IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

JESSICA K BIRTCHER
Claimant

L A LEASING INC
Employer

APPEAL NO. 14A-UI-07273-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 06/15/14
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

L A Leasing (employer) appealed a representative's July 8, 2014 decision (reference 01) that concluded Jessica Birtcher (claimant) was eligible to receive unemployment insurance benefits. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was scheduled for August 7, 2014. The claimant participated personally and through a former co-worker, James Deeley. The employer participated by Colleen McGuinty, Unemployment Insurance Administrator, and James Cole, Site Manager.

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 employer is a temporary employer. The claimant was hired on January 16, 2014, as a full-time crew leader assigned to work at Rock Tenn. On June 18, 2014, employees were working in a very warm environment. Mr. Deeley, a first responder employed by Rock Tenn, noticed the claimant had stopped perspiring and her skin was cool to the touch. He thought she was showing signs of heat exhaustion. He asked for a second opinion from another Rock Tenn first responder and she agreed. He asked another Rock Tenn first responder who was also a registered nurse. She agreed. Mr. Deeley notified the Rock Tenn supervisor. The supervisor said the claimant could not be in the building. A female first responder told the claimant she would notify the employer and walk the claimant outside. Mr. Deeley agreed to drive the claimant home. He tried to talk the claimant into going to the hospital but the claimant declined. The claimant returned to work on June 19, 2014. The employer told the claimant she walked off the job without notifying the employer and voluntarily quit work.

The claimant filed for unemployment insurance benefits with an effective date of June 15, 2014. The employer participated in the fact-finding interview on July 7, 2014, by providing a written statement. The employer provided witnesses for the fact finder to call but the fact finder did not call any of the witnesses.

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 section 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 leave work. Therefore, the separation cannot be viewed as voluntary.

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.

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 reported illness which occurred on June 18, 2014. The claimant was told she was seriously ill, she could not stay at the workplace, and the absence would be reported for her. The claimant's absence does not amount to job misconduct because it was properly reported to the best of her ability under the circumstances. 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 July 8, 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/css