IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

MARY HALL
Claimant

ROSE VISTA HOME INC
Employer

APPEAL NO: 09A-UI-17879-ET

ADMINISTRATIVE LAW JUDGE DECISION

OC: 11-01-09
Claimant: Respondent (1)

Section 96.5-2-a – Discharge/Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the November 23, 2009, reference 01, decision that allowed benefits to the claimant. After due notice was issued, a hearing was held by telephone conference call before Administrative Law Judge Julie Elder on January 6, 2010. The claimant did not respond to the hearing notice and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. David Sherer, Assistant Administrator and Meg Kohles, DON, participated in the hearing on behalf of the employer and were represented by Attorney Tara Hall. Employer's Exhibits One through Nine were admitted into evidence.

ISSUE:

The issue is whether the employer discharged the claimant for work-connected misconduct.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a full-time CNA for Rose Vista Home from March 3, 2007 to August 23, 2009. She injured her right shoulder May 31, 2009, while attempting to adjust a ceiling fan at her home. On June 9, 2009, she provided the employer with a note from her doctor stating she was unable to work June 1 and June 2, 2009 (Employer's Exhibit One). On June 2, 2009, she provided the employer with another note from her doctor stating she was unable to perform any lifting duties from June 1 to June 7, 2009, but could perform other available work (Employer's Exhibit Two). On June 8, 2009, the claimant provided the employer with another note from her doctor continuing the restrictions and stating she was scheduled to see an orthopedist June 11, 2009 (Employer's Exhibit Three). On June 11, 2009, the claimant provided the employer with a note from her orthopedist stating she could not perform any work with her right arm/shoulder (Employer's Exhibit Four). On June 25, 2009, the employer sent the claimant a letter stating she qualified for FMLA and it considered her leave to have started May 30, 2009 (Employer's Exhibit Six). On August 24, 2009, the employer sent the claimant a letter stating her employment was terminated August 23, 2009, because she exhausted her FMLA leave and was not able to return to work (Employer's Exhibit Seven). On September 3, 2009, the claimant provided the employer a note from her orthopedist stating she could not lift

more than ten pounds, she had a follow up appointment in four weeks and she should be able to return to full duty October 1, 2009 (Employer's Exhibit Five). Meg Kohles, DON, talked to the claimant when she brought in the September 3, 2009, note and told her she would be happy to hear from her when her restrictions were lifted. The claimant received a full release to return to her duties October 1, 2009. Ms. Kohles tried to call the claimant twice October 1, 2009, and left messages that a CNA position was open but did not receive a return call from her. She did not speak to the claimant personally or send her a registered letter offering her a CNA position. The claimant did not file a claim for benefits until November 1, 2009.

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 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(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/injury cannot constitute job misconduct since they are not volitional. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The claimant was injured at home May 31, 2009, and immediately notified the employer of her injury. The employer placed her on FMLA effective May 30, 2009, after her physician restricted the work she was able to perform June 1, 2009. She received a full release to return to work October 1, 2009. The employer terminated her employment when her FMLA expired August 23, 2009. Consequently, the claimant was not required to return to the employer and offer her services. While the employer called the claimant October 1, 2009, and left a message stating there was a CNA position available, that offer of work was not made in person or by registered letter and therefore is not considered a bona fide offer of work. Additionally, the claimant did not have a valid claim for benefits at that time so even if the employer had made a bona fide offer of work and the claimant refused it that would not have been a disqualifying event. Because the final absence was related to properly reported illness/injury, no final or current incident of unexcused absenteeism has been established and no disqualification is imposed. Benefits are allowed.

DECISION:

The November 23, 2009, reference 01, decision is affirmed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

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Julie Elder
Administrative Law Judge

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Decision Dated and Mailed

je/css