IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARSHA T DRISKELL
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 07A-UI-11114-DWT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 10/28/07 R: 03
Claimant: Appellant (2)

Section 96.5-2-a - Discharge

STATEMENT OF THE CASE:

Marsha T. Driskell (claimant) appealed a representative's November 21, 2007 decision (reference 01) that concluded she was not qualified to receive unemployment insurance benefits, and the account of Care Initiatives (employer) would not be charged because the claimant voluntarily quit her employment for reasons that do not qualify her to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on December 28, 2007. The claimant participated in the hearing with her attorney, Veronica Franck. Lynn Corbeil, attorney at law, represented the employer. Kyle Merry, the administrator, and Deb Clark, the director of nurses, testified on the employer's behalf. During the hearing, Employer Exhibits One through Six were offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the claimant voluntarily quit her employment for reasons that do not qualify her to receive unemployment insurance benefits, or did the employer discharge her for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on May 1, 2006, as a cook. The claimant later became the employer's full-time activity coordinator. Merry was the claimant's most recent supervisor.

At the time of hire, the claimant received information about the employer's attendance policy. (Employer Exhibit Two.) The attendance policy requires employees to personally contact their supervisor two hours prior to a scheduled shift when employees are unable to work as scheduled. When an employee has more than six unscheduled attendance occurrences within a 12-month period, the employer starts its progressive discipline. The employer discharges an employee when the employee does not call or report to work two times. (Employer Exhibit One.)

On October 22, the claimant received paperwork she needed to complete to request leave under the Family Medical Leave Act. The claimant's son was hospitalized and she wanted to spend as much time with him as possible. The week of October 22, the claimant informed the employer she would use a combination of vacation and sick leave to cover her absences while she was at the hospital with her son. The claimant understood the employer would grant her leave under the family leave act as soon as she submitted all the necessary paperwork. The employer did not receive paperwork from a doctor until October 30.

On October 26, the claimant and Merry talked about the claimant returning to work on Monday, October 29. On October 26, the claimant indicated she planned to return to work on October 29. Merry reminded the claimant that if she was not able to return to work, she needed to contact him.

On October 29, 2007, the claimant was ill. In addition to having a bacterial infection, she could not talk because she had laryngitis. The claimant asked J.D., one of her volunteers, to inform the employer that the claimant was unable to work on October 29. About 8:30 a.m., J.D. informed the office manager that the claimant would be absent that day. Merry called the claimant's home five times on October 29. Merry left two messages on October 29. In one message, Merry asked the claimant about a schedule. The claimant had J.D. bring the requested schedule to the employer. The claimant saw her doctor on October 29. The claimant's doctor restricted her from going to the hospital to visit her son or to work until she recovered from a bacterial infection. The claimant did not ask her doctor to contact the employer to let the employer know she was unable to work for a few days and that she had laryngitis.

When the claimant did not report to work or personally contact Merry on October 29, he wrote up a verbal warning even though he knew J.D. had already contacted the employer about the claimant's October 29, 2007 absence. (Employer Exhibit Three.) The claimant did not call or go to work on October 30, 2007. As a result of this absence, Merry wrote up another disciplinary action form and indicated this was the claimant's final written warning. (Employer Exhibit Four.) The claimant did not call or report to work on October 31, 2007. As a result of this absence, the employer terminated the claimant's employment for her second no-call, no-show incident.

The first day the claimant could talk was November 1, 2007. The claimant called the employer at 7:25 a.m. and talked to Clark. The claimant explained that she had not been able to contact the employer before because she had laryngitis. The employer asked the claimant to come to work. When the claimant came to work, the employer gave the claimant all the disciplinary reports Merry created on October 29, 30 and 31. The employer informed the claimant she no longer worked for the employer because she had not personally contacted Merry or reported to work these days.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not qualified to receive unemployment insurance benefits if she voluntarily quits employment without good cause attributable to the employer, or an employer discharges her for reasons constituting work-connected misconduct. Iowa Code §§ 96.5-1, 2-a. Even though the claimant did not personally contact the employer for three days, she directed J.D. to inform the employer she was ill and unable to work on October 29, 2007. Although the claimant did not call or report to work the next two days, she contacted the employer on November 1, the first day she could talk, to explain why she had not called or reported to work on October 30 and 31. The claimant's actions do not establish that she intended to quit her employment. Instead, the

employer made the decision to end the claimant's employment on October 31. Based on the employer's attendance policy, the employer established business reasons for discharging the claimant.

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665 (Iowa 2000).

For unemployment insurance purposes, misconduct amounts to a deliberate act and a material breach of the duties and obligations arising out of a worker's contract of employment. Misconduct is a deliberate violation or disregard of the standard of behavior the employer has a right to expect from employees or is an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Inefficiency, unsatisfactory conduct, unsatisfactory performance due to inability or incapacity, inadvertence or ordinary negligence in isolated incidents, or good faith errors in judgment or discretion are not deemed to constitute work-connected misconduct. 871 IAC 24.32(1)(a).

The law presumes excessive unexcused absenteeism is an intentional disregard of the claimant's duty to an employer and amounts to work-connected misconduct except for illness or other reasonable grounds for which the employee was absent and has properly reported to the employer. 871 IAC 24.32(7).

Prior to October 29, the claimant's job was not in jeopardy. Even though the claimant did not personally contact Merry on October 29 to report she was ill and unable to work, the employer received information from J.D. that the claimant was unable to work. The employer did not realize the claimant could not talk. The employer's expectation that the claimant go to the employer's facility when she was ill is not realistic. While the claimant should have had J.D. take a doctor's note to the employer to excuse the claimant's absence on October 29, 30, and 31, she did not. The claimant did not think to have her doctor's office contact the employer to let the employer know how ill the claimant was and that she could not work. The evidence does not establish that the claimant intentionally failed to report to work on October 29, 30, and 31. Instead, the claimant was ill and unable to work.

Even though the claimant did not properly notify the employer that she was ill and unable to work, in this case she established a justifiable reason – she had laryngitis. Since the employer called the five times on October 29 when the employer knew she was ill, it does not make sense that the employer did not contact her on October 30 or 31 and ask her or someone on her behalf to contact the employer to let the employer know why she was not at work. Under the facts of this case, the claimant did not commit work-connected misconduct. Therefore, as of October 28, 2007, the claimant is qualified to receive unemployment insurance benefits.

DECISION:

The representative's November 21, 2007 decision (reference 01) is reversed. The claimant did not voluntarily quit her employment. Instead, the employer discharged her for business reasons that do not constitute work-connected misconduct. As of October 28, 2007, the claimant is qualified to receive unemployment insurance benefits, provided she meets all other eligibility requirements. The employer's account may be charged for benefits paid to the claimant.

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Debra L. Wise
Administrative Law Judge

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Decision Dated and Mailed

dlw/kjw