IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

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

ALETHA L MOSCHETTI
Claimant

RUTHVEN COMMUNITY CARE CENTER INC
Employer

APPEAL NO. 06A-UI-09761-S2T

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/03/06 R: 01
Claimant: Respondent (1)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

Ruthven Community Care Center (employer) appealed a representative's September 25, 2006 decision (reference 01) that concluded Aletha Moschetti (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 held on October 25, 2006. The claimant participated personally. The employer was represented by Tara Hall, Attorney at Law, and participated by Delores Pyle, Administrator. The claimant offered one exhibit which was marked for identification as Exhibit A. Exhibit A was received into evidence. The employer offered two exhibits which were marked for identification as Exhibits One and Two. Exhibits One and Two were received into evidence.

ISSUE:

The issue is whether the claimant was discharged for misconduct.

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 18, 2006, as a full-time personal attendant. This was the claimant's second period of employment. During her first period of employment, she was absent frequently because of her infant son's illness. When the employer re-hired the claimant, the employer warned the claimant she could not be absent for any reason. The claimant does not remember this warning.

On September 1, 2006, the claimant fell at home. She immediately went to her physician who thought she had a wrist strain or a possible bone fracture. The claimant telephoned the employer and told her she had a "no lifting restriction" from the physician. The employer assured the claimant she would not have to lift anything. The claimant reported for work. The minor stress of writing at work exacerbated the claimant's injury. Her wrist became swollen and discolored. She asked a co-worker to document the injury but he refused.

On September 2, 2006, the claimant properly reported to the employer that she could not work because of the injury to her wrist. The claimant attempted to find someone to work for her but

could find no one. The employer told the claimant she would be terminated for failing to appear for work with her injured wrist. The claimant spoke to an emergency room doctor who advised her to take medication and ice the wrist. The medication made the claimant drowsy. She slept and iced her wrist on September 2, 2006. On September 3, 2006, the claimant telephoned the employer and found that she had been terminated.

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 illness which occurred on September 2, 2006. 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 September 25, 2006 decision (reference 01) is affirmed. The claimant was discharged. Misconduct has not been established. Benefits are allowed, provided the claimant is otherwise eligible.

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Beth A. Scheetz
Administrative Law Judge

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Decision Dated and Mailed

bas/kjw