IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

DEBORAH L DEYO
Claimant

ALLEN MEMORIAL HOSPITAL
Employer

APPEAL NO. 14A-UI-05006-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 04/13/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Allen Memorial Hospital (employer) appealed a representative's May 7, 2014. decision (reference 01) that concluded Deborah Deyo (claimant) was discharged and there was no evidence of willful or deliberate misconduct. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for June 3, 2014. The claimant was represented by Sarah Reindl, Attorney at Law, and participated personally. The employer participated by Mary Peterson, Human Resources Business Partner; Maynard Murch, Laboratory; Director; and Wendy Bienemann, Laboratory Manager. The employer offered and Exhibit One was received into evidence.

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 considered all of the evidence in the record, finds that: The claimant was hired on September 5, 2000 as a full-time laboratory technical associate. The employer's handbook is available on the internet. The claimant reported her absences by calling the office and reporting it to whoever answered the telephone, probably a co-worker. This type of reporting of absences was always acceptable to the employer. On January 16, 2014, the employer issued the claimant a written warning for performance issues.

On April 1, 2014, the claimant reported to the laboratory manager a male co-worker was acting inappropriately in the workplace. The claimant was busy carrying specimens when the co-worker said, "Jesus Christ, can't you hear the fucking phone? When did you start running specimens?" Running specimens was part of the claimant's job. The manager said she would look into the matter. This was not the first time the male co-worker was inappropriate with the claimant at work.

The claimant was diagnosed with an arterial malformation of the brain that causes syncope, or fainting, during times of stress. During these episodes the claimant would become incontinent. The employer was aware of her condition.

The employer has a policy that if a urine sample came into the emergency room, it did not get sent up to the main laboratory without a label. One day a sample came in the emergency room but the physician did not issue orders. The claimant and her co-worker saw the sample. Without an order, the sample did not get a label. The sample could not be sent to the main lab without the label. On April 15, 2014, the laboratory director issued the claimant a written warning for delaying the sending of that urine sample to the main laboratory. The claimant had followed the employer's instructions and not sent the sample without a label and the employer issued her a warning. The claimant became upset and refused to sign the warning.

After leaving the director's office the claimant called her co-worker and asked if she received a warning for the incident, too. The co-worker did not receive a warning. The claimant was upset and crying. She went to her car with another co-worker. The claimant knew she had to leave due to her medical condition or risk fainting. The co-worker waited with the claimant while she calmed down before the claimant could drive home. The claimant told two co-workers she was leaving for the day. The co-workers notified the employer.

On April 16, 2014, the claimant returned to work and met with the vice president of human resources and the human resources business partner. The claimant asked what progress had been made on the investigation of the male co-worker's continuing inappropriate behavior. The employer said it would look into the matter and placed the claimant on paid administrative leave on April 16, 2014. The employer asked the claimant why she left early on April 15, 2014. The claimant told the employer she left because she was pushed to her limits.

On April 17, 2014, the employer told the claimant she was separated from employment. The employer considered the claimant to have quit work on April 15, 2014, for leaving early.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow the administrative law judge concludes the claimant did not voluntarily quit work without good cause attributable to the employer.

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.

A voluntary leaving of employment requires an intention to terminate the employment relationship accompanied by an overt act of carrying out that intention. Local Lodge #1426 v. Wilson Trailer, 289 N.W.2d 608, 612 (Iowa 1980). The claimant had no intention to voluntarily leave work. In fact, the employer returned the claimant to work after April 15, 2014. The claimant's separation was not voluntary.

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.

Iowa Admin. Code r. 871-24.32(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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.,* 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(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 which occurred on April 15, 2014. The claimant had always reported her absences by notifying her co-workers. The claimant notified her co-workers she was leaving on April 15, 2014. The claimant was clearly upset due to the reprimand. The

claimant knew she had to leave work due to the stress and her medical history. 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.

DECISION:

The representative's May 7, 2014, decision (reference 01) is affirmed. The employer has not met its 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/pjs