IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

VELETA M JACKSON
Claimant

GOOD SAMARITAN SOCIETY INC
Employer

APPEAL NO: 14A-UI-08450-DT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 07/20/14
Claimant: Respondent (1/R)

Section 96.5-2-a – Discharge
Section 96.5-1 – Voluntary Leaving

STATEMENT OF THE CASE:

Good Samaritan Society, Inc. (employer) appealed a representative's August 7, 2014 (reference 01) decision that concluded Veleta M. Jackson (claimant) was qualified to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on September 4, 2014. The claimant participated in the hearing. Cheryl Williams appeared on the employer's behalf. During the hearing, Claimant's Exhibits A and B were entered into evidence. The record was left open through September 10 for submission of additional documentation by the claimant regarding hospitalization and medical treatment after July 17, 2014; six pages in that regard were then admitted into the record as Claimant's Exhibit C. The claimant did also offer three additional pages for treatment preceding July 17 and one additional page for a non-treatment issue, but since those were not within the scope of the directive for documents for which the record was held open, those documents were not admitted. 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:

Was there a disqualifying separation from employment either through a voluntary quit without good cause attributable to the employer or through a discharge for misconduct?

OUTCOME:

Affirmed. Benefits allowed, if otherwise eligible.

FINDINGS OF FACT:

The claimant started working for the employer on May 27, 2010. She worked full time as a housekeeping assistant at the employer's long-term care nursing facility. Her last day of work was June 17, 2014.

The claimant had been absent due to a health condition from June 9 through June 15. She did report for work on June 17. She was next scheduled for work on June 19 and June 20. The employer was not clear as to whether the claimant had called in on June 19, but considered her a no-call/no-show on June 20. The employer had some indication that the claimant had called in sick again on June 23 and June 27, but considered her to be a no-call/no-show on June 24. The employer also considered the claimant a no-call/no-show on June 28, June 29, and June 30 and considered her to have voluntarily quit by job abandonment on June 30. The employer's job abandonment policy indicates that an employee will be deemed to have voluntary quit if the employee has two or more no-call/no-shows, not necessarily consecutively. The employer's insurance company sent the claimant a Consolidated Omnibus Budget Reconciliation Act (COBRA) health insurance rights letter on or about July 14 which indicated that the claimant's employment was ended.

The claimant had been granted FMLA (Family Medical Leave) for her absence from June 9 through June 15. The claimant asserted she had some belief that her leave might go through September because of a typographical error on a doctor's note dated June 11 (Claimant's Exhibit A). However, the claimant had reported back to work on June 17. The claimant believed that after June 17 she had communicated with her immediate supervisor, the director of housekeeping, to indicate she was still not recovered from the condition which had led to the absence from June 9 through June 15; she acknowledged that she might not have called in every day she missed work, in part because she was too sick and in part because she believed she was covered under an extension of the FMLA leave. It does appear that the claimant went into a walk-in clinic on June 20, was seen in an emergency room on June 22, had lab work done on June 25, and was admitted to the hospital "for further care and management" from July 3 through July 14.

REASONING AND CONCLUSIONS OF LAW:

A claimant is not eligible for unemployment insurance benefits if she quit the employment without good cause attributable to the employer or was discharged for work-connected misconduct. Iowa Code §§ 96.5-1; 96.5-2-a.

Rule 871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. A voluntary leaving of employment requires an intention to terminate the employment relationship and an action to carry out that intent. *Bartelt v. Employment Appeal Board*, 494 N.W.2d 684 (Iowa 1993); *Wills v. Employment Appeal Board*, 447 N.W.2d 137, 138 (Iowa 1989). The employer asserted that the claimant was not discharged but that she voluntarily quit through job abandonment. The intent to quit can be inferred in certain circumstances. For example, a consecutive three-day no-call/no-show in violation of company rule is considered to be a voluntary quit. Rule 871 IAC 24.25(4). The employer's policy does not comply with this rule; however, as it infers an intent to quit after only two days and they need not be consecutive. Further, while the claimant's recollection was confused as to whether she had spoken to her supervisor and had been allowed to return to her leave status, the employer's information was also not clear cut as to what communications may have occurred. There has not been a showing of intent to quit. The administrative law judge concludes that the employer has failed to satisfy its burden that the claimant voluntarily quit. Iowa Code §96.6-2. As the separation was not a voluntary quit, it must be treated as a discharge for purposes of unemployment insurance. Rule 871 IAC 24.26(21); *Peck v. EAB*, 492 N.W.2d 438 (Iowa App. 1992).

The issue in this case is then whether the employer effectively discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right or even had any other choice but to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code § 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. *Cosper v. IDJS*, 321 N.W.2d 6 (Iowa 1982).

In order to establish misconduct such as to disqualify a former employee from benefits an employer must establish the employee was responsible for a deliberate act or omission which was a material breach of the duties and obligations owed by the employee to the employer. Rule 871 IAC 24.32(1)a; *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445 (Iowa 1979); *Henry v. Iowa Department of Job Service*, 391 N.W.2d 731, 735 (Iowa App. 1986). The conduct must show a 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Henry*, supra. In contrast, 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. Rule 871 IAC 24.32(1)a; *Huntoon*, supra; *Newman v. Iowa Department of Job Service*, 351 N.W.2d 806 (Iowa App. 1984).

The reason the employer effectively discharged the claimant her absence from work after June 17, 2014. Excessive unexcused absences can constitute misconduct, however, in order to establish the necessary element of intent, the final incident must have occurred despite the claimant's knowledge that the occurrence could result in the loss of her job. *Cosper*, supra; *Higgins v. IDJS*, 350 N.W.2d 187 (Iowa 1984). Absences due to properly reported illness cannot constitute work-connected misconduct since they are not volitional, even if the employer was fully within its rights to assess points or impose discipline up to or including discharge for the absence under its attendance policy. Rule 871 IAC 24.32(7); *Cosper*, supra; *Gaborit v. Employment Appeal Board*, 734 N.W.2d 554 (Iowa App. 2007). In this case, the employer asserts that the reasons for the final absences were not properly reported. However, it is clear that the claimant's failure to report her absences were not volitional, as she was confused as a result of her medical condition and believed that she was still covered under her medical leave. The employer has not met its burden to show disqualifying misconduct. *Cosper*, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

However, a significant issue has arisen as a result of the information provided in the hearing as to whether the claimant, who was hospitalized as least as recently as July 14, was then fully recovered and able and available for work by July 20 and since that date. This issue was not included in the notice of hearing for this case and the case will be remanded for an investigation and preliminary determination on that issue. Rule 871 IAC 26.14(5).

DECISION:

The representative's August 7, 2014 (reference 01) decision is affirmed. The claimant did not voluntarily quit and the employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible. The matter is remanded to the Benefits Bureau for investigation and determination of the able and available issue.

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Lynette A. F. Donner
Administrative Law Judge

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Decision Dated and Mailed

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