**IOWA WORKFORCE DEVELOPMENT**
**UNEMPLOYMENT INSURANCE APPEALS**

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

**AMANDA R ELLIOTT**
Claimant

**G J BRUNS DDS**
Employer

**APPEAL NO. 09A-UI-11331-LT**

**ADMINISTRATIVE LAW JUDGE DECISION**

**OC: 07/05/09**
**Claimant: Appellant (2)**

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

**STATEMENT OF THE CASE:**

The claimant filed a timely appeal from the August 5, 2009, reference 01, decision that denied benefits. After due notice was issued, a telephone conference hearing was held on August 27, 2009. Claimant participated. Employer participated through Gregory Bruns, DDS, and Jackie Green, Receptionist.

**ISSUE:**

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of benefits.

**FINDINGS OF FACT:**

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked full-time as a dental hygienist and was separated on June 22, 2009. She was last absent on June 22 when she texted employer that she would not be in because she had a migraine headache. On June 16 she spoke to Green to notify employer of the reason for her absence. On June 17 she left a message on employer's recorder about her absence related to illness. On June 18 she called but did not leave a message and texted about her continued absence because of the headache. On June 22 she sent a text message to the employer about her absence. Employer received both texts. Green called her and left her a message her employment was terminated but gave no reason. She did see a physician about her headache more than once that week but was unaware employer wanted a doctor's excuse. Employer had not warned her either verbally or in writing that her job was in jeopardy because of attendance or any other reason. All other absences were related to reported illness. Employer was aware of her migraine diagnosis when she was hired and did not ask for supporting medical documentation.

**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 § 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 if it is not contrary to public policy, 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. Because the final absence for which she was discharged was related to properly reported illness or injury, and inasmuch as employer had not previously warned claimant that her job was in jeopardy due to attendance issues, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. 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.

**DECISION:**

The August 5, 2009, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css