IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

ISABELLA L THOMPSON Claimant **REMBRANDT ENTERPRISES INC** Employer	**APPEAL 14A-UI-03414-LT** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 03/02/14** **Claimant: Appellant (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Admin. Code r. 871-24.32(7) – Excessive Unexcused Absenteeism
Iowa Code § 96.5(1) – Voluntary Quitting

STATEMENT OF THE CASE:

The claimant filed an appeal from the March 26, 2014, (reference 01) unemployment insurance decision that denied benefits based upon a discharge from employment. The parties were properly notified about the hearing. A telephone hearing was held on April 21, 2014. Claimant participated with former coworker, Darcell Dion Groce. Employer participated through assistant human resources manager, Pamela Winkel and safety coordinator/workers' compensation manager, Cory Hawkins. Employer's Exhibits 1 through 6 were received.

ISSUES:

Did claimant voluntarily leave the employment with good cause attributable to employer or did employer discharge claimant for reasons related to job misconduct sufficient to warrant a denial of benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant was employed full time as a packager from March 14, 2013, and was separated from employment on February 28, 2014. Her last day of work was the shift beginning February 14 and ending on February 15, 2014, when she reported her left shoulder (between neck and shoulder, caused stabbing pain in the mid-back when getting up from prone position) injury. The work-relatedness of the injury is disputed. On February 17, she was not scheduled and went to Dr. Archer at Trimark Buena Vista Clinic who said she could return to work on February 18 with restrictions allowing her to push, pull, carry and lift 10 pounds frequently, 20 pounds occasionally, and 30 pounds maximum. He suggested a follow-up visit in two weeks. (Employer's Exhibit 2)

On February 19 she was scheduled to work and provide the medical excuse. She called reporting she was unable to work. On February 20 she was scheduled to work and called stating she was unable to work. She was scheduled to work on February 24 when she called reporting her absence because of inability to work due to continuing back pain. She did not see

a doctor after February 17. On February 25 safety director Patrick Burger called claimant and she told him she needed to see a chiropractor or physical therapist but could not afford it. Burger instructed her to bring in the doctor's note so it could be submitted to the workers' compensation insurance carrier. She said she did not have transportation to do that. Hawkins stopped by her house shortly after Burger called her. She gave him the medical note and they reviewed it together. (Employer's Exhibit 2) He told her the employer had work for her that fit within those restrictions so she should report to work that day. She said she did not have a ride to work. She had usual transportation to work with Groce and both worked 12-hour shifts, 5:00 pm to 5:00 a.m. Hawkins asked her if she could take a cab to work but given the 25 minute one-way commute, it was too expensive. Other friends were not available to provide a ride. Hawkins offered her work on an eight-hour shift if that worked better for her. She said she did not have transportation for that shift. She was available to work 12 hours but had missed work due to continued back pain. (Employer's Exhibit 3) She was a no-call/no-show on February 28, because her medication made her sleepy and she overslept but did not call in when she woke up. The employer considered her to have abandoned her job on this date. (Employer's Exhibit 6) She continued reporting her absences due to back pain to her immediate supervisor until he told her she had been fired. On March 5, she was able to report to work went to the office when supervisor Al Irmiter told her she had been fired on February 28. (Employer's Exhibit 4) The employer's policy provides that no-call/no-show absences for three consecutive workdays is considered job abandonment a voluntarily quitting of employment. A copy of that policy was not provided. There is no record of claimant having been warned about attendance.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-1 provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(4) provides:

> Voluntary quit without good cause. 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. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code § 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code § 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:
>
> (4) The claimant was absent for three days without giving notice to employer in violation of company rule.

Even though Burger initiated the call to claimant on February 25, and she told him she was still in pain and unable to report to work, the absence is considered properly reported since a reasonable person would not expect to have to call back and tell him the same thing. Since the

claimant did not have three consecutive no-call/no-show absences as required by the rule in order to consider the separation job abandonment, the separation was a discharge and not a quit.

Iowa Code § 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.

The employer has the burden of proof in establishing disqualifying job misconduct. Excessive absences are not considered misconduct unless unexcused. 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. Iowa Admin. Code r. 871-24.32(7); *Cosper*, supra; *Gaborit v. Emp't Appeal Bd.*, 734 N.W.2d 554 (Iowa Ct. App. 2007). Medical documentation is not essential to a determination that an absence due to illness should be treated as excused. *Gaborit*, supra.

There was dispute between Hawkins and claimant about why she had not been reporting to work. Her testimony she was still experiencing back pain is credible. There was an apparent miscommunication about the transportation since claimant was able to get a ride to her regular shift with Groce but was unable to find transportation for hours he did not work. Since she had already reported her injury pain to Burger on February 25, her inability to work that same day when talking to Hawkins was not a refusal to work due to transportation. An employer's point system or no-fault absenteeism policy is not dispositive of the issue of qualification for benefits. A reported absence related to illness or injury is excused for the purpose of the Iowa Employment Security Act. A failure to report to work without notification to the employer is generally considered an unexcused absence, as was claimant's last absence on February 28, 2014. However, one unexcused absence is not disqualifying since it does not meet the excessiveness standard. The February 25, absence was reported due to injury pain and is excused. The other absences between the injury date of February 16, and February 24 were properly reported due to injury pain. Both parties were in an untenable situation because the employer wanted additional medical information or to have claimant return to light-duty work. She could not afford follow-up appointments for the continuing back pain, which prevented her from returning to work. However, the claimant did not quit but was discharged by the employer, which places the burden of proof on the employer. The inability to afford a medical appointment to obtain medical documentation required by the employer because of lack of health insurance, workers' compensation coverage or income, excused the failure to provide a medical excuse or release beyond February 17, 2014. Inasmuch as the employer had not previously warned

claimant about absenteeism, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The March 26, 2014, (reference 01) decision is reversed. Claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided she is otherwise eligible.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/css