrative Law Judge

_____
Decision Dated and Mailed

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