IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

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Appeal Number: 05A-UI-11140-LT
OC: 10-02-05 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Iowa Code §96.5(2)a – Discharge/Misconduct
871 IAC 24.32(7) – Excessive Unexcused Absenteeism

STATEMENT OF THE CASE:

Employer filed a timely appeal from the October 20, 2005, reference 02, decision that allowed benefits. After due notice was issued, a hearing was held on November 15, 2005. Claimant did participate and was represented by Steve Hamilton, Attorney at Law. Employer did participate through Rebecca Bengston and Stephanie Amick. Claimant's Exhibit A was received. The administrative law judge took judicial notice of the administrative record.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed as a full-time CNA on first shift through September 9, 2005 when she was discharged. On September 9 claimant spoke to a female in the office at regular phone number

on September 9 and confirmed she was still off work because of a doctor's excuse from the day before and she would report to work on Monday. She called Stephanie Amick on September 8 and reported her pain from the work injury and the doctor's appointment scheduled for that day. Her last day of work was September 7, 2005. Employer sent a certified termination letter on September 9 which claimant received on September 10.

On February 11 claimant had a court appointment and had arranged for that absence in advance with Lisa Gritner. On March 5 claimant reported to employer her back and neck hurt and on March 14 she reported a doctor's appointment. Claimant notified Nicole at work on April 11 about her inability to work that day due to complications from her work injury and also left a message for Gritner at her home. Claimant's absences on April 20, 21 and 22, 2005 were related to her work injury incurred on February 19, 2005. Employer suspended her because of those absences for three days effective April 27, 2005. She was also absent on June 18 because of arm pain related to the work injury.

Claimant ultimately had surgery on July 12, 2005 (fusion of cervical herniated discs and removal of C5 and C7). Employer has a no fault attendance policy and different charge nurses reported the absences. Claimant has no children that would need child care as her youngest is 13 years of age. She only mentioned transportation to school as it related to employer wishing to change her shift.

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.

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.

Excessive absences are not considered misconduct unless unexcused. Absences due to properly reported illness or injury cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982).

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, employer incurs potential liability for unemployment insurance benefits related to that separation. A reported absence related to illness or injury is excused for the purpose of the

Iowa Employment Security Act. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. Absences reported in advance to which the employer acquiesces, such as the court appointment, are also considered excused. Inasmuch as the final absence for which she was discharged was properly reported to employer's main office and was related to complications of a work injury, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed. Even if employer's claim of a no call-no show on September 9 were to be accepted as fact, that one hypothetical unexcused absence without a prior history of other unexcused absences or warning is not disqualifying, as it does not meet the excessiveness standard. In this case it appears employer was grasping for any reason, however illegitimate, to end claimant's employment. Benefits are allowed.

DECISION:

The October 20, 2005, reference 02, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

dml/pjs