IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

SHIRLEY A HENRY
Claimant

CARE INITIATIVES
Employer

APPEAL NO. 12A-UI-03291-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 02/12/12
Claimant: Appellant (2)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Shirley Henry (claimant) appealed a representative's March 28, 2012 decision (reference 01) that concluded she was not eligible to receive unemployment insurance benefits because she was discharged from work with Care Initiatives (employer) for excessive unexcused absenteeism after being warned. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for April 13, 2012. The claimant participated personally. The employer was represented by David Williams, assistant manager of appellate services, and participated by Katie Miller, business office manager, and John Boughton, administrator. Attorney at Law Joseph Thornton observed the hearing.

ISSUE:

The issue is whether the claimant was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

The administrative law judge, having heard the testimony and having considered all of the evidence in the record, finds that: The claimant was hired on June 23, 2011, as a full-time certified nursing assistant. The claimant signed for receipt of the employer's handbook on June 23, 2011. The claimant was tardy on July 12, 2011. She properly reported her absence due to illness on July 13, 2011. On July 21, 2011, the claimant was tardy due to transportation issues. On July 27, 2011, the employer issued the claimant a written warning for absenteeism. The employer notified the claimant that further infractions could result in termination from employment.

On September 19, 2011, the employer mistakenly scheduled the claimant to work even though it knew that the claimant would be in school that day to obtain a medication license that the employer wanted to the claimant to earn. On October 18, 2011, the employer thought the claimant was absent but she worked. On October 23, 2011, the claimant was absent after she properly requested and was granted a personal day. On October 27, 2011, the claimant was tardy for work.

On November 9, 2011, the clamant suffered a work-related injury. The injury was covered by the employer's workers' compensation carrier. The business office manager told the claimant that she was only to report to her. The employer recorded that the claimant was tardy on December 31, 2011, but the claimant was not tardy. On January 13, 2012, the claimant saw her physician and was issued restrictions. On January 18, 2012, the claimant had an MRI and was too ill to work

afterwards. The claimant reported this to the employer. The employer issued the claimant an attendance point for her failure to come to work after the procedure. The claimant requested and was granted time off on January 24, and 25, 2012, to attend medical appointments associated with her work injury. The acting Director of Nursing forgot to tell the scheduler and the claimant was on the schedule to work. The employer recorded the claimant as a failure to call or report to work on January 24, 2012. The doctor issued the claimant new restrictions on January 25, 2012. She was not allowed to lift, push or pull ten pounds or more.

On January 27, 2012, the claimant met with the administrator on her day off asking for accommodations to meet her new restrictions. The claimant could no longer push open the heavy doors at work that weighed more than ten pounds. The administrator did not accommodate the restrictions on January 28, 29, and 30, 2012.

On February 11, 2012, the claimant properly reported to the employer that she could not work on February 11 and 12, 2012, because she was in pain after her physical therapy appointment. The employer told the claimant to report to the workers' compensation physician on February 13, 2012. The employer told the claimant she would be terminated if she did not provide a doctor's excuse for February 11 and 12, 2012. The physician would not issue the claimant an excuse from work for February 11 and 12, 2012, because he did not see the claimant on February 11 or 12, 2012. On February 14, 2012, the employer terminated the claimant for excessive absenteeism and failure to have a doctor's excuse for February 11 and 12, 2012.

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 medical issue which occurred on February 11 and 12, 2012. The claimant's absence does not amount to job misconduct, because it was properly reported. The employer's testimony was confusing because it did not have the claimant's schedule, time cards, or entire employment file at the time of the hearing. The employer was unclear about what days the claimant was at work and days of doctors' appointments. The claimant appeared to testify from records she maintained.

An employer cannot relieve itself of liability for unemployment insurance benefits by telling a worker to see a doctor two days after the reporting of pain and then terminate for not seeing the doctor when she reported the pain. The employer has failed to provide any evidence of willful and deliberate misconduct that would be a final incident leading to the discharge. The claimant was discharged, but there was no misconduct.

DECISION:

The representative's March 28, 2012 decision (reference 01) is reversed. The employer has not met its burden proof to establish job-related misconduct. Benefits are allowed.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw