IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JULIE L WALROD
Claimant

SYMPHONY SENIOR HOLDINGS INC
Employer

APPEAL NO. 17A-UI-00040-S1-T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 12/04/16
Claimant: Respondent (1)

Section 96.5-1 - Voluntary Quit
Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

Symphony Senior Holdings (employer) appealed a representative's December 20, 2016, decision (reference 01) that concluded Julie Walrod (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 25, 2017. The claimant participated personally. The employer participated by Ivette Martin, Payroll Manager; Heather Christiansen, Executive Director; and Lesley Birely, Director of Health and Wellness. Exhibit D-1 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 October 1, 2015, as a full-time certified nurses' assistant/medical aid. The claimant signed for receipt of the employer's handbook on October 1, 2015. The handbook states that a doctor's note is necessary for three or more medical absences to count as one occurrence. If a doctor's note is not provided for the three or more medical absences, the employee will be considered to have voluntarily resigned. The handbook states that an employee with six occurrences will be separated from employment.

The claimant properly reported she was absent due to medical issues on August 8, October 19, November 2, 5, 6, 7, 8, and 9, 2016. The claimant had bronchitis on November 2, 2016, and saw her physician. The claimant provided a note to the employer indicating she could not work from November 2 to 4, 2016. The claimant was still coughing and could not work through November 11, 2016.

On November 14, 2016, the claimant returned to work and worked her entire shift. After her shift the employer talked to the claimant about her absences. It completed a Notice of No Fault

Attendance Disciplinary Action and asked the claimant to sign it. The claimant refused to sign it and the employer did not give her a copy of the document. The document indicated the claimant had 6.3 attendance points. It did not terminate the claimant or notify the claimant that further infractions could result in any disciplinary action. The document listed the claimant's absences. On November 7, 2016, the employer wrote "absent – still coughing off through 11-11-16". In another section the employer wrote that the claimant cannot return to work until she brings back a doctor's release and a doctor's excuse for November 5, 6, and 7, 2016.

The claimant contacted her physician on November 14, 2016. The physician's representative informed the claimant that the physician could not provide a note for seven days or more in the past. The claimant sent a text to the employer on November 14, 2016, explaining the situation. The employer did not respond to the claimant. The claimant sent two texts to the employer on November 15, 2016. The claimant asked the employer what she should do. The employer did not respond. The employer believes the claimant voluntarily quit work.

The claimant filed for unemployment insurance benefits with an effective date of December 4, 2016. The employer participated personally at the fact finding interview on December 19, 2016, by Ivette Martin.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant did not voluntarily quit work.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. *Local Lodge #1426 v. Wilson Trailer*, 289 N.W.2d 608, 612 (Iowa 1980). The claimant had no intention of leaving. This was evidenced by the communication the claimant had with the employer each day and her return to work on November 14, 2016. The employer would not allow the claimant to return to work after November 14, 2016, and did not respond to the claimant's request for information. The separation must be analyzed as involuntary.

The administrative law judge concludes the claimant was not discharged for misconduct.

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.

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). 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 properly reported illness which occurred on November 9, 2016. The claimant's absence does not amount to job misconduct because it was properly reported. The employer has failed to provide any evidence of willful and deliberate misconduct which would be a final incident leading to the discharge.

An employer may discharge an employee for any number of reasons or no reason at all, but if it fails to meet its burden of proof to establish job related misconduct as the reason for the separation, the employer incurs potential liability for unemployment insurance benefits related to that separation. Inasmuch as the employer had not previously warned the claimant about any of the issues leading to the separation, it has not met the burden of proof to establish the claimant acted deliberately or negligently in violation of company policy, procedure, or prior warning. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The representative's December 20, 2016, decision (reference 01) is affirmed. 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

_____
Decision Dated and Mailed

bas/rvs

NOTE TO EMPLOYER:
If you wish to change the street name of record, please access your account at:
https://www.myiowaui.org/UITIPTaxWeb/.
Helpful information about using this site may be found at:
http://www.iowaworkforce.org/ui/uiemployers.htm and
http://www.youtube.com/watch?v=_mpCM8FGQoY