IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DANIELLE M LAWHEAD
Claimant

DELAVAN INC
Employer

APPEAL NO. 17A-UI-12499-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/19/17
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Danielle Lawhead (claimant) appealed a representative's December 5, 2017, decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits after her separation from employment with Delavan (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for December 29, 2017. The claimant participated personally. The employer did not provide a telephone number where it could be reached and therefore, did not participate in the hearing. The claimant offered and Exhibit A was received into evidence.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and considered all of the evidence in the record, finds that: The claimant was hired on August 7, 2014, as a full-time manufacturing specialist. The claimant received the employer's handbook when she was hired. The employer has a progressive attendance policy. It said that employees would be issued a verbal warning, a written warning, a final written warning, and be terminated when the supervisor determines the employee has been absent too many times. The handbook does not have an attendance point system.

The employer changed the claimant's schedule from night to day shift in the middle of 2016. This caused the claimant some sleep disruption. In February 2017, the claimant starting seeking medical help for chronic fatigue. She was having problems waking up on time in the mornings. The claimant was diagnosed with depression and scheduled a sleep study. Her physician found she had "significant obstructive sleep apnea". The sleep apnea made it difficult for the claimant to sleep well and wake up easily. The sleep apnea was a precursor of the fatigue and the depression.

The claimant could not be fitted with a CPAP until August 2017. She applied for Family Medical Leave Act (FMLA) leave on September 1, 2017, through the employer's human resources

department. Intermittent FMLA was retroactively granted from approximately July 25, 2017, to August 28, 2017. On September 1, 2017, she thought she was applying for ongoing leave. The claimant was unaware that she could request an extension of the leave.

The employer issued the claimant a final written warning after she was tardy for work four times. The warning was issued prior to her sleep apnea diagnosis but her physician acknowledged that her absences were due to sleep apnea.

On November 20, 2017, the claimant overslept due to sleep apnea. She was still getting used to the CPAP machine and waking up was difficult. The claimant immediately called the employer to report the problem and the reason. She was fifteen minutes tardy. The employer terminated the claimant for absenteeism.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant was not discharged for misconduct

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:
>
> 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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r.871-24.32(8) provides:

> (8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not misconduct unless unexcused. Absences due to properly reported illness can never constitute job misconduct since they are not volitional. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Unreported absences do not constitute job misconduct if the failure to report is caused by mental incapacity. *Roberts v. Iowa Department of Job Service*, 356 N.W.2d 218 (Iowa 1984). The employer must establish not only misconduct but that there was a final incident of misconduct which precipitated the discharge. The last incident of absence was a reported illness which occurred on November 20, 2017. The claimant's absence does not amount to job misconduct because it was reported as soon as her condition would allow. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge. The claimant was discharged but there was no misconduct.

DECISION:

The representative's December 5, 2017, decision (reference 01) is reversed. The employer has not met its burden of proof to establish job related misconduct. Benefits are allowed, provided claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/rvs