IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

CARRIE A GARDNER
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 09A-UI-00257-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11/16/08 R: 03
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct
Section 96.4-3 – Able and Available

STATEMENT OF THE CASE:

Carrie Gardner (claimant) appealed a representative's January 5, 2009 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she had voluntarily quit employment with Care Initiatives (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for January 22, 2009. The claimant participated personally. The employer was represented by Cheryl Roethemeier, Hearings Representative, and participated by LuAnn Modlin, Administrator. The claimant offered and Exhibit A was received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct. In addition whether the claimant is able and available for work.

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 July 10, 2007, as a full-time housekeeper. On or about July 11, 2008, the claimant fell down a flight of stairs before going to work. She worked that day but called in sick on July 14, 2008. The claimant saw a physician and was restricted from working. The employer granted the claimant Family Medical Leave (FMLA). Later the claimant discovered she had to have surgery. After surgery she was restricted from working for three months and the claimant informed the employer. The employer thinks it told the claimant that it could not hold the job for her until she recovered. The claimant has no memory of this. The employer did not communicate by letter.

The claimant had surgery on September 11, 2008. The employer did not offer the claimant an extension of FMLA or any other medical leave. On November 11, 2008, the claimant stopped by her work before seeing her physician later that day. The claimant wanted to know what she should bring into the employer from the doctor so she could start work again. The employer told her she was no longer employed because she could not return after surgery. The employer told the claimant it would contact the claimant and give her information about her work status. The

claimant went to her physician on November 11, 2008, and received a release to return to work without restriction. The employer never contacted the claimant.

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:
>
> 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(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.

871 IAC 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. 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. The claimant was discharged but there was no misconduct.

The next issue is whether the claimant was able and available for work. For the following reasons the administrative law judge concludes she is.

871 IAC 24.23(1) provides:

> Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.
>
> (1) An individual who is ill and presently not able to perform work due to illness.

When an employee is ill and unable to perform work due to that illness she is considered to be unavailable for work. The claimant was released to return to work without restrictions on November 11, 2008. She is considered to be available for work as of November 11, 2008. The claimant is not disqualified from receiving unemployment insurance benefits.

DECISION:

The representative's January 5, 2009 decision (reference 01) is reversed. The employer has not met its proof to establish job-related misconduct. Benefits are allowed. The claimant is not disqualified from receiving unemployment insurance benefits. She is able and available for work as of November 11, 2008.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/css